[redacted]

NATIONAL UNIVERSITY LIBRARY
SAN DIEGO

NON CIRCULATING

CALIFORNIA REPORTER REFERENCES

95 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App.	P.2d	
Page	Vol.	Page
1	211	917
4	212	5
6	212	52
10	212	1
17	212	26
20	212	62
23	212	43
31	212	9
36	212	240
41	212	265
44	212	17
46	212	6
51	212	260
56	212	278
60	212	243
64	212	49
69	212	255
73	212	541
78	212	263
82	212	946
82	213	788
118	212	608
126	212	546
128	212	535
136	212	597
144	212	531
151	212	526
159	212	937
174	212	587
179	212	269
183	212	540
186	213	1
200	212	582
204	212	591
214	212	275
218	212	545
220	212	965
265	212	267
269	212	569
278	212	553
280	213	62
293	212	585
296	213	47
306	212	603
314	212	906
320	212	921
329	213	9
332	212	910
338	212	558
341	212	933
346	213	42
352	212	914
352	214	23
357	213	19
368	212	627
372	213	37
381	212	525
384	213	91
398	213	73
402	212	927
414	213	26
425	213	33
430	212	624
436	212	917
443	213	11
454	213	70
460	212	560
463	213	100
472	213	118
483	213	45
486	213	60
489	213	111
503	213	17
507	213	420
511	213	125
518	213	76
520	213	404
527	213	429
533	213	129
536	213	408
538	213	105
541	213	58
543	213	423
553	213	417
559	213	408
566	213	414
570	213	395
577	213	393
580	213	399
586	213	527
589	213	513
594	213	413
595	213	502
599	213	727
605	213	748
611	213	752
614	213	529
619	213	740
631	213	534
635	213	753
644	213	500
648	213	780
659	213	537
671	213	518
676	213	778
680	213	523
685	213	767
692	213	532
696	213	521
700	213	516
703	213	734
708	214	71
722	214	80
725	214	106
731	213	760
736	213	775
740	213	737
745	214	82
766	214	392
778	214	50
790	213	731
795	214	58
804	214	41
816	213	762
824	213	771
827	213	773
827	223	48
831	213	724
835	214	412
838	214	21
840	214	15
845	214	28
850	214	113
857	214	110
862	214	99
872	214	18
877	214	94
885	214	420
890	214	403
893	214	405
896	214	589
902	214	436
905	214	400
911	214	426
918	214	79
919	212	629
924	213	132
931	213	790

CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER
SECOND SERIES

WEST KEY NUMBER SYSTEM

219 P.2d – 220 P.2d

CITE BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES
Thus:
219 P.2d 1

ST. PAUL, MINN.
WEST PUBLISHING CO.
1950

COPYRIGHT, 1950, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 219, Nos. 1-3;
Vol. 220, Nos. 1-5.

COPYRIGHT, 1950, BY WEST PUBLISHING CO.

Cal.Rep. 219-220 P.2d
3—1970

JUDGES AND OFFICERS

SUPREME COURT

Chief Justice

PHIL S. GIBSON	San Francisco

DEPARTMENT ONE

Presiding Judge

JOHN W. SHENK	San Francisco

Associate Justices

JESSE W. CARTER	San Francisco
B. REY SCHAUER	Los Angeles

DEPARTMENT TWO

Presiding Justice

DOUGLAS L. EDMONDS	San Francisco

Associate Justices

ROGER J. TRAYNOR	Berkeley
HOMER R. SPENCE	San Francisco

Clerks

William I. Sullivan	Clerk	San Francisco
Harry M. Gardiser	Chief Deputy Clerk	San Francisco
Loren F. White	Deputy Clerk	San Francisco
William J. Sinkford	Deputy Clerk	San Francisco
A. R. Fairwell	Deputy Clerk	San Francisco
A. F. Bradovich	Deputy Clerk	Sacramento
Henry P. Crabtree	Deputy Clerk	Los Angeles
David Blomgren	Deputy Clerk	Los Angeles

JUDGES AND OFFICERS

DISTRICT COURTS OF APPEALS

FIRST DISTRICT—SAN FRANCISCO

Division 1

Presiding Justice

RAYMOND E. PETERS	San Francisco

Associate Justice

A. F. BRAY	San Francisco
FRED B. WOOD	San Francisco

Division 2

Presiding Justice

JOHN T. NOURSE	San Francisco

Associate Justices

C. J. GOODELL	San Francisco
MAURICE T. DOOLING, Jr.	Hollister

Clerks

Walter S. Chisholm	Clerk	San Francisco
L. R. Elkington	Deputy Clerk	San Francisco
Paul Dinoia	Deputy Clerk	San Francisco

SECOND DISTRICT—LOS ANGELES

Division 1

Presiding Justice

THOMAS P. WHITE	Los Angeles

Associate Justices

WILLIAM C. DORAN	Los Angeles
LOUIS C. DRAPEAU	Los Angeles

Division 2

Presiding Justice

MINOR MOORE	Los Angeles

Associate Justices

MARSHALL F. McCOMB	Los Angeles
EMMET H. WILSON	Los Angeles

DISTRICT COURTS OF APPEALS—Cont'd.

Division 3

Presiding Justice

CLEMENT L. SHINN	Los Angeles

Associate Justices

PARKER WOOD	Los Angeles
PAUL VALLÉE	Los Angeles

Clerks

James E. Brown	Clerk	Los Angeles
Wm. E. Doran	Deputy Clerk	Los Angeles
Eugene B. Stanley	Deputy Clerk	Los Angeles

THIRD DISTRICT—SACRAMENTO

Presiding Justice

ANNETTE ABBOTT ADAMS	Sacramento

Associate Justices

PAUL PEEK	Long Beach
B. F. VAN DYKE	Sacramento

Clerks

L. A. Endres	Clerk	Sacramento
Thomas J. Dillon	Deputy Clerk	Sacramento

FOURTH DISTRICT

Fresno—San Bernardino—San Diego

Presiding Justice

CHARLES R. BARNARD	Fresno

Associate Justices

LLOYD E. GRIFFIN	San Diego
STANLEY MUSSELL	San Bernardino

Clerks

Earl J. Verdeckberg	Clerk	San Diego
Lloyd E. Hidden	Deputy Clerk	San Bernardino
Roy M. Bostwick	Deputy Clerk	Fresno
George J. Kobelin	Deputy Clerk	San Diego

APPELLATE DEPARTMENT, SUPERIOR COURT

LOS ANGELES COUNTY

Presiding Judge

HARTLEY SHAW	Los Angeles

Judges

EDWARD T. BISHOP	Los Angeles
JESS E. STEPHENS	Los Angeles

Clerk

J. J. MacGregor	Los Angeles

SAN FRANCISCO COUNTY

Presiding Judge

FRANKLIN A. GRIFFIN	San Francisco

Judges

EDWARD P. MURPHY	San Francisco
HERBERT C. KAUFMAN	San Francisco

Clerk

S. I. Hughes	San Francisco

SAN DIEGO COUNTY

Presiding Judge

L. N. TURRENTINE	San Diego

Judges

ROBERT B. BURCH	San Diego
WILLIAM A. GLEN	San Diego

Clerk

Bruce Robinson	San Diego

SACRAMENTO COUNTY

Presiding Judge

RAYMOND T. COUGHLIN	Sacramento

Judges

MALCOLM C. GLENN	Sacramento
GROVER W. BEDEAU	Sacramento

ALAMEDA COUNTY

Presiding Judge

S. VICTOR WAGLER	Oakland

Judges

RALPH HOYT	Oakland
A. J. WOOLSEY	Oakland

Attorney General

Fred N. Howser	Los Angeles

CASES REPORTED

	Vol.		Page
Abbott v. Miller, App.	220	P.2d	570
Acuna v. Perez, App.	219	P.2d	35
Allen; Warren v., App.	219	P.2d	471
Alva v. Sequoia Union High School Dist., App.	220	P.2d	788
Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 439; Ralphs Grocery Co. v., App.	220	P.2d	802
Angus v. Roth, App.	220	P.2d	429
Angus-Page Mach. Co.; Protex-A-Kar Co. v., App.	220	P.2d	429
Anrecht v. Brown, App.	220	P.2d	754
Arbuckle's Estate, In re, App.	220	P.2d	950
Armstrong v. Zibell, App.	219	P.2d	812
Arnold v. Howell, App.	219	P.2d	854
Auman; People v., App.	220	P.2d	569
Avalon Products v. Lentini, App.	219	P.2d	485
Axe v. Los Angeles County, App.	220	P.2d	781
Backstron, Ex parte, App.	220	P.2d	742
Bailard v. Marden, App.	219	P.2d	806
Baker v. Baker, App.	220	P.2d	576
Bank of America Nat. Trust & Sav. Ass'n; Engleman v., App.	219	P.2d	868
Bank of America Nat. Trust & Sav. Ass'n; Field v., App.	220	P.2d	750
Bank of America Nat. Trust & Sav. Ass'n v. Greenbach, App.	219	P.2d	814
Bank of America Nat. Trust & Sav. Ass'n; Toland v., App.	220	P.2d	16
Banta; Costa v., App.	219	P.2d	478
Becker's Estate, In re, App.	220	P.2d	766
Bernstein v. Piller, App.	220	P.2d	558
Bertone; Bobbio v., App.	220	P.2d	578
Bertram v. Orlando, App.	220	P.2d	417
Big Bear Land & Water Co.; Eamoe v., App.	220	P.2d	408
Birch Ranch & Oil Co.; Drinkhouse v., App.	219	P.2d	45
Blackmun's Estate, In re, App.	220	P.2d	30
Blue Diamond Corp.; Sheller v., App.	220	P.2d	26
Blumenthal; Gavin v., App.	220	P.2d	759
Board of Medical Examiners of State; Garfield v., App.	219	P.2d	829
Board of Public Works of City of Los Angeles; Garner v., App.	220	P.2d	958
Bobbio v. Bertone, App.	220	P.2d	578
Bolger; Mahnkey v., App.	220	P.2d	824
Bomberger v. McKelvey, Sup.	220	P.2d	729
Brattain v. Pacific Elec. Ry. Co., App.	220	P.2d	747
Brown; Anrecht v., App.	220	P.2d	754
Brown v. Brown, App.	219	P.2d	483
Brucks v. Home Federal Sav. & Loan Ass'n, App.	220	P.2d	611
Buchanan; Cobarrubia v., App.	219	P.2d	31
Burwell v. McCabe, two cases, App.	220	P.2d	614
California Auto Court Ass'n v. Cohn, App.	219	P.2d	511
Calimpco, Inc. v. Warden, App.	219	P.2d	915
Campus Camera Shop; Gursey v., App.	219	P.2d	884
Carlson; Nealis v., App.	219	P.2d	56
Cartwright v. Superior Court in and for Los Angeles County, App.	219	P.2d	862
Case v. Kadota Fig Ass'n of Producers, Sup.	220	P.2d	912
Cason v. Glass Bottle Blowers Ass'n of U. S. and Canada, App.	220	P.2d	34
Central Valley Equipment Co. v. State of Cal., City and County of San Francisco, App.	220	P.2d	811

	Vol.		Page
Chase; Lenchner v., App.	220	P.2d	921
City and County of San Francisco v. Consolidated Fisheries, App.	219	P.2d	73
City and County of San Francisco; Walker v., App.	219	P.2d	487
City of San Diego v. Superior Court in and for San Diego County, App.	219	P.2d	906
Civil Service Commission of San Mateo County; Fickeisen v., App.	220	P.2d	605
Clark; Credit Bureau of San Diego v., App.	220	P.2d	596
Clark v. Tide Water Associated Oil Co., App.	220	P.2d	628
Clary's Estate, In re, App.	220	P.2d	754
Clement v. State Reclamation Bd., Sacramento San Joaquin Drainage Dist., Sup.	220	P.2d	897
Clifton's Brookdale, Inc.; Oppenheimer v., App.	220	P.2d	422
Clifton's Brookdale, Inc.; Oppenheimer v., App.	220	P.2d	435
Cobarrubia v. Buchanan, App.	219	P.2d	31
Cohn; California Auto Court Ass'n v., App.	219	P.2d	511
Colvin v. George, App.	219	P.2d	64
Conrad v. West, App.	219	P.2d	477
Consolidated Fisheries; City and County of San Francisco v., App.	219	P.2d	73
Consolidated Fisheries; Fernandez v., App.	219	P.2d	73
Contra Costa County; Rains v., App.	220	P.2d	816
Cook; Seeley v., App.	219	P.2d	859
Cooper; Salomon v., App.	220	P.2d	774
Costa v. Banta, App.	219	P.2d	478
Cotton; Snyder v., App.	220	P.2d	572
Craig v. Reed, App.	220	P.2d	771
Crane v. Livingston, App.	220	P.2d	744
Credit Bureau of San Diego v. Clark, App.	220	P.2d	596
Cusolito; Salvati v., App.	220	P.2d	800
Dandini; Remillard Brick Co. v., App.	220	P.2d	927
Daut v. Daut, App.	220	P.2d	63
Dawson; People v., App.	220	P.2d	587
Denlinger v. Luton, App.	219	P.2d	495
Denlinger's Estate, In re, App.	219	P.2d	495
Department of Social Welfare of Cal. v. Machado, App.	220	P.2d	411
De Witt; People v., App.	220	P.2d	981
Dillon v. Superior Court in and for Los Angeles County, App.	220	P.2d	553
Downey; National Auto. & Cas. Ins. Co. v., App.	220	P.2d	962
Drinkhouse v. Birch Ranch & Oil Co., App.	219	P.2d	45
Duffy; Odlum v., Sup.	219	P.2d	785
Dufner v. Fox, App.	220	P.2d	30
Duvall v. T. W. A., App.	219	P.2d	463
Eamoe v. Big Bear Land & Water Co., App.	220	P.2d	405
Engleman v. Bank of America Nat. Trust & Sav. Ass'n, App.	219	P.2d	868
Felt; People v., App.	219	P.2d	54
Fereria v. Nunn, App.	220	P.2d	20
Fernandez v. Consolidated Fisheries, App.	219	P.2d	73
Fick v. Nilson, App.	220	P.2d	752
Fickeisen v. Civil Service Commission of San Mateo County, App.	220	P.2d	605
Fickeisen v. Peebler, App.	219	P.2d	564
Field v. Bank of America Nat. Trust & Sav. Ass'n, App.	220	P.2d	750
Finkelstin; People v., App.	220	P.2d	934
Fong; Malloy v., App.	220	P.2d	48
Fox; Dufner v., App.	220	P.2d	30
Franklin v. Superior Court in and for San Francisco County, App.	220	P.2d	8
Freeman; Quirici v., App.	219	P.2d	897
Garfield v. Board of Medical Examiners of State, App.	219	P.2d	829
Garner v. Board of Public Works of City of Los Angeles, App.	220	P.2d	958
Gavin v. Blumenthal, App.	220	P.2d	759
George v. Colvin, App.	219	P.2d	64

	Vol.		Page
Geske; Stiller v., App.	220	P.2d	437
Gilbert v. Gilbert, App.	220	P.2d	573
Glass Bottle Blowers Ass'n of U. S. and Canada; Cason v., App.	220	P.2d	34
Gonsalves v. Hodgson, App.	220	P.2d	560
Gould v. Wilson, App.	220	P.2d	430
Greenbach; Bank of America Nat. Trust & Sav. Ass'n v., App.	219	P.2d	814
Griffin; People v., App.	219	P.2d	519
Gursey v. Campus Camera Shop, two cases, App.	219	P.2d	884
Hahn; People v., Super.	220	P.2d	438
Hall v. Hall, App.	219	P.2d	808
Hamner; Owsley v., App.	219	P.2d	888
Hard v. Plumas County, Sup.	220	P.2d	2
Harris; People v., App.	220	P.2d	812
Hart; People v., App.	220	P.2d	595
Hawkins v. Sanguinetti, App.	220	P.2d	58
Hewlett v. McDonald, App.	220	P.2d	805
Higgins; Suburban Gas Service v., App.	220	P.2d	798
Hodgson; Gonsalves v., App.	220	P.2d	560
Holmes v. Holmes, App.	220	P.2d	603
Holther; Robbins v., App.	220	P.2d	585
Home Federal Sav. & Loan Ass'n; Brucks v., App.	220	P.2d	611
Hopkins; La Jolla Casa de Manana v., App.	219	P.2d	871
Housing Authority of City of Eureka v. Superior Court in and for Humboldt County, Sup.	219	P.2d	457
Howell; Arnold v., App.	219	P.2d	854
Hunter v. Justice's Court of Centinela Tp., Los Angeles County, App.	219	P.2d	501
Hyman v. Hyman, App.	220	P.2d	623
Industrial Acc. Commission; Industrial Indem. Co. v., App.	220	P.2d	765
Industrial Acc. Commission; Pierson v., App.	220	P.2d	794
Industrial Acc. Commission; Whitaker v., App.	220	P.2d	793
Industrial Indem. Co. v. Industrial Acc. Commission, App.	220	P.2d	765
International Fishermen & Allied Workers of America v. Stemland, Super.	219	P.2d	554
Jackson v. Superior Court in and for Merced County, App.	219	P.2d	879
Jaynes v. Jaynes, App.	220	P.2d	598
Jepsen v. Sherry, App.	220	P.2d	819
Johnston; Stott v., App.	219	P.2d	845
Justice's Court of Centinela Tp., Los Angeles County; Hunter v., App.	219	P.2d	501
Kadota Fig Ass'n of Producers; Case v., Sup.	220	P.2d	912
Kaeppelin v. U. S., App.	219	P.2d	475
Kevil's Estate, In re, App.	220	P.2d	555
Kirk; People v., App.	220	P.2d	976
Kleinberg v. Underwriters at Lloyd's London, App.	219	P.2d	38
Koon v. Sher, App.	220	P.2d	784
Kromrey's Estate, In re, three cases, App.	220	P.2d	805
La Jolla Casa de Manana v. Hopkins, two cases, App.	219	P.2d	871
Lane v. Superior Court in and for Siskiyou County; App.	219	P.2d	497
Lansburgh v. Market St. Ry. Co., App.	220	P.2d	423
Larson v. Thoresen, App.	219	P.2d	492
Lazar; Vogt v., App.	220	P.2d	418
Lenchner v. Chase, App.	220	P.2d	921
Lentini; Avalon Products v., App.	219	P.2d	485
Lewis v. Southern Pac. Co., App.	220	P.2d	431
Lewis v. Steifel, App.	220	P.2d	769
Liss; People v., Sup.	219	P.2d	789
Livingston; Crane v., App.	220	P.2d	744
Lloyd; People v., App.	220	P.2d	10
Lo Greco; Monarco v., Sup.	220	P.2d	737

CASES REPORTED

	Vol.		Page
Los Angeles County; Axe v., App.	220	P.2d	781
Luton; Denlinger v., App.	219	P.2d	495
McCabe; Burwell v., App.	220	P.2d	614
McCabe's Estate, In re, App.	220	P.2d	614
McCollister; Stewart v., App.	220	P.2d	618
McCormick v. McNally, App.	220	P.2d	780
McDonald; Hewlett v., App.	220	P.2d	805
McGrath v. Young, App.	220	P.2d	609
Machado; Department of Social Welfare of Cal. v., App.	220	P.2d	411
McKay v. Superior Court in and for Shasta County, App.	220	P.2d	945
McKelvey v. Bomberger, Sup.	220	P.2d	729
McNally; McCormick v., App.	220	P.2d	780
Mahnkey v. Bolger, App.	220	P.2d	824
Malloy v. Fong, two cases, App.	220	P.2d	48
Marden; Bailard v., App.	219	P.2d	806
Market St. Ry. Co.; Lansburgh v., App.	220	P.2d	423
Mendes; People v., Sup.	219	P.2d	1
Merritt; Pacific States Corp. v., App.	219	P.2d	40
Merritt's Estate, In re, App.	219	P.2d	40
Miller; Abbott v., App.	220	P.2d	570
Mission Taxi Co.; Roy v., App.	219	P.2d	840
Mitchell v. Superior Court of Cal., in and for Los Angeles County, App.	219	P.2d	861
Monarco v. Lo Greco, two cases, Sup.	220	P.2d	737
Moon; Williams v., App.	219	P.2d	902
Moore; Talmadge v., App.	220	P.2d	588
Moore v. White, App.	220	P.2d	918
Moore Dry Dock Co.; Sanguinetti v., App.	220	P.2d	398
Morrison's Estate, In re, App.	220	P.2d	413
Mueseler's Estate, In re, App.	220	P.2d	18
Myers v. Richfield Oil Corp., App.	220	P.2d	973
National Auto. & Cas. Ins. Co. v. Downey, App.	220	P.2d	962
National Dollar Stores v. Wagnon, App.	219	P.2d	49
Nealis v. Carlson, App.	219	P.2d	56
Nelson; Wanders v., App.	219	P.2d	852
Nicholson v. Smith, App.	219	P.2d	39
Nilson; Fick v., App.	220	P.2d	752
Nunes; Stiles v., App.	220	P.2d	792
Nunn; Fereria v., App.	220	P.2d	20
Odlum v. Duffy, Sup.	219	P.2d	785
One 1938 Ford Sedan, Engine No. ID 66852GG; People v., App.	219	P.2d	839
Oppenheimer v. Clifton's Brookdale, Inc., App.	220	P.2d	422
Oppenheimer v. Clifton's Brookdale, Inc., App.	220	P.2d	435
Orlando; Bertram v., App.	220	P.2d	417
Osburn v. Wright, App.	220	P.2d	591
Owens; People v., App.	220	P.2d	575
Owsley v. Hamner, App.	219	P.2d	888
Pacific Elec. Ry. Co.; Brattain v., App.	220	P.2d	747
Pacific States Corp. v. Merritt, App.	219	P.2d	40
Pacific Tel. & Tel. Co. v. Wellman, App.	219	P.2d	506
Parker's Estate, In re, App.	220	P.2d	580
Peebler; Fickeisen v., App.	219	P.2d	864
Penaat v. Zeiss, App.	219	P.2d	60
People v. Auman, App.	220	P.2d	569
People v. Dawson, App.	220	P.2d	587
People v. De Witt, App.	220	P.2d	981
People v. Felt, App.	219	P.2d	54
People v. Finkelstin, App.	220	P.2d	934
People v. Griffin, App.	219	P.2d	519

	Vol.		Page
People v. Hahn, Super.	220	P.2d	438
People v. Harris, App.	220	P.2d	812
People v. Hart, App.	220	P.2d	595
People v. Kirk, App.	220	P.2d	976
People v. Liss, Sup.	219	P.2d	789
People v. Lloyd, App.	220	P.2d	10
People v. Mendes, Sup.	219	P.2d	1
People v. One 1938 Ford Sedan, Engine No. ID 66852GG, App.	219	P.2d	839
People v. Owens, App.	220	P.2d	575
People v. Raffington, App.	220	P.2d	967
People v. Sanchez, Sup.	219	P.2d	9
People v. Sanders, App.	220	P.2d	761
People v. Schuman, App.	219	P.2d	36
People v. Solloway, App.	219	P.2d	801
People v. Steccone, App.	219	P.2d	515
People v. Torres, App.	219	P.2d	480
People v. Wochnick, App.	219	P.2d	70
People v. Wolfeart, App.	220	P.2d	778
Perea; Shepherd v., App.	220	P.2d	776
Perea; Shepherd v., App.	220	P.2d	777
Perez; Acuna v., App.	219	P.2d	35
Perez' Estate, In re, App.	219	P.2d	35
Petrolane, Limited; Shellhaas v., App.	219	P.2d	797
Pierson v. Industrial Acc. Commission, App.	220	P.2d	794
Piller; Bernstein v., App.	220	P.2d	558
Plumas County; Hard v., Sup.	220	P.2d	2
Protex-A-Kar Co. v. Angus-Page Mach. Co., App.	220	P.2d	429
Public Utilities Commission; Southern Cal. Freight Lines v., Sup.	220	P.2d	393
Quirici v. Freeman, App.	219	P.2d	897
Raffington; People v., App.	220	P.2d	967
Rains v. Contra Costa County, App.	220	P.2d	816
Ralphs Grocery Co. v. Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 439, App.	220	P.2d	802
Rauch; Sacks v., App.	220	P.2d	22
Razutis, Ex parte, Sup.	219	P.2d	15
Reed; Craig v., App.	220	P.2d	771
Reid; Yates v., App.	219	P.2d	62
Remillard Brick Co. v. Dandini, App.	220	P.2d	927
Richfield Oil Corp.; Myers v., App.	220	P.2d	973
Rive's Estate, In re, App.	219	P.2d	475
Robbins v. Holther, App.	220	P.2d	585
Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church, App.	220	P.2d	66
Rosicrucian Fellowship Non-Sectarian Church; Rosicrucian Fellowship v., App.	220	P.2d	66
Roth v. Angus, App.	220	P.2d	429
Roy v. Mission Taxi Co., two cases, App.	219	P.2d	840
Sacks v. Rauch, App.	220	P.2d	22
Salomon v. Cooper, App.	220	P.2d	774
Salvati v. Cusolito, App.	220	P.2d	800
Sanchez; People v., Sup.	219	P.2d	9
Sanders; People v., App.	220	P.2d	761
San Diego, City of, v. Superior Court in and for San Diego County, App.	219	P.2d	906
San Diego County; Vista Irr. Dist. v., App.	219	P.2d	793
San Diego Trust & Sav. Bank; Stewart v., App.	220	P.2d	580
Sandoval v. Southern Cal. Enterprises, App.	219	P.2d	928
San Francisco, City and County of, v. Consolidated Fisheries, App.	219	P.2d	73
Sanguinetti; Hawkins v., App.	220	P.2d	58

	Vol.		Page
Sanguinetti v. Moore Dry Dock Co., App.	220	P.2d	398
Saunders v. Saunders, App.	219	P.2d	28
Schuman; People v., App.	219	P.2d	36
Seeley v. Cook, App.	219	P.2d	859
Sequoia Union High School Dist.; Alva v., App.	220	P.2d	788
Sheller v. Blue Diamond Corp., App.	220	P.2d	26
Shellhaas v. Petrolane, Limited, App.	219	P.2d	797
Shepherd v. Perea, App.	220	P.2d	776
Shepherd v. Perea, App.	220	P.2d	777
Sher; Koon v., App.	220	P.2d	784
Sherry; Jepsen v., App.	220	P.2d	819
Smith; Nicholson v., App.	219	P.2d	39
Smith v. Winder, App.	219	P.2d	18
Snyder v. Cotton, App.	220	P.2d	572
Solloway; People v., App.	219	P.2d	801
Southern Cal. Enterprises; Sandoval v., App.	219	P.2d	928
Southern Cal. Freight Lines v. Public Utilities Commission, Sup.	220	P.2d	393
Southern Pac. Co.; Lewis v., App.	220	P.2d	431
Sperry; Weaver v., App.	220	P.2d	555
Sprague, In re, App.	220	P.2d	28
Spruce v. Wellman, App.	219	P.2d	472
Stainback v. West, App.	220	P.2d	950
State of Cal., City and County of San Francisco; Central Valley Equipment Co. v., App.	220	P.2d	811
State Reclamation Bd., Sacramento San Joaquin Drainage Dist.; Clement v., Sup.	220	P.2d	897
Steccone; People v., App.	219	P.2d	515
Steifel; Lewis v., App.	220	P.2d	769
Stemland; International Fishermen & Allied Workers of America v., Super.	219	P.2d	554
Stewart v. McCollister, App.	220	P.2d	618
Stewart v. San Diego Trust & Sav. Bank, App.	220	P.2d	580
Stiles v. Nunes, App.	220	P.2d	792
Stiller v. Geske, App.	220	P.2d	437
Stott v. Johnston, App.	219	P.2d	845
Suburban Gas Service v. Higgins, App.	220	P.2d	798
Superior Court in and for Humboldt County; Housing Authority of City of Eureka v., Sup.	219	P.2d	457
Superior Court in and for Los Angeles County; Cartwright v., App.	219	P.2d	862
Superior Court in and for Los Angeles County; Dillon v., App.	220	P.2d	553
Superior Court in and for Merced County; Jackson v., App.	219	P.2d	879
Superior Corut in and for San Diego County; City of San Diego v., App.	219	P.2d	906
Superior Court in and for San Francisco County; Franklin v., App.	220	P.2d	8
Superior Court in and for Shasta County; McKay v., App.	220	P.2d	945
Superior Court in and for Siskiyou County; Lane v., App.	219	P.2d	497
Superior Court of Cal., in and for Los Angeles County; Mitchell v., App.	219	P.2d	861
Talmadge v. Moore, App.	220	P.2d	588
Thoresen; Larson v., App.	219	P.2d	492
Tide Water Associated Oil Co.; Clark v., App.	220	P.2d	628
Toland v. Bank of America Nat. Trust & Sav. Ass'n, App.	220	P.2d	16
Toland's Estate, In re, App.	220	P.2d	16
Torres; People v., App.	219	P.2d	480
T. W. A.; Duvall v., App.	219	P.2d	463
Underwriters at Lloyd's London; Kleinberg v., App.	219	P.2d	38
U. S.; Kaeppelin v., App.	219	P.2d	475
Vallindras, Ex parte, Sup.	220	P.2d	1
Vista Irr. Dist. v. San Diego County, App.	219	P.2d	793
Vogt v. Lazar, App.	220	P.2d	418

	Vol.		Page
Wagnon; National Dollar Stores v., App.	219	P.2d	49
Walker v. City and County of San Francisco, App.	219	P.2d	487
Wallace v. Wallace, App.	219	P.2d	910
Wallace's Estate, In re, App.	219	P.2d	910
Walters' Estate, In re, App.	220	P.2d	22
Wanders v. Nelson, App.	219	P.2d	852
Warden; Calimpco, Inc. v., App.	219	P.2d	915
Warren v. Allen, App.	219	P.2d	471
Weaver v. Sperry, App.	220	P.2d	555
Wellman; Pacific Tel. & Tel. Co. v., App.	219	P.2d	506
Wellman; Spruce v., App.	219	P.2d	472
West; Conrad v., App.	219	P.2d	477
West; Stainback v., App.	220	P.2d	950
Whitaker v. Industrial Acc. Commission, App.	220	P.2d	793
White; Moore v., App.	220	P.2d	918
Williams v. Moon, App.	219	P.2d	902
Wilson; Gould v., App.	220	P.2d	430
Winder; Smith v., App.	219	P.2d	18
Winder's Estate, In re, App.	219	P.2d	18
Wissner v. Wissner, App.	219	P.2d	553
Wochnick; People v., App.	219	P.2d	70
Wolfeart; People v., App.	220	P.2d	778
Wright; Osburn v., App.	220	P.2d	591
Yates v. Reid, App.	219	P.2d	62
Young; McGrath v., App.	220	P.2d	609
Zeiss; Penaat v., App.	219	P.2d	60
Zibell; Armstrong v., App.	219	P.2d	812

†

CALIFORNIA REPORTER

219 PACIFIC REPORTER

SECOND SERIES

35 Cal.2d 537

PEOPLE v. MENDES.

Cr. 5085.

Supreme Court of California, in Bank.
June 13, 1950.
As Modified on Denial of Rehearing
July 6, 1950.

Luis Lopez Mendes was convicted of murder in the first degree in the Superior Court for Colusa County, Ben R. Ragain, J., and he appealed. The Supreme Court, Traynor, J., held that the evidence was insufficient to sustain the conviction for first-degree murder but would sustain a conviction for second-degree murder.

Judgment modified and as modified affirmed, and cause remanded with directions.

Edmonds, Shenk and Spence, JJ., dissented.

1. Criminal law 🔑126(2)

In murder prosecution, defendant was not entitled to a change of venue on the ground that he could not secure a fair and impartial trial in the county where trial was held because he was a foreign national charged with murdering a popular officer in a small community, where the jury was selected without undue difficulty, trial did not take place until approximately three months after the homicide, and the newspaper accounts did not appear to be different from the usual reporting of any homicide of the sort involved. Pen.Code, § 1033.

2. Criminal law 🔑126(2)

In murder prosecution, popularity of the decedent and the fact that the inhabitants are well known to each other in a small community and the customary newspaper publicity do not necessarily warrant a grant of motion for change of venue on the ground that defendant cannot secure a fair and impartial trial in the community. Pen. Code, § 1033.

3. Criminal law 🔑590(2)

In a murder prosecution, denying motions of defendant for continuance on ground that counsel was retained ten days before trial and had insufficient time to prepare was not error where he had the assistance of appointed counsel who had almost two months to prepare for trial.

4. Criminal law 🔑617

In murder prosecution, request for continuance because of illness of counsel was waived when counsel appeared and disavowed any intent to move for a continuance for that reason at that time. Pen. Code, § 1050.

5. Criminal law 🔑642

The competence of an interpreter is ordinarily for the trial court to determine.

6. Criminal law 🔑642

In prosecution of a Mexican for murder, where defendant and witnesses testified through a court-appointed interpreter, denying motion to replace interpreter on the ground of incompetence was not error where the court interpreter and defendant's interpreter were generally in agreement and no errors were shown which were not corrected in the course of trial.

7. Criminal law 🔑361(1)

In murder prosecution of a Mexican, admitting statement of conversation of witness to deputy sheriff in English that defendant had a gun and she wanted him searched, which was admitted to show that defendant had retreated from the deceased, not because he thought the stranger had returned but because of the statement, was not error though defendant claimed he did not understand English, where it was a question for the jury to determine whether defendant retreated because he understood the conversation or because he thought the stranger had returned.

8. Criminal law ⚷829(1)

In murder prosecution, refusing defendant's instruction that defendant was not only entitled to evidence offered on his own behalf but that offered on behalf of the prosecution to show his innocence was not error in view of the instructions given.

9. Criminal law ⚷720(6), 1037(2), 1044

In murder prosecution, defendant could not complain of alleged misconduct of the prosecutor in eliciting irrelevant testimony and in commenting on facts not in evidence during his argument where no motion to strike the irrelevant testimony was made, and facts referred to by the prosecutor could reasonably be inferred from the evidence, and no request was made to the trial court to admonish the jury in regard to the others.

10. Criminal law ⚷1171(1)

In murder prosecution, record did not show prejudicial misconduct by the prosecutor that would warrant a new trial.

11. Homicide ⚷282

Generally, the determination of the degree of the crime of homicide is left to the discretion of the jury, but the jury's discretion is not absolute. Pen.Code, § 189.

12. Homicide ⚷199

In determining whether the killing was deliberate and premeditated so as to authorize first-degree murder conviction, actions of defendant before as well as at the time of the killing and the means by which the homicide is accomplished are important. Pen.Code, § 189.

13. Homicide ⚷253(3), 347

In murder prosecution, where if the jury believed that defendant knew his pursuer was not a stranger the evidence would sustain a conviction of no more than murder in the second degree and there was no evidence to support an inference that defendant formed a deliberate and premeditated intent to kill deceased evidence was insufficient to sustain a conviction for first-degree murder, and the Supreme Court would modify the judgment by reducing the degree of the crime to murder in the second degree. Pen.Code, § 189.

14. Criminal law ⚷1139

Section of the Code of Civil Procedure providing for the admission of additional evidence in the Appellate Court only where trial by jury is not a matter of right or has been waived is applicable only in civil actions. Code Civ.Proc. § 956a.

15. Criminal law ⚷1139

Application of defendant in murder prosecution to have documentary evidence admitted and added to the record was required to be denied where a jury trial was not waived. Const. art. 6, § 4¾.

◆

Thomas C. Perkins, Sacramento, and John D. McComish, Colusa, for appellant.

Fred N. Howser, Attorney General, and Doris H. Maier, Deputy Attorney General, for respondent.

TRAYNOR, Justice.

At about 7:30 p. m. on August 30, 1949, defendant, a twenty year old Mexican farm laborer, together with Gonzales and Sandoval, entered the La Moderna Cafe in Grimes, California and embarked upon an evening of beer drinking. They had originally set out to take Gonzales from Colusa to his home in Arbuckle at the request of Maria Coronado. Maria was the common-law wife of Sandoval and the mother-in-law of defendant. Gonzales was a friend of the family. A tall man, a stranger to defendant but a friend of Gonzales, either accompanied the group from Colusa to Grimes or joined them in the cafe. Early in the evening he and defendant had an argument. It is not clear who was the aggressor, but the stranger was the larger of the two and defendant was still lame from a recent automobile accident. Shortly thereafter defendant left the cafe and returned later. There is a conflict in the evidence as to whether Sandoval left and returned with defendant or remained at the cafe. Later in the evening defendant had another argument with the stranger, and one of the cafe employees observed that he had a gun, which he moved from one pocket to another. An employee asked defendant to leave, and he did. Another employee, Frances Mendes, asked the stranger, who was intoxicated, to go to a shack behind the cafe and sleep. While she was pointing out the way from a side door she observed defendant at the outside front corner of the building pointing a gun at them. The stranger proceeded to the shack, and defendant sat down at the outside front corner of the building. Frances Mendes then summoned deputy sheriff Ainger at his home nearby. Ainger deputized his son, and the two went in their automobile to the cafe where they arrived about 11:30 p. m. The deputy sheriff noticed four persons lounging near the front corner of the cafe when he arrived. He was met at the door by Frances who pointed out defendant and requested that he be searched because he had a gun. Defendant then started to retreat around the side of the building and the deputy sheriff's son ran after him and shouted at him. In the course of the first six or eight seconds of his retreat defendant fired two shots in rapid succession. The second shot struck the deputy sheriff's son, inflicting a wound from which he subsequently died. Defendant was arrested the following morning when he was found hiding in a clump of trees in a dry slough. He put up no resistance at the time of his arrest, and the gun was found on the ground where he had been hiding.

Defendant testified that when he and Sandoval left the cafe, Sandoval drove them to their home in Colusa. Sandoval entered the house and defendant stayed in the car. They then started back to Grimes, and on the way Sandoval thrust the gun on defendant over his protest telling him he would need it for his protection because they were going to kill him. During the second argument the stranger displayed a knife and indicated he intended to use it. Later when the deputy sheriff and his son drove up, Gonzales, who was near defendant outside the cafe, gave defendant a shove and addressed him in Spanish. Defendant retreated under the impression that the stranger had returned, and when he heard running and shouting behind him, fired two shots without aiming. He had no intention of killing or even hitting anyone and wished only to escape from what he feared was a murderous assault by the stranger.

On September 29th the district attorney filed an information charging defendant with murder. The next day the court appointed Ralph W. Rutledge and John D. McComish as counsel for defendant. On October 10th defendant was arraigned and pleaded not guilty and not guilty by reason of insanity, and the court set the trial for November 28th. On November 18th Thomas C. Perkins was retained by the Mexican Consul on behalf of defendant, and on November 23rd he was substituted for the court-appointed counsel and at that time associated John D. McComish with him as counsel for the defense. On November 23rd defendant moved for a change of venue under Penal Code section 1033 and also for a continuance to allow additional time for Mr. Perkins to prepare for trial. The motion for a continuance was denied on that date, and on November 26th the motion for a change of venue and a renewal of the motion for a continuance were both denied. The plea of not guilty by reason of insanity was withdrawn. On November 27th Mr. Perkins informed the judge by telephone that he was ill and was prepared to present an affidavit of his physician that he should stay in bed for three days. The judge informed him that the case would go to trial the next day and that if he were not present the court would reappoint Mr. Rutledge to represent defendant. Mr. Perkins appeared the following day and filed the affidavit of the physician. He did not move for a continuance but stated that he wanted the affidavit to be on file in the event that he should become worse and request a continuance for that reason. No further motion for a continuance was made, however, and the trial proceeded. The jury returned a verdict of guilty of murder of the first degree without recommendation.

[1, 2] On his appeal defendant contends that the trial court erred in denying his motion for a change of venue. He urges the following facts as establishing that he could not secure a fair and impartial trial in Colusa County; that he was a foreign national charged with murdering a popular officer of a small community; that the decedent, his family, and the prosecuting attorneys were well known to, or friends of, a large fraction of the jury panel; and that the newspaper accounts of the homicide both stimulated and reflected a hostile and biased attitude against him in the county. The newspaper accounts, however, appear to be no different from the usual reporting of any homicide of this sort. The popularity of the decedent, the fact that the inhabitants are well known to each other in a small county, and the customary newspaper publicity, do not necessarily warrant the granting of a motion for change of venue. People v. Yeager, 194 Cal. 452, 482–483, 229 P. 40; People v. Agnew, 77 Cal.App.2d 748, 758–759, 176 P.2d 724; People v. Ford, 25 Cal. App. 388, 394, 143 P. 1075. Against defendant's motion the district attorney presented affidavits of the editors of the two local papers describing the attitude of the community. The record also shows that a jury was selected without undue difficulty and that defendant did not exhaust his peremptory challenges. The trial did not take place until approximately three months after the homicide. In view of these facts and the trial court's own knowledge of the atmosphere of the community, it cannot be said that the trial court erred in concluding that defendant could secure a fair and impartial trial in Colusa County. People v. Brite, 9 Cal.2d 666, 689–690, 72 P.2d 122; People v. Hall, 220 Cal. 166, 170, 30 P.2d 23, 996; People v. Yeager, supra; People v. Agnew, supra; People v. Ford, supra.

[3, 4] Defendant contends that the trial court erred in denying his motions for continuances. The fact that Mr. Perkins was retained ten days before the trial and had the assistance throughout of one of the appointed counsel who had almost two months to prepare, establishes, however, that the trial court did not abuse its discretion in denying a continuance to allow Mr. Perkins additional time to prepare. People v. Dorman, 28 Cal.2d 846, 852, 172 P.2d 686. As to the request for a continuance because of illness, any objection was waived when Mr. Perkins appeared and disavowed any intent to move for a continuance for that reason at that time. Although he contends that a motion in court would have been a futile act in view of the trial judge's attitude communicated to him over the telephone the day before, there was at no time any proper motion before the court for a continuance based on counsel's illness Penal Code § 1050.

[5, 6] Defendant contends that the trial court erred in denying a motion to replace the court-appointed interpreter on the ground of incompetence. Defendant and three witnesses testified through the court-appointed interpreter. Defendant also had the assistance throughout the trial of interpreters from the Mexican Consulate. The record contains affidavits of defendant's interpreters that the court-appointed interpreter was incompetent. It was arranged at the trial that if defendant's interpreter disagreed with the court-appointed interpreter the questions should be asked and answered anew for purposes of correction. Defendant points out many instances in the record where corrections were made in this manner and the court interpreter admitted error. The competence of the interpreter is ordinarily for the trial court to determine. People v. Valencia, 27 Cal.App. 407, 408, 150 P. 68; People v. Salas, 2 Cal.App. 537, 539, 84 P. 285; see 3 Wigmore on Evidence, 3rd Ed., § 811, p. 225. Since the court interpreter and defendant's interpreter were generally in agreement and the affidavits set forth no errors that were not corrected in the course of the trial, the trial court was justified in concluding that the court-appointed interpreter was competent.

[7] Defendant contends that the trial court erred in admitting in evidence the statement of Frances Mendes to deputy sheriff Ainger that defendant had a gun and she wanted him searched. This evidence was admitted to show that defendant had retreated, not because he thought the stranger had returned, but because of the

conversation he heard between Frances and the deputy sheriff. Although defendant withdrew his objection when it was established that he was within earshot and made no objection when the same conversation was related by a second witness, he now contends that the statement was not admissible to show his response thereto because he did not understand English. There was evidence in the record, however, from which it could be inferred that defendant did have some understanding of English. It was therefore for the jury to determine whether he retreated because he understood the conversation or because he thought the stranger had returned. People v. Simmons, 28 Cal.2d 699, 713, 172 P.2d 18.

[8] Defendant contends that the trial court erred in refusing the following instruction: "You are instructed that in this case the defendant is not only entitled to depend upon evidence which he may have offered on his own behalf, but he is entitled to the benefit of any and all evidence, or lack of evidence tending in any way to show his innocence, which may have been offered by the prosecution if there is any such evidence." The jury was instructed, however, to consider *all* the evidence in the case in reaching their verdict. Murder, its degrees, and included offenses were defined, and the jury was instructed as to intoxication, justifiable homicide, and self-defense. The burden of proof resting on the prosecution to prove every material allegation was emphasized. The principle embodied in defendant's proposed instruction was therefore adequately covered by the instructions that were given.

[9, 10] Defendant contends that the prosecuting attorney was guilty of misconduct in eliciting irrelevant testimony in one instance and in commenting on facts not in evidence during his argument. No motion to strike the irrelevant testimony was made, however, and defendant has not shown how he was prejudiced thereby. Many of the facts referred to by the prosecuting attorney could reasonably be inferred from the evidence, see People v. Eggers, 30 Cal.2d 676, 693, 185 P.2d 1, and no request was made to the trial court to admonish the jury in regard to the others. The trial court, however, during the course of the trial and in its instructions, admonished the jury that they were to be governed solely by the evidence introduced in the case and not by statements made by counsel. We have concluded, therefore, that the record shows no prejudicial misconduct that would warrant a new trial. See, People v. Sampsell, 34 Cal.2d 757, 214 P.2d 813, and cases there cited.

Defendant contends that the evidence is insufficient to support a conviction of murder in the first degree. We agree with this contention. Under the provisions of Penal Code section 189 the homicide in this case could be murder of the first degree only if it were a "willful, deliberate, and premeditated killing." The jury could have inferred that defendant shot at his pursuer thinking he was either the stranger or another. If they concluded that defendant knew his pursuer was not the stranger, they could only speculate on the question whether the shooting was, as the prosecuting attorney contended in his closing argument, in pursuance of a plan to kill if necessary to avoid arrest. The whole incident occurred within six to eight seconds. There is no evidence that defendant had any reason to fear the police, or that the deputy sheriff and his son were in uniform so that defendant might have inferred they were officers. Thus, if the jury believed that defendant knew his pursuer was not the stranger, the evidence would sustain a conviction of no more than murder of the second degree. Penal Code § 189; People v. Holt, 25 Cal.2d 59, 153 P.2d 21; People v. Valentine, 28 Cal.2d 121, 169 P.2d 1; People v. Bender, 27 Cal.2d 164, 179, 163 P.2d 8.

There is no evidence bearing on the relationship of defendant to the stranger to support an inference that defendant formed a deliberate and premeditated intent to kill him. Defendant did not know him before the day of the homicide. Although defendant did have two arguments of an undetermined nature with him, there is no evidence that he made any verbal threats against him and his conduct was inconsistent with the existence of a deliberately formed intent to kill. He did not use the gun during the course of the arguments, and he left the cafe quietly when requested to do so. Although there is evidence that he pointed the gun at the stranger for a moment, he neither pursued him nor interfered with his departure. The situation had become quiescent by the time the officers arrived, and as noted above, there is nothing in the evidence of what happened in the next few seconds to show a deliberate and premeditated killing.

Respondent contends, however, that the evidence that defendant left the cafe to secure a gun is sufficient to support an inference that he had formed an intent to kill the stranger and armed himself to carry out his plan. Even if it is assumed, however, that such evidence would support an inference of premeditation, there is no evidence that he left the cafe to secure a gun. Defendant testified that he did not leave for that purpose but that the gun was forced upon him on the return trip from Colusa to Grimes. If the jury disbelieved defendant's testimony they would still be left with no evidence as to why defendant left the cafe or when or under what circumstances he became armed.

[11] "Generally the determination of the degree of the cirme is left to the discretion of the jury. (Citations.) But the jury's discretion is not absolute. Since the amendment of section 1181 of the Penal Code in 1927 trial courts and reviewing courts are authorized to modify the judgment and fix a lesser degree of the crime in those instances where on an appraisal of all the evidence there is found to be lacking any substantial evidence of the elements required to constitute the degree of the crime as fixed by the jury. * * *

[12, 13] "In determining whether the killing was accompanied by a deliberate and premeditated intention to take life such circumstances as the previous relations between defendant and the victim, the actions of the defendant before as well as at the time of the killing, and the means by which the homicide is accomplished, are important." People v. Tubby, 34 Cal.2d 72, 207 P.2d 51, 54. When such circumstances are considered in relation to the evidence in this case it is clear that the record is devoid of any substantial evidence that defendant had formed a wilful, deliberate, and premeditated intent to kill.

[14, 15] Defendant has filed in this court an application to have documentary evidence admitted and added to the record. Section 4¾ of Article VI of the Constitution and section 956a of the Code of Civil Procedure provide for the admission of additional evidence in the appellate court only where trial by jury is not a matter of right or has been waived. Although it has been held that section 956a is only applicable in civil actions People v. Cowan, 38 Cal.App.2d 144, 152–154, 100 P.2d 1079, it is unnecessary to decide whether defendant's application would be proper if the trial had been before a judge sitting without a jury. Since a jury trial was not waived the application must be denied.

The order denying the motion for a new trial is affirmed. The judgment is modified by reducing the degree of the crime to murder of the second degree and as so modified the judgment is affirmed. The cause is remanded to the trial court with directions to sentence defendant to imprisonment for the term prescribed by law for murder of the second degree.

GIBSON, C. J., and CARTER and SCHAUER, JJ., concur.

EDMONDS, Justice (dissenting).

As I read the record, there is an abundance of substantial evidence to support the jury's implied finding of premeditation. Although this evidence would support a contrary conclusion, I cannot agree that, as a matter of law, it is insufficient as the basis of the jury's implied finding that Mendes is guilty of a "willful, deliberate and premeditated killing".

Pedro Saucedo, who was the bartender in the La Moderna saloon in Grimes on the evening of the shooting, testified that Mendes came in sometime between 7:30 and 10 o'clock. Three men were with him.

There were four persons in the barroom. Mendes commenced "* * * sort of knocking or shaking the bottles on the bar". Saucedo told him to refrain from doing so. Apparently, Mendes complied with this request.

Later, according to Saucedo, Mendes "* * * sort of got mad with other persons". Asked to be more specific, the witness replied: "I don't know what he did. I heard just arguments * * * they were talking loud * * * I don't know whether they did fight or not."

Frances Mendes, an employee at the La Moderna who is not related to defendant, testified that she was tending the bar with Saucedo at that time, and had served beer to Mendes and his companions. There was an argument between Mendes and a tall stranger. As Mrs. Mendes described the incident, "* * * well, they were playing at first, and they—they got sore at each other. They were joking, they were friendly; and then after a while they were mad, and I don't remember what happened." When she was asked whether the incident was limited to verbal exchanges or included a fight, she replied, "Well, a little fight, then we separated them and told Mr. Mendes to leave."

Enrique Sandoval, one of the companions of Mendes that evening, testified that they entered the saloon about seven o'clock in the evening. He and Mendes, with another man and the tall stranger, drank together at the bar. After Mendes consumed about seven beers, the two men quarreled.

According to the testimony of Mendes, after he and two companions entered the saloon, they and a tall stranger drank several beers. Mendes said that he "was talking to the bartender—bar maid—and then some one came and insulted me * * *." This person, Mendes told the jury, "came near me and then started swearing at me and tell me lots of bad words * * * Then he came back to me again and insulted me again * * * Telling me of my mother * * *." Such a reference, the interpreter explained, is a Mexican insult.

Continuing his testimony, Mendes declared that the tall stranger "* * * struck me when I was sitting down on the bar". Then, as all of the witnesses agreed, Mendes and his friend Sandoval left the saloon and drove away in the latter's car.

With Sandoval driving the car, the two men went to Colusa and then returned to Grimes, a distance of about 30 miles. Mendes said that they went to their home in Colusa, where Sandoval procured a gun. "Early he didn't have anything", said Mendes, "but after he came out of the house he had a gun." As Mendes related the occurrences, he was afraid of returning to Grimes, but Sandoval gave him the gun and said, "here. Defend yourself because they are going to kill you." Mendes explained that he had the gun in his hand when he reached Grimes, and at that time attempted to return the gun to Sandoval. The latter again said, "No, it is for your defense, because they are going to kill you and you haven't got anything."

Although he was frightened, said Mendes, he entered the saloon at Sandoval's insistence. The tall stranger was still there. Mendes "* * * went to one side because [he] was afraid". At that time, according to the testimony of Mendes, the tall stranger began to remove his shirt, and stated that he had a knife and "* * * he didn't want that knife just to bless the saints". Mendes explained this expression as meaning that the knife was to be used.

Saucedo testified that Mendes was showing a gun he had in his hand at about this time. According to Saucedo's description of the events, Mendes was changing the gun from one pocket to the other and from one hand to the other. At this point, Saucedo put Mendes out of the saloon. This was at approximately 11:30.

Mendes sat on the porch. The barmaid sent the tall stranger to a shack near the saloon where he could sleep. While she was talking to him through the side door in order to direct him to the shack, Mendes pointed his gun at them. As Mrs. Mendes described the scene, "Well, when I saw the gun was when I was talking to the boy through the side door, and telling him where the shack was; then Mr. Mendes [defendant] pointed it at us—pointed at us with a gun." This witness stated that she knew the object pointed at the stranger and herself was a gun, because "* * * I saw it shining; I knew it was a gun (indicating)."

Shortly thereafter and at the request of Saucedo, Frances Mendes went for the police. George H. Ainger, Sr., a deputy sheriff, and his son responded to her call. Mrs. Mendes told the officer that Mendes was armed and asked that he be searched. As Ainger started toward Mendes, the latter went around the corner of the saloon and began running. George Ainger, Jr., who was unarmed, shouted at Mendes to stop, and started after him. According to the officer, although the headlights of his car were burning, the illumination on and about the saloon porch was insufficient for him to recognize Mendes' features. As the officer reached the corner, Mendes fired twice in quick succession. The second shot struck Ainger, Jr., and killed him. The father fired once at the fleeing Mendes and then his gun jammed. Mendes was found the next day in a culvert several miles away. The gun was lying nearby.

Upon this evidence, the jury was justified in determining that Mendes, while unarmed, was insulted by and fought with a tall stranger. Thereafter, Mendes drove 30 miles with his friend and returned to the saloon with a revolver. The quarrel was then renewed and Mendes displayed his gun. At one time he aimed the gun at the tall stranger and the barmaid, who was standing next to him. Soon thereafter, Mendes fired two shots at the son of the deputy sheriff whom he thought, because of the poor illumination, was the tall stranger.

Certainly from this evidence the jury might infer that young Ainger was killed because of the premeditated plan of Mendes to kill the tall stranger. The departure from the saloon without a gun and the return with it alone would support such a conclusion. But even if this evidence were not believed by the jury, the testimony as to the quarrel and the subsequent display and aiming of the gun at the tall stranger justifies the implied finding of the jury that the crime was premeditated.

The facts of his case are quite similar to those in People v. Walker, 76 Cal.App. 2d 10, 14, 172 P.2d 380, 382. There, in affirming the judgment, the court stated: "While the evidence discloses no enmity between appellant and deceased it reveals that the former's 'blood lust had been aroused' to the extent that he desired to take life * * *. From the success of his venture it was a fair deduction that his act was a deliberate and malicious homicide. People v. Sainz, 162 Cal. 242, 244, 121 P. 922. If he aimed to shoot Alfred and by accident hit Vernal, or if he mistook Vernal for Alfred, in either event his murderous intent was by law transferred to the victim. People v. Pivaroff, 138 Cal.App. 625, 628, 33 P.2d 44; People v. Suesser, 142 Cal. 354, 367, 75 P. 1093."

In the present case, although "* * * the whole incident occurred within six to eight seconds", the killing was the culmination of events which transpired in the three hours after Mendes went to the saloon. During that time he armed himself and displayed his weapon several times during a long quarrel with the tall stranger. However, the elapsed time is not the determining aspect. People v. Maughs, 149 Cal. 253, 86 P. 187; People v. Fowler, 178 Cal. 657, 174 P. 892. Rather it is of course a question as to whether the evidence shows a "willful, deliberate, and premeditated killing". Although from the evidence as to Mendes' acts, the jury might have found lack of premeditation, it determined that he is guilty of murder in the first degree. That determination is beyond the reach of an appellate court.

For these reasons, I would affirm the judgment.

SHENK and SPENCE, JJ., concur.

Rehearing denied; SHENK, EDMONDS, and SPENCE, JJ., dissenting.

35 Cal.2d 522

PEOPLE v. SANCHEZ.

Cr. 4997.

Supreme Court of California, in Bank.

June 9, 1950.

Daniel Canas Sanchez was convicted in the Superior Court, Orange County, Raymond Thompson, J., of assault with a deadly weapon, robbery, and taking an automobile with intent to deprive owner of the possession thereof and from the judgment of conviction and order denying his motion for new trial, defendant appealed. The Supreme Court, Schauer, J., held that refusal to give requested instructions and comment by prosecuting attorney on defendant's failure to testify without proper instruction as to effect of such failure constituted prejudicial error as to charges of robbery and taking an automobile concerning which the evidence of specific intent was close, but did not require reversal of conviction of assault with a deadly weapon.

Judgment and order affirmed as to first charge and reversed as to second and third charges and cause remanded for a new trial on such charges.

For prior opinion see 205 P.2d 393.

1. Criminal law ⚷1134(1)

Where judgment sentencing defendant to state prison on all four counts of information had been vacated as to count on which defendant was convicted of simple assault and a new judgment pronounced on such conviction before notice of appeal was filed and no appeal was taken from judgment on conviction of simple assault, appeal would be interpreted as applicable only to convictions on other counts of information.

2. Criminal law ⚷1

Joint operation of act and general criminal intent is essential to constitute any crime. Pen.Code, § 20.

3. Robbery ⚷3

An intent to steal is an essential element of the crime of robbery.

4. Automobiles ⚷339

The intent to either permanently or temporarily deprive owner of his title to or possession of automobile is an essential element of the statutory offense of taking an automobile with intent to deprive owner of possession thereof. Vehicle Code, § 503.

5. Criminal law ⚷774

Where defendant relied on intoxication as a partial defense, requested instruction that evidence of intoxication must be considered in determining existence of any particular intent necessary to constitute a particular kind or degree of crime was essential in trial on charges of robbery and taking an automobile with intent to deprive owner of possession thereof, and failure to give such instruction was not excused by any error in requested instruction as to specific intent necessary to constitute assault with a deadly weapon. Vehicle Code, § 503; Pen.Code, § 22.

6. Criminal law ⚷769

Trial court must see to it that jury is adequately informed on the law governing all elements of the case submitted to an extent necessary to enable jury to perform its function in conformity with the applicable law, and merely reading to jury the wholly correct requested instructions is not always sufficient.

7. Criminal law ⚷808½

Where intoxication was relied on as a partial defense, instruction in language of statute that criminal intent is manifested by the circumstances connected with offense and the sound mind and discretion of accused and that all persons are of sound mind, unless they are idiots, lunatics or affected with insanity was misleading in that it diverted jury's attention from the possible effect of intoxication upon intent. Pen.Code, §§ 21, 22.

8. Criminal law ⚷823(7)

Error in refusing to give requested instructions as to evidence of intoxication as bearing on existence of particular intent necessary to constitute offense charged was not ameliorated by general instruction that defendant was not guilty unless he acted knowingly and wilfully, where court went on to charge that wilfully as applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. Pen.Code, §§ 21, 22.

9. Criminal law ⚷722½

Where defendant did not testify in his own behalf, reference in argument to jury to an alleged previous felony conviction was not justified as affecting his credibility. Code Civ.Proc. § 2051.

10. Criminal law ⚷673(5), 730(13), 1173(2)

Where defendant did not testify in his own behalf and record contained no evidence of previous felony conviction, failure of trial court, at the time or in instructions, to admonish jury to disregard deputy district attorney's insinuations in argument to jury that defendant had previously been convicted of a felony was prejudicial error as to charges of robbery and taking an automobile with intent to deprive owner of possession thereof concerning which the evidence as to specific intent was close and the inferences to be drawn therefrom sharply conflicting. Vehicle Code, § 503.

11. Criminal law ⚷721(1), 787(1), 1171(5), 1173(2)

Where defendant relied on partial defense of voluntary intoxication, sufficient to destroy both volition and memory, prosecuting attorney's reference in argument to jury to defendant's failure to testify in his own behalf and trial court's failure to properly instruct as to the effect of such failure as indicating the truth of evidence which defendant could reasonably be expected to explain or deny was prejudicial error as to charges concerning which the evidence of specific intent was close, particularly since intoxication of defendant would explain failure to deny evidence against him. Const. art. 1, § 13.

12. Criminal law ⚷1186(4)

Where uncontradicted evidence showed both an assault and an actual battery with a deadly weapon and by means of force, proof of specific intent was unnecessary to sustain conviction of assault with a deadly weapon and refusal to give requested instruction as to intoxication of defendant as bearing on specific intent, failure to admonish jury to disregard unsupported insinuations of prosecuting attorney that defendant had previously been convicted of a felony, and prosecuting attorney's comment upon and trial court's failure to properly instruct as to effect of defendant's failure to testify did not require reversal of such conviction. Pen.Code, §§ 240, 242, 245, 960, 1258, 1404; Const. art. 1, § 13, art. 6, § 4½.

◆

James E. Walker, Santa Ana, for appellant.

Fred N. Howser, Attorney General, and William E. James, Deputy Attorney General, for respondent.

SCHAUER, Justice.

[1] Appellant Sanchez (hereinafter sometimes called defendant) and one Noble were jointly charged with (count 1) assault with a deadly weapon (knife) on one Rodriguez (count 2) assault with a deadly weapon (knife) on one Maldanado, (count 3) robbery of Rodriguez, and (count 4) violation of section 503 of the Vehicle Code in taking the automobile of one Perez with intent to deprive the owner of possession thereof. A jury found defendant guilty on counts 1, 3 and 4, and guilty of the included offense of simple assault on count 2. Noble was acquitted on counts 1 and 4 and convicted of the included offense of simple assault on count 2; on count 3, although the jury found that he was armed with a deadly weapon at the time of the commission of the robbery, it determined that the offense was of the second degree. A motion for new trial was made and denied and judgment sentencing defendant to the state prison on all four counts was rendered by the court on November 16, 1948, but two days later that judgment was vacated as to count 2 and a new judgment was pronounced, sentencing defendant to the county jail for one day. Defendant's notice of appeal, filed November 24, 1948, recites that he appeals from the "judgments of conviction made and entered * * * on the 16th day of November, 1948, and from the order * * * denying * * * motion for new trial." Since the November 16 judgment as to count 2 had been vacated before the notice of appeal was filed, and since no appeal has been taken from the judgment of November 18, we interpret

this appeal as applicable only to the felony convictions on counts 1, 3 and 4. We have concluded that the judgment on count 1 can be sustained but that the judgments on counts 3 and 4 must be reversed because of errors which relate to (1) Sanchez' sole defense (that he was too intoxicated to have the "particular purpose, motive, or intent" necessary to constitute the particular crimes of which he was convicted on such counts (Pen. Code, § 22)); (2) misconduct of deputy district attorney in referring to an asserted prior conviction of defendant, although there was no evidence of such conviction before the jury; (3) comment of the prosecution and lack of instruction by the trial court as to the effect of Sanchez' failure to take the witness stand.

Defendant called no witnesses and, as indicated, did not testify on his own behalf. To support his defense he relied upon the testimony of the victims of the alleged crimes (prosecution witnesses), the testimony of his co-defendant Noble, and a statement made by defendant to police officers the day following his alleged commission of the offenses. The statement, transcribed by a shorthand reporter, was read into evidence by the prosecution. In it defendant declared that he had been drinking liquor for a period of time just prior to the alleged occurrence of the crimes charged, and had no recollection concerning them.

The record discloses that on a Sunday morning in September, 1948, one Perez delivered his automobile to Maldanado, in Santa Ana, for the purpose of having Maldanado paint it. Later in the morning Maldanado, Rodriguez, Noble, and defendant Sanchez met by chance at a cafe in Santa Ana, "had a beer," and thereafter left for San Juan Capistrano in Perez' automobile. A bottle of gin was purchased en route. After consuming the gin and drinking more beer the four went to the beach near San Jaun Capistrano, where another bottle of gin, a fifth of a gallon, was purchased. They then started back to Santa Ana, with Maldanado driving. On the way defendant spilled or poured some gin on Maldanado; Maldanado stopped the car and an altercation arose. Defendant told Noble to "take care of" Maldanado; defendant cut Rodriguez on the face and left arm with a pruning knife; and both defendant and Noble held knives against, but did not cut, Maldanado. The knife held by Noble was a pocket knife which belonged to defendant Sanchez. Noble and Sanchez together took $20 and a wrist watch from Rodriguez. Sanchez then drove Perez' automobile from the scene, taking Noble with him and leaving Rodriguez and Maldanado by the road.

Maldanado testified that all four persons in the group had been drinking and that he "imagined" defendant was intoxicated. Rodriguez testified that he himself drank very little of the gin. Noble testified that he drank none of the gin but that "Sanchez drank a considerable quantity" of it. According to the statement of Sanchez which was read into evidence, "I remember something * * * about [Noble] taking care of Maldanado and I would take care of [Rodriguez] * * * I don't remember getting mad or spilling gin or anything like that. But I do remember I saw blood on [Rodriguez'] hand, but I don't remember cutting him * * * It is all a blank after that because I don't remember * * * I don't remember driving."

[2-4] In every crime there must be a joint operation of act and intent. (Pen. Code, § 20.) In addition to this general criminal intent, two of the crimes with which this appeal is concerned require proof of a specific intent: An element of the crime of robbery is the intent to steal (People v. Crowl (1938), 28 Cal.App.2d 299, 308, 82 P.2d 507; 22 Cal.Jur., Robbery, § 5); and an element of the crime denounced by section 503 of the Vehicle Code is the "intent to either permanently or temporarily deprive the owner [of the vehicle taken] of his title to or possession of such vehicle." It is code law that "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime,

the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." (Pen. Code, § 22; 7 Cal.Jur., Criminal Law, § 26.)

Defendant requested and the trial court refused to give the following instruction (numbers in brackets are inserted for convenience of discussion):

"[1] You are instructed that our law provides that 'no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition.' This means that such a condition, if shown by the evidence to have existed in the defendant at the time when allegedly he committed the crime charged, is not of itself a defense. It may throw light on the occurrence and aid you in determining what took place; but when a person in a state of intoxication, voluntarily produced in himself, commits a crime, the law does not permit him to use his own vice as a shelter against the normal, legal consequences of his conduct.

"[2] However, when the existence of any particular motive, purpose or intent is a necessary element to constitute a particular kind or degree of crime, the jury, in determining whether or not such motive, purpose or intent existed in the mind of the accused, must take into consideration the evidence offered to prove that the accused was intoxicated at the time when the crime allegedly was committed.

"[3] Thus in the crime of assault with a deadly weapon with which the defendant * * * is accused in this case, in Count 1 of the information, the specific intent to commit an assault with a deadly weapon, to-wit, a knife, is a necessary element of the crime. * * *

"[4] Thus in the crime of robbery of which the defendant * * * is accused in this case in Count 3 of the information, the specific intent to steal property from the possession of the owner by means of violence, force or fear with the intention of permanently depriving the owner of his property is a necessary element of the crime.

"[5] Thus in the crime of driving and taking the * * * [automobile as charged in Count 4 of the information * * *, the specific intent to either permanently or temporarily deprive said owner thereof of his title to, or possession of such vehicle is a necessary element of the crime.

"[6] As to any Count in which it is found that the defendant * * * did not have the required intent to commit the crime charged, he must be acquitted."

[5, 6] The substance of paragraph [1] of the refused instruction was covered by other instructions which were given. However, the trial court erroneously failed to give any instruction covering the rule correctly stated in paragraph [2]. The People urge that refusal of the entire instruction was correct because paragraph [3] thereof is erroneous in declaring that a specific intent is a necessary element of the crime of assault with a deadly weapon. However, assuming that under the circumstances of this case proof of a specific intent in the use of the knives was not essential (see People v. McCoy (1944), 25 Cal. 2d 177, 188–194, 153 P.2d 315; see also People v. Marseiler (1886), 70 Cal. 98, 100, 11 P. 503; 3 Cal.Jur., Assault and Battery, § 14; cf. People v. Raner (1948), 86 Cal.App.2d 107, 112–113, 194 P.2d 37; People v. Crowl (1938), 28 Cal.App.2d 299, 305, 82 P.2d 507) nevertheless, because of the charges in counts 3 and 4, respectively, of robbery and violation of section 503 (Vehicle Code), an instruction stating the rule of paragraph [2] was essential in relation to the trial on those counts. Explanatory paragraphs [4], [5] and [6] are correct and pertinent and the error of the requested instruction could easily have been cured by striking out paragraph [3]. A trial court's duty is not always adequately performed by merely reading to the jury the wholly correct requested instructions; it is that court's duty to see to it that the jury are adequately informed on the law governing all elements of the case submitted to them to an extent necessary to enable them to perform their function in conformity with the applicable law. (People v. Putnam (1942), 20 Cal.2d 885, 890–891, 129 P.2d 367; People v. Bender (1945), 27

Cal.2d 164, 175–176, 163 P.2d 8.) In the light of all the circumstances of this case the failure to inform the jury of the rule stated in paragraph [2] cannot, insofar as counts 3 and 4 are concerned, be excused by the fact that defendant's proposed instruction was in part erroneous.

[7, 8] The effect of this error was enhanced by the trial court's giving, after an instruction in the language of section 20 of the Penal Code, supra, a further instruction in the language of section 21: "The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity." As a proposition of abstract law, isolated from its context, the instruction is correct; but, in a case where intoxication is relied upon as a partial defense, it is misleading for it tends to divert the attention of the jury from the possible effect of intoxication upon "intent or intention." Nor is the error ameliorated by the general instruction that "unless defendant acted 'knowingly' and 'wilfully,' he is not guilty as charged, and in this connection it is to be noted that the defendant may urge that although he may have been guilty of a technical violation of the law, he was innocent of any guilty purpose in connection therewith. The Court charges you, as a matter of law, however, that ignorance of the law, or of the effect of the law, is no excuse. The word 'wilfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not imply any intent to violate law or to injure another, or to acquire any advantage." Such instruction did not direct the jury's attention to the applicable partial defense of intoxication.

[9] Defendant complains of references by each of the two deputy district attorneys who argued for the People, at the close of evidence, to an asserted prior felony conviction of Sanchez. No such conviction was charged against him for the purpose of increasing his punishment; he did not take the stand, so there was no place for reference to a felony conviction as affecting his credibility (Code Civ.Proc. § 2051); furthermore, there was no evidence before the jury that he had been previously convicted of felony. Nevertheless the People on appeal make the remarkable assertion that "It is not difficult to understand how the prosecuting attorney might conceivably believe that the fact of Sanchez' prior felony conviction was before the jury." The deputy district attorney who began the People's argument to the jury said, "You have the defendant Sanchez and the defendant Noble, both convicted of a felony —"; he then apparently endeavored to make it clear that his mention of Sanchez in this connection was a slip of the tongue, and his error may well have been one of inadvertence. There is, however, no semblance of inadvertence in, or justification for, the following deliberate misconduct of the deputy district attorney who concluded the People's argument:

"Eliminate, if you can, the testimony of Noble and the failure of Sanchez to testify and, as Mr. Walker [Sanchez' counsel] says, there are only three people in this case who have been convicted of a felony. That is what he says. I wonder why his defendant didn't take the stand? Is he in the same group? [The reference to "*three* people * * * who have been convicted of a felony" may have been inadvertent; actually, the evidence shows that only Maldanado and Noble had been previously convicted of felony; the suggestion that Sanchez had been previously convicted of felony could not have been inadvertent, for it had been clearly pointed out by the deputy district attorney who opened the People's argument and by Mr. Walker, defendant Sanchez' attorney, that there was no evidence before the jury that Sanchez had suffered such a prior conviction.]

"Mr. Walker: Just a minute, I object. I don't think counsel correctly quoted my statement.

"[The Deputy District Attorney]: The people who have been convicted of a felony in this case are the ones you said, Noble, Maldanado—

"Mr. Walker: And that is all.

"[The Deputy District Attorney]: Is that all? Sanchez is in the case. He is the defendant.

"Mr. Walker: I am objecting to counsel's argument and assign it as prejudicial misconduct and ask that the jury be instructed to disregard it.

"The Court: No comments. You went outside the record."

After this failure by the trial court to give a specific and proper admonishment, the deputy district attorney continued his argument. And the instructions given later did not contain anything particularly directed toward removing the effect of the prosecuting attorney's misconduct or the court's failure to act immediately and vigorously toward curing it.

[10] The People point out that this is not a situation of insistently repeated misconduct of the prosecuting attorney; that "A trial judge is in a better position than is an appellate court to determine the probable effect of misconduct of counsel and his conclusion on that question will not be disturbed by an appellate court unless in the circumstances it is plainly wrong." (People v. Sarazzawski (1945), 27 Cal.2d 7, 15, 161 P.2d 934.) The trial judge here, in ruling on defendant's motion for new trial, said, "the sum total of the whole thing would be that the jury went out believing that Sanchez never had been convicted of a felony." The trial judge's determination on this point is not substantiated by the record. His single statement, "No comments. You went outside the record," was clearly insufficient to dispel the effect of the deputy district attorney's insinuations and statements as to Sanchez' asserted, unproved conviction of felony. Furthermore, the record shows, the trial judge based his ruling in part on his stated belief that "regardless of what impression the jury gained I think the evidence is so overwhelming that I don't see how the jury could have reached any other conclusion." Except as to count 1 the last quoted statement is clearly incorrect; as to counts 3 and 4, even if we assume that there is overwhelming evidence that defendant did the *acts* in question, nevertheless the evidence as to his specific *intent* is close and the inferences to be drawn from such evidence are sharply conflicting. Therefore, the improper reference to a previous conviction was prejudicial. (See People v. Duvernay (1941), 43 Cal.App.2d 823, 828–829, 111 P.2d 659; People v. Ford (1948), 89 Cal.App.2d 467, 470–471, 200 P.2d 867.

[11] Also prejudicial were the prosecuting attorney's reference to defendant's failure to take the stand and the trial judge's omission to properly instruct as to the effect of such failure. Under section 13 of article I of the California Constitution, the trial judge and prosecuting attorney are permitted limited comment upon the failure of the defendant to testify in his own behalf. (Adamson v. People of State of California (1947), 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903, 171 A.L.R. 1223.) This comment, however, is restricted to statements that defendant's failure to explain or deny evidence against him, when he could reasonably be expected to do so, may be considered by the jury as indicating the truth of such evidence. (People v. Adamson (1946), 27 Cal.2d 478, 490, 165 P.2d 3.) "The jury is not free under the constitutional provision to give defendant's failure to testify any consideration it sees fit, any more than court or counsel are free to make any comment thereon they see fit." (Concurring opinion, Traynor, J., People v. Albertson (1944), 23 Cal.2d 550, 584, 145 P.2d 7.) "Since a conviction must be supported by something more substantial than silence, it is essential that the jury be instructed as to the limitations upon the consideration that it may give a defendant's failure to testify." (Id., page 586 of 23 Cal.2d, page 25 of 145 P.2d.) In the present case, since defendant relied upon the partial defense of voluntary intoxication, sufficient to destroy both his volition and his memory, he was entitled to the type of instruction indicated above. The failure to give such instruction is especially prejudicial because the evidence of intoxication, if believed, would have presented a rational explanation for his failure to deny the evidence against him.

[12] As to count 1, the charge of assault with a deadly weapon is sustained by uncontradicted evidence showing not merely an *assault* in the technical sense (Pen. Code, § 240) but an actual battery (Pen. Code, § 242) with a weapon and by means of force unmistakably coming within the purview of section 245 of the Penal Code. Under these circumstances no proof of specific intent was essential to sustain the conviction and, in the light of the entire record, it does not appear that the errors which require a reversal as to counts 3 and 4, caused any miscarriage of justice on count 1. (See Calif. Const., Art. 6, § 4½; Pen.Code, §§ 960, 1258, 1404.)

For the reasons above stated, the judgment upon count 1 and the order denying a new trial as to that count are affirmed; the judgments upon counts 3 and 4 and the order denying a new trial as to those counts are reversed and the cause is remanded for a new trial on those counts.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

35 Cal.2d 532

Ex parte RAZUTIS.

Cr. 5014.

Supreme Court of California, in Bank.

June 13, 1950.

Joseph John Razutis brought original habeas corpus proceedings to secure his release from prison after conviction of two counts of grand theft. The Supreme Court, Gibson, P. J., held that there had been a waiver by petitioner in grand theft prosecution of right to object to fact that one of the witnesses at preliminary examination was questioned in absence of petitioner's counsel, that alleged irregularities in connection with arrest and preliminary examination did not furnish ground for release on habeas corpus, that any invalidity in proceedings prior to commitment was waived, and that petition was insufficient to entitle petitioner to habeas corpus on ground that petitioner's witnesses had been run out of town by the police so that they were unable to testify for him in grand theft prosecutions.

Application for writ denied.

1. Criminal law 🔑245

Where both defendant and his counsel had knowledge of the fact that at preliminary examination one of the witnesses was examined during the absence of defendant's counsel, but defendant and his counsel knowingly proceeded to trial without making any complaint, there was an effective waiver of objection to the examination of that witness in absence of defendant's counsel.

2. Habeas corpus 🔑30(1)

Alleged irregularities in connection with arrest and preliminary examination of petitioner, and alleged fact that evidence was insufficient to warrant holding petitioner for trial, did not furnish ground for release of petitioner on habeas corpus after trial and conviction.

3. Criminal law 🔑245

Where there was no motion made pursuant to the Penal Code to have information set aside because of alleged irregularities in connection with arrest and preliminary examination and because of alleged lack of sufficient evidence to warrant holding defendant for trial, any invalidity in proceedings prior to commitment would be deemed waived. Penal Code, §§ 995, 996.

4. Habeas corpus 🔑85(1)

In habeas corpus proceeding to secure release of petitioner from prison, on ground that he was convicted of grand theft because his witnesses were allegedly run out of town by the police, it was incumbent on petitioner to show that there had been a material deception and that there was knowledge thereof on the part of the prosecuting officers.

5. Habeas corpus 🔑62

In habeas corpus proceeding to secure release of petitioner from prison, on ground that he was convicted of grand theft because his witnesses were allegedly run out of town by the police, writ would be denied, where no reporter's transcript of the trial proceedings was produced, petition did not state what actual facts were or specify precise testimony which would have been given by witnesses, there was no charge that prosecuting authorities had knowledge of alleged fact that witnesses were run out of town by the police, and petition did not show any explanation for delay in raising question of suppression of evidence or any excuse for failure to present the evidence.

6. Habeas corpus ⟹53

On habeas corpus proceedings by a prisoner to secure his release from prison, he must allege with particularity the facts on which he would have the final judgment of conviction overturned, and he must fully disclose his reasons for delaying in presentation of those facts.

◆

Joseph John Razutis, in pro. per., and John H. Paine, Sacramento, under appointment by the Supreme Court, for petitioner.

Fred N. Howser, Attorney General, and Clarence A. Linn, Deputy Attorney General, for respondent.

GIBSON, Chief Judge.

Petitioner, who is confined in the State Prison at San Quentin after conviction of two counts of grand theft, seeks his release from custody on the grounds that he was denied due process of law by reason of certain matters occurring prior to his trial, and that police officers suppressed evidence by intimidating witnesses and thereby deprived him of the means of establishing his defense.

The petition was filed in propria persona, and thereafter this court appointed counsel who filed a brief and argued herein on behalf of petitioner. It has been difficult to ascertain the facts because no reporter's transcript of the proceedings at the trial has been prepared, petitioner having failed to file a timely notice of appeal. There has been lodged in this court, however, the original clerk's record in the trial court which contains a certified copy of the reporter's transcript of the preliminary examination. This record shows that petitioner was convicted on two counts of grand theft, apparently on the theory that he obtained money from the complaining witness by false pretenses.

[1] The first complaint of petitioner is that he was deprived of the right to counsel during his preliminary examination because one witness was examined out of order during the absence of petitioner's counsel. It appears that the case was set for preliminary examination at 9 o'clock in the morning and that the committing magistrate, after waiting until 10:54 for counsel to appear, took the testimony of one witness and then continued the case until 1:45 that afternoon, at which time defendant's counsel appeared and participated in the remainder of the preliminary examination without raising any objection to the prior proceedings and without making any attempt to have the witness recalled for examination or cross-examination. Thereafter, although petitioner was also represented by counsel at the trial, no motion was made to set aside the information, and there is no claim that any objection was made on this ground by motion or otherwise. It appears that counsel at the preliminary examination was aware of the fact that some proceedings were taken during his absence, and it may be assumed that counsel at the trial was also aware of this fact, since petitioner was entitled to demand a copy of the transcript of those proceedings, and no claim is made that he or his counsel did not receive one as provided in Penal Code section 870. Under these circumstances, where it appears that both defendant and his counsel had knowledge of all the facts and that they knowingly proceeded to trial without making any complaint, it is clear that there was an effective waiver of the objections. Cf. Ex parte Tedford, 31 Cal.2d 693, 694, 192 P.2d 3; Ex parte Connor, 16 Cal.2d 701, 706, 108 P.2d 10; People v. Harris, 219 Cal. 727, 729-730, 28 P.2d 906; People v. Greene, 80 Cal.App.2d 745, 747-749, 182 P.2d 576.

[2, 3] Complaint is also made of a number of asserted irregularities in connection with petitioner's arrest and preliminary examination, including the claim of lack of sufficient evidence to warrant holding him

for trial, but none of them furnish ground for release on habeas corpus after trial and conviction. All of these objections relate to the legality of the commitment by the magistrate, and petitioner's remedy was by motion pursuant to section 995 of the Penal Code to set aside the information. No such motion was made and, accordingly, any invalidity in the proceedings prior to the commitment is deemed waived under section 996.[1] Ex parte Tedford, 31 Cal.2d 693, 694, 192 P.2d 3; People v. Harris, 219 Cal. 727, 729-730, 28 P.2d 906; People v. Coates, 95 Cal.App.2d 78, 212 P.2d 263; In re Heinze, 116 Cal.App. 286, 288-289, 2 P.2d 561; In re Northcutt, 71 Cal.App. 281, 283, 235 P. 458.

Petitioner finally contends that his conviction resulted from the suppression of evidence by reason of the wrongful intimidation of witnesses by the police. He alleges that there were three witnesses whose testimony would have established his innocence, and that he was prevented from establishing a full and complete defense when these witnesses "were run out of town by the police of the City of Oakland." No further facts are alleged, but attached to the petition are copies of affidavits by petitioner's brother, Julius, and two friends, James E. Land and Thomas Curry, which state that after the preliminary examination, but before the trial, they visited petitioner's attorney and were told that the police wanted to see them; that they went to the city jail and were questioned by inspectors who told them to leave town or they would be thrown in jail; and that in view of the threats they had no choice but to return to their homes in Chicago. The affidavits of Land and Curry assert that they were "well acquainted with the case" and did not believe that petitioner was guilty, but they do not purport to state the facts with reference to the transactions on which the charges were based or to specify the facts, to which they would testify, that would establish a lack of guilt. The brother's affidavit does not indicate that he had any knowledge of the transactions or that he could give any material evidence favorable to petitioner.

[4] The claim that a conviction was obtained because evidence was deliberately suppressed is similar to the claim that the conviction resulted from the use of perjured testimony. In both cases the essence of the charge is that petitioner has been deprived of his liberty by reason of a deliberate deception of court and jury, and it is incumbent on him to show that there was a material deception and that there was knowledge thereof on the part of the prosecuting officers. See Ex parte Swain, 34 Cal.2d 300, 209 P.2d 793; Ex parte Manchester, 33 Cal. 2d 740, 742, 204 P.2d 881; Ex parte Lindley, 29 Cal.2d 709, 722-724, 177 P.2d 918; In re Mooney, 10 Cal.2d 1, 15, 73 P.2d 554. As stated in the Manchester case, supra, 33 Cal. 2d at page 742, 204 P.2d at page 882, "The relief sought may not be accorded unless the petitioner has sufficiently alleged facts in support of his position. * * * The facts alleged must also indicate that the petitioner had no opportunity to present the alleged true matter on the trial; that is, that there was such suppression of the truth by the authorities as prevented his discovery and use thereof at the trial. Otherwise the defendant on trial could himself suppress the facts and reserve a case for his later release." See also Ex parte Swain, 34 Cal.2d 300, 209 P.2d 793.

[5] In the present case, the petition is deficient in a number of respects. In the first place, the showing made is not sufficient to enable us to pass on the materiality of the assertedly suppressed evidence, or to determine whether there was a material deception. As we have seen, there was no appeal, and no reporter's transcript of the trial proceedings has been produced, and the petition does not state what the actual facts are or specify the precise testimony

---

[1] Section 995 provides that an information may be set aside on motion on the grounds that "1. That before the filing thereof the defendant had not been legally committed by a magistrate. 2. That the defendant had been committed without reasonable or probable cause." Section 996 provides: "If the motion to set aside the indictment or information is not made, the defendant is precluded from afterwards taking the objections mentioned in the last section."

which would have been given by the witnesses. While the affidavits state that the affiants were "well acquainted with the case and did not believe that petitioner was guilty of the charge," there is no specification of the facts, to which they would testify, that would tend to establish a lack of guilt. Under these circumstances it is clear that the showing of materiality is insufficient.

Further, while the application states that the alleged witnesses were "run out of town by the police," there is no charge that the prosecuting authorities had knowledge of the asserted suppression of evidence. The only statement indicating the identity of any officer having such knowledge is the recital in the brother's affidavit that an "Inspector Hash" told him to leave town, and there is no allegation that this inspector or any other officer who questioned the witnesses was connected in any way with the prosecution of petitioner.

Moreover, the petition does not show any explanation for the delay in raising the question of suppression of evidence or any excuse for petitioner's failure to present the evidence. See Ex parte Swain, 34 Cal.2d 300, 209 P.2d 793. Such an explanation is particularly necessary in a case such as the present where it appears from the application that the asserted witnesses are the brother and two friends of the petitioner and that he not only knew of their existence and identity but probably knew the facts to which they would testify, and where it also appears that the witnesses visited the attorney who represented petitioner at the preliminary examination and apparently had some conversation with him about the case prior to the trial.

[6] Petitioner has requested that a referee be appointed to ascertain the facts relating to the asserted suppression of evidence, but it is apparent from the foregoing that he is not entitled to this relief on the basis of his present application. As stated in Ex parte Swain, 34 Cal.2d 300, 209 P.2d 793, 796, "We are entitled to and we do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts. This procedural requirement does not place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in propria persona any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation."

The order to show cause is discharged, and the application for the writ is denied without prejudice to the filing of a new petition which shall meet the requirements above specified.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

---

98 Cal.App.2d 78

In re WINDER'S ESTATE.

SMITH v. WINDER.

No. 14152.

District Court of Appeal, First District, Division 1, California.

June 13, 1950.

Rehearing Denied July 13, 1950.

Hearing Denied Aug. 10, 1950.

Proceeding in the matter of the estate of A. H. Winder, deceased. Rulura T. Winder filed a petition for letters of administration alleging that she was surviving spouse of the decedent, and Dorothy Winder Smith and another filed an opposition to petition and also filed a petition for letters of administration for themselves. An order appointing Rulura T. Winder as administratrix was entered by the Superior Court of the State of California in and for the county of Alameda, James R. Agee, J., and Dorothy Winder Smith alone appealed. The District Court of Appeal, Schottky, J. Pro Tem., held that evidence failed to show that petitioner was precluded from entering into a valid marriage with deceased on ground that she was common-law wife of another at time of her purported ceremonial marriage with deceased.

Affirmed.

1. Marriage 🔑13, 20(2)

At common law no formal ceremony is essential to a valid marriage, and agreement between parties per verba de praesenti to be husband and wife constitutes a valid marriage.

2. Marriage 🔑3

The validity of a common law marriage alleged to have been contracted in Nebraska would be determined in accordance with decisions of that state. Civ.Code, § 63.

3. Marriage 🔑36

In Nebraska prior to 1923, if one party to alleged common law marriage induced the other to believe in good faith that the contract was made and binding, the law would hold the party taking such advantage to full terms of the agreement.

4. Marriage 🔑20(1)

In Nebraska prior to 1923, the contract requisite to creation of marriage relations need not be expressed in any special manner, or by any specified form of words, but could be sufficiently evidenced in any clear and unambiguous language or conduct.

5. Marriage 🔑22

During period when a common law marriage could be validly consummated in Nebraska, a man and woman, contractual capables, holding forth to community by conduct, demeanor, and habits, that they had agreed to be husband and wife constituted a "common-law marriage".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Common-Law Marriage".

6. Marriage 🔑42, 50(1)

The proof of subsequent ceremonial marriages of each of the parties is evidence to be considered in determining whether a common-law marriage was entered into in Nebraska during period when a common-law marriage could be validly consummated, but it was not conclusive.

7. Marriage 🔑13

The subsequent denial of a common-law marriage by parties who had allegedly contracted a common-law marriage in Nebraska during period when common-law marriage could be validly consummated could not destroy validity of the marriage any more than a subsequent denial of a ceremonial marriage could change status created by it. Civ.Code, § 63.

8. Marriage 🔑13, 50(1)

In order to prove common-law marriage under Nebraska law during period when a common-law marriage could be validly consummated by circumstantial evidence, there must be evidence of cohabitation as man and wife, or the assumption openly of marital duties and obligations continued for such time and to such extent as to reasonably sustain conclusion that parties have agreed to become husband and wife, and mutual consent of the parties to live as husband and wife may be established solely by evidence of marital conduct.

9. Action 🔑66

The law of the forum governs the proof in court of a fact alleged, and law of the forum governs presumptions and inferences drawn from evidence.

10. Appeal and error 🔑991
Evidence 🔑89

A presumption unless declared by law to be conclusive may be controverted by other evidence, direct or indirect, but unless so controverted the jury is bound to find according to the presumption, and whether a presumption is so controverted is a question of fact for trial court, and conclusion of that tribunal is conclusive upon an appellate court unless it be manifestly without sufficient support in the evidence. Code Civ.Proc. § 1959.

11. Evidence 🔑53, 85

A presumption is evidence and may in certain cases outweigh positive evidence adduced against it. Code Civ.Proc. § 1959.

12. Marriage 🔑50(1)

Evidence supported finding that no common-law marriage was consummated in Nebraska between petitioner, seeking letters of administration as legal widow of deceased, and her first husband by their living together as husband and wife in Nebraska from 1905 to 1907 after petitioner had previously secured a divorce, and, hence, petitioner was not precluded from thereafter entering into valid marriage with deceased on ground that the alleged common-law marriage had never been dissolved.

13. Marriage 🔑40(11)

Mere proof of a former marriage and the continued life of both spouses is not sufficient to show invalidity of second ceremonial marriage, and there must be a further showing that the first marriage has not been set aside by judicial decree.

14. Marriage 🔑40(11)

Burden of proof is on party attacking the validity of second marriage of one of the spouses.

15. Marriage 🔑50(1)

Even if established that common-law marriage had been consummated in Nebraska between petitioner, seeking letters of administration as legal widow of deceased, and her first husband by their living together as husband and wife in Nebraska from 1905 to 1907 after petitioner had previously secured a divorce, evidence supported finding that the common-law marriage had been dissolved and did not preclude petitioner from thereafter entering into valid marriage with deceased.

16. Divorce 🔑320

Marriage between deceased and petitioner, who was seeking letters of administration as legal widow of deceased, was not invalid because it was performed in violation of provision in Colorado divorce decree secured by deceased's first wife prohibiting remarriage within one year from date of divorce, where marriage was performed outside the state of Colorado.

17. Marriage 🔑50(4)

Evidence did not require finding that marriage between deceased and petitioner, who was seeking letters of administration as legal widow of deceased, was invalid on ground that marriage was performed in Nebraska under a license issued in the State of Iowa, notwithstanding that unsigned deposition of petitioner stated that she was married in Omaha, Nebraska.

18. Executors and administrators 🔑20(7)

In proceeding by one for letters of administration as legal widow of deceased, wherein deceased's two daughters by prior marriage filed an opposition to the petition and a petition for letters of administration for themselves, evidence failed to show any abuse of discretion by trial court that in any way deprived daughters of opportunity to present their case.

19. Executors and administrators 🔑20(7)

In proceeding by one for letters of administration as legal widow of deceased, opposed by deceased's two daughters by a prior marriage on ground that petitioner was not deceased's surviving wife, petitioner's testimony as to why she lived with her first husband as husband and wife after having secured a divorce from him was material on issue as to whether petitioner was precluded from entering into valid marriage with deceased on ground of existing common-law marriage between herself and first husband.

20. Executors and administrators 🔑20(10)

In proceeding by one for letters of administration as legal widow of deceased, wherein deceased's daughters by a prior marriage filed an opposition to the petition and petition for letters of administration for themselves, where only issue to be determined was whether original petitioner was the surviving widow, and order made by trial court upon that issue was as broad as pleadings in the matter, trial court did not commit prejudicial error by failing to make specific findings on what one of the daughters claimed were the material issues.

21. Executors and administrators 🔑20(10)

On appeal from order granting letters of administration to petitioner as legal widow of deceased over opposition of deceased's two daughters by a prior marriage, only function of appellate court was to determine whether trial court's order was properly supported by evidence, and it would not make its own separate findings of fact in its decision.

◆

Dorothy Winder Smith, Oakland, in pro per.

Breed, Robinson & Stewart, Oakland, for respondent.

SCHOTTKY, Justice pro tem.

The decedent, A. H. Winder, died on or about March 10, 1948, in Alameda County, California, and thereafter respondent, Rulura T. Winder, filed a petition for letters of administration alleging that she was the surviving spouse of said decedent. Her petition was regularly set for hearing on March 24. On March 30, appellant Dorothy Winder Smith and Beatrice Martens, daughters of decedent A. H. Winder, filed an opposition to respondent's petition, and also a petition for letters of administration for themselves.

The hearing on both petitions for letters and the opposition to respondent's petition were consolidated and set for hearing on April 14, 1948, and were continued to June 29 for trial. On June 29 the hearing was continued to July 6. In the meantime, the Central Bank of Oakland was appointed special administrator of decedent's estate. On July 6, appellant and Beatrice Martens appeared each with counsel who had previously represented them, and substituted a new attorney to appear for both of them, and through said attorney sought a further continuance of the matter. The court permitted respondent to introduce some evidence in support of her petition and then continued the matter to July 8 for the purpose of allowing appellant's and Beatrice Martens' new attorney to cross-examine respondent and to present evidence. On July 8, the hearing was again resumed and evidence was introduced by respondent and appellant.

The matter was then continued to August 5, 1948, at which time further evidence was introduced and the matter submitted on briefs. The minutes of September 21, 1948, show that on that date the deposition of respondent which had been taken by appellant and the certified statement of Walter G. Purtzer, Clerk of the District Court of Madison County, Nebraska, were admitted in evidence and the matter ordered submitted.

On September 24, respondent's petition for letters of administration was granted and respondent appointed administratrix. On September 27, 1948, the court by a written order found that respondent Rulura T. Winder was the surviving spouse of the decedent, and appointed her administratrix, denied the petition of appellant and Beatrice Martens for letters, and overruled the objections and opposition to respondent's petition. This appeal is from said order, appellant appearing in propria persona.

Appellant has made numerous contentions in her briefs but the principal issues presented upon this appeal, as stated by appellant, are: (1) Was Rulura T. Winder (or Haley, as appellant contends) the common-law wife of Herbert A. Haley by virtue of a common-law reconciliation and remarriage of spouses in the State of Nebraska? (2) Was Rulura T. Winder ever validly married to A. H. Winder? The record is comparatively brief, consisting of a reporter's transcript of 59 pages, a clerk's transcript, and a number of documentary exhibits including the aforementioned deposition of respondent, which is unsigned.

Before discussing the legal questions involved, we shall summarize briefly the evidence as shown by the record. Due no doubt to her inexperience in presenting legal matters, appellant has made many statements as to purported facts which do not appear in the record, which statements, of course, we must disregard.

Respondent Rulura T. Winder, nee Tostevin, was married to Herbert A. Haley in Superior, Wisconsin, on September 30, 1891. One child, a daughter, was born of the marriage. In July, 1903, in an action filed by her in Superior, Wisconsin, respondent was granted a divorce. In 1905, at his request, according to her testimony, she went to Nebraska and joined

Haley, and upon his statement that they would be remarried they lived together as man and wife in Norfolk, Nebraska, from 1905 to 1907. The following quotation from the transcript is illuminating as to the relationship of respondent and Haley during that time: The Court: Why did you live with him? The Witness: I had no choice. I met him in a town in Nebraska and he had become entangled with someone else, so it was impossible to get a new license, and he kept saying, 'I will get it in the next town,' and never got it. The Court: In other words, you would have gone through a marriage ceremony with him? The Witness: Oh, yes, I wouldn't have joined [him] if I hadn't expected to. The Court: You would have remarried him? The Witness: Oh, yes. The Court: But he kept telling you he was tied up with some other woman and he couldn't get a license? The Witness: That is it, exact. The Court: You kept on living with him. Let's not be misunderstood. But you understand what 'living with him as his wife' means, don't you? The Witness: Well, he never thought the divorce mattered. The Court. I didn't mean that, but, Mrs. Winder—The Witness: Yes? The Court: —you were divorced from him first, weren't you? The Witness: Yes. The Court: All right. Then you went back with him? The Witness: Yes, because he asked me to come. The Court: All right. And you lived with him as his wife? The Witness: Yes. The Court: All right. And you intended to remarry him? The Witness: Yes. The Court: But that was never done? The Witness: No."

In 1907, no license to marry having been obtained by Haley, respondent left him and returned to the home of her parents in Wisconsin, and in March, 1908, a marriage ceremony was performed there between respondent and A. H. Winder. This marriage was made void by the vacating of the divorce decree which Winder had obtained in Nebraska from his former wife, Mary J. Winder. Winder then filed an action for divorce in Colorado against Mary J. Winder and she appeared in said action and was granted a divorce upon her cross-complaint. On May 4, 1911, respondent and Winder were, according to the marriage certificate introduced in evidence, married in Council Bluffs, Iowa. On February 6, 1909, according to the marriage certificate introduced in evidence, Herbert A. Haley was married to one Anna A. Miller in Madison County, Nebraska. The certificate of the Clerk of the District Court of Madison County, Nebraska, stating that there was no record of any divorce between respondent and Herbert A. Haley between 1905 and 1912, was admitted in evidence, as was also a death certificate showing that Haley died in Madison County on January 26, 1935. Respondent testified that she and Winder lived together as man and wife from 1911 on and that they moved to California in 1912 and were residents of California until Winder's death. Respondent testified that she and Winder took vacation trips each year, usually out of the state, and stayed overnight at various hotels and resorts. She testified particularly as to taking these trips after the date of Haley's death in 1935 and of staying overnight at Las Vegas, Nevada, and at the Grand Canyon in Arizona.

Other facts appearing from the record will be hereinafter set forth.

Appellant's first major contention is that respondent Rulura T. Winder became the common-law wife of Herbert A. Haley when she returned to him in Nebraska after her divorce from him, and that said common-law marriage was never dissolved.

[1-8] Up to 1923 common-law marriages were recognized as legal in Nebraska. "At common law no formal ceremony is essential to a valid marriage, and an agreement between the parties per verba de praesenti to be husband and wife constitutes a valid marriage, no other ceremony being necessary." (35 Am.Jur. 198.) Although our examination of the authorities convinces us that the decisions of the Nebraska courts as to common-law marriages are substantially the same as in most jurisdictions, including California, since the validity of a common-law marriage alleged to have been contracted in Nebraska must ordinarily be determined in accordance with the decisions of that

state, Civ.Code, § 63, we shall quote from some of the numerous decisions of Nebraska courts, cited by appellant, as follows: "Hence if one party to such relation induces the other to believe in good faith that the contract is made and binding, the law will hold the party taking such advantage to the full terms of the agreement, as in other cases." Coad v. Coad, 87 Neb. 290, at page 292, 127 N.W. 455, 457. "The contract requisite to the creation of the marriage relation need not be expressed in any special manner, or by any prescribed form of words, but may be sufficiently evidenced by any clear and unambiguous language or conduct." Reynoldson v. Reynoldson, 96 Neb. 270, 147 N.W. 844, syllabus. It was held that, during the period when a common-law marriage could be validly consummated, "a man and woman, contractual capables, holding forth to the community by conduct, demeanor, and habits, that they had agreed to be husband and wife constituted a common-law marriage." In re Estate of Tilton, 129 Neb. 872, at page 875, 263 N.W. 217, 219. "The proof of subsequent ceremonial marriages by each of the parties is evidence to be considered in determining whether a common-law marriage was entered into, but is is not conclusive. The subsequent denial of a common-law marriage by the parties cannot destroy its validity any more than a subsequent denial of a ceremonial marriage can change the status created by it. Public policy forbids that the permanence of the marriage relation, even though entered into under common-law rules, should depend upon any such whimsical contingency. The evidence, if believed, is sufficient to meet the well-stated rules announced in Re Estate of Lust, (Ghelin v. Johnson) 186 Minn. 405, 243 N.W. 443." Wilson v. Wilson, 139 Neb. 153, at page 157, 296 N.W. 766, 786. And in Collins v. Hoag & Rollins, 121 Neb. 716, 238 N.W. 351, it was held, as set forth by appellant, that where there is no proof of any express contract or oral agreement of marriage and a common-law marriage is to be proved by circumstantial evidence, there must be evidence of cohabitation as man and wife, or the assumption openly of marital duties and obligations, continued for such time and to such extent as to reasonably sustain the conclusion or inference that the parties have agreed to become and be husband and wife, and that the mutual consent of the parties to live as husband and wife may be established solely by evidence of marital conduct.

Appellant has cited numerous other authorities enunciating well-settled principles concerning which there is no dispute. In fact, appellant has presented the issue to this appellate court as though it were being submitted to a trial court. There is no doubt that if the trial court had determined that a valid common-law marriage had been entered into by respondent and Haley in Nebraska and that said marriage had not been dissolved, there would be sufficient evidence in the record to sustain such holding. But the trial court did not so determine, and the question which we must decide is whether, upon the evidence and the inferences that may reasonably be drawn therefrom, and the various applicable presumptions of law, we are compelled to say, as a matter of law, that the order of the trial court is unsupported by the record.

While it must be conceded that the record shows that respondent and Haley lived together as husband and wife after she returned to Nebraska in 1905, yet we do not believe that such evidence compels the finding that there was a common-law marriage consummated. Her testimony hereinbefore set forth reveals that she lived with Haley in reliance upon his statement that he would get a license and they would be married, but that he was involved with some other woman and did not secure the license. It is fairly inferable from her testimony that while she did live with him there was no intention either on his part or her part to contract a common-law marriage, and that when he failed to keep his promise to get a license so they could have a ceremonial marriage she left him. The fact that Haley himself entered into a ceremonial marriage with another woman in the same county on February 6, 1909, lends support to the conclusion that he did not intend any common-law marriage between respondent and himself. As was said by the court in Estate of Campbell, 12 Cal.App. 707, at page 708 (syllabus) 108 P. 669: "The presumption of a marriage between A and B, founded simply upon habit and repute, is overcome by proof of a second actual marriage between A and C during the lifetime of B." And in Estate of Baldwin, 162 Cal. 471, at pages 488-489, 123 P. 267, 275, our Supreme Court said: "In this state before the Codes, the common law rule obtained; and this principle of the common law was placed in the Code, and still remains there, in the declaration that it is a disputable presumption 'that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.' Code Civ.Proc. § 1963, subd. 30. This presumption at common law, as under the Code, was disputable; and whenever it conflicted with a higher presumption, as the presumption of innocence, where a charge of bigamy was based upon a marriage resting in cohabitation and repute, it fell."

[9] In Restatement of the Law, under Conflict of Laws, it is stated in section 595: "Proof of Facts (1) The law of the forum governs the proof in court of a fact alleged (2) The law of the forum governs presumptions and inferences to be drawn from evidence."

[10] Section 1959 of the Code of Civil Procedure provides that "A presumption is a deduction which the law expressly directs to be made from particular facts." There can be no doubt that presumptions are evidence. In 10 California Jurisprudence, section 65, at page 748, it is stated: "'A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted the jury are bound to find according to the presumption.' Whether or not a presumption is so controverted is a question of fact for the trial court, and the conclusion of that tribunal is conclusive upon an appellate court unless it be manifestly without sufficient support in the evidence."

[11] And as was said in the oft-cited case of Smellie v. Southern Pacific Co., 212 Cal. 540, at page 549, 299 P. 529, 532: "That a presumption is evidence and may in certain cases outweigh positive evidence adduced against it has long been the settled law of this state. [Citing cases.]"

Appellant has cited Estate of Tersip, 86 Cal.App.2d 43, 194 P.2d 66, as supporting her position that the proof of the common-law marriage overcame the presumptions hereinbefore mentioned. Appellant's reliance upon this case and upon Wilson v. Wilson, supra, which is referred to therein, shows that appellant does not appreciate the difference between an appeal from an adverse judgment and the affirmance of a favorable judgment. In the Tersip case, an application was made to remove Jeanne E. Tersip as administratrix on the ground that she was not the legal widow of the decedent William J. Tersip. Upon the hearing in that case, evidence was introduced indicating quite strongly that she was the common-law wife of one Roberts and that such marriage had not been dissolved. The trial court found that she was the common-law wife of Roberts and had never been legally married to Tersip, and revoked her letters of administration. Upon appeal the order of the lower court was affirmed, the appellate court holding that the evidence sustained the finding that appellant had contracted a common-law marriage with Roberts in Minnesota and was not the wife of decedent. The question of whether a common-law marriage existed was a question of fact in the Tersip case, just as it was in the instant case, the difference being that in the Tersip case the trial court resolved the conflict in favor of the existence of the common-law marriage, whereas in the instant case the trial court held otherwise.

[12] We conclude that the implied finding of the court that no common-law marriage was consummated between respondent and Herbert Haley is supported by the record and the authorities.

[13, 14] Respondent makes the contention that even assuming a common-law

marriage was established between respondent and Haley the subsequent marriage of respondent to Winder creates a presumption that the prior marriage was dissolved. Respondent cites Mazzenga v. Rosso, 87 Cal.App.2d 790, at page 792, 197 P.2d 770, 771, where the court said: " 'The presumption of continuance which ordinarily attaches when the relation of husband and wife has once been shown does not apply when the validity of a second marriage is called in question. In such instances the presumption as to the validity of the second marriage displaces the presumption as to the continuance of the first relation. * *' In so ruling, the trial court followed the law stated in Marsh v. Marsh, 79 Cal.App. 560, 567, 250 P. 411, 413: 'It has been held time and again by the Supreme Court of this state that mere proof of a prior marriage and the continued life of both spouses is not sufficient to make a case against a second ceremonial marriage—that there must be a further showing that the first marriage has not been set aside by judicial decree,' citing Estate of Hughson, 173 Cal. 448, 160 P. 548, and other cases. The burden of proof, is, of course, on the party attacking the validity of the second marriage. That such is the law, there can be no doubt."

And in Kelsey v. Miller, 203 Cal. 61, at page 90, 263 P. 200, 212, the court said: "The mere proof of a prior marriage and the continued life of both spouses is not sufficient to make a case against *a second ceremonial marriage*. There must be a further showing that the first marriage had not been set aside by judicial decree. There is a very strong presumption in favor of the legality of a marriage regularly solemnized." Code Civ.Proc., § 1963, subd. 30; see, also, Estate of Hughson, 173 Cal. 448, 160 P. 548; In re Pusey's Estate, 173 Cal. 141, 159 P. 433.

While it is true that appellant did introduce into evidence a certificate of the Clerk of the District Court of Madison County, Nebraska, certifying that there was no record of any divorce between respondent and Herbert A. Haley between 1905 and 1912, yet it also appears from the evidence that Haley was in the wallpaper business and that while he had his headquarters in Norfolk, Madison County, up to 1907 when respondent left him, he traveled a great deal, and appellant offered no evidence that he was a resident of Madison County continuously between 1907 and the date of the second marriage of respondent to Winder on May 4, 1911.

[15] It was for the trial court to weigh the evidence and the presumptions, and in the instant case we believe that even if the court had concluded that a common-law marriage had been consummated between respondent and Haley (which we are convinced it had not) the court might well have held in accordance with the presumption that such common-law marriage had been dissolved.

Appellant's second major contention is that respondent Rulura T. Winder was never legally married to decedent A. H. Winder because (1) respondent was still validly married to her former husband, Herbert A. Haley, by virtue of a common-law marriage contracted during a reconciliation of spouses in a common-law state; (2) the Colorado court still retained jurisdiction of the status of A. H. Winder and that of his wife, Mary J. Winder, and the divorce decree which was signed on May 3, 1911, was in effect an interlocutory decree.

We have already determined that there was sufficient evidence to support the implied finding of the court that no common-law marriage was consummated between respondent and Haley.

[16] Appellant next contends that under the decree of divorce in the action of Winder against his wife, Mary J. Winder, which decree was entered in Colorado on May 3, 1911, he could not contract a valid marriage before the expiration of one year, and therefore the claimed marriage of respondent and Winder in Council Bluffs, Iowa, on May 4, 1911, was invalid.

Appellant quotes from section 2122 of the Revised Statutes of Colorado, 1908, reading in part as follows: "In case no appeal or writ of error shall be taken from a decree of the court granting a divorce, the court shall have power to set aside such decree and reopen such case at any time within one year from the date of entering such decree, upon application of the defeated party under oath showing good reason therefor; but if no such application be made within such time, or the same be denied, then such decree shall never be reopened for any cause; and during said period of one year from the granting of a decree of divorce neither party thereto shall be permitted to re-marry to any other person."

Appellant also cites Means v. Means, 40 Cal.App.2d 469, 104 P.2d 1066, in which case the plaintiff obtained in Wisconsin a divorce decree containing a provision that it should be effective only in accordance with the Wisconsin statutes, which provide that a divorce judgment does not become effective until expiration of one year from the date of its entry. Thereafter, the plaintiff moved to California and within the one-year period entered into a marriage with the defendant in Arizona. In affirming the judgment of the trial court that the plaintiff's previous marriage had not been dissolved and annulling her marriage to the defendant, the appellate court held that the laws of the State of Wisconsin, under which the divorce proceedings were taken, governed the validity of the divorce, and that the Supreme Court of Wisconsin had interpreted the statute to mean that the marriage was not dissolved until the expiration of the one-year period, and that the plaintiff's purported marriage to the defendant was null and void.

Respondent in reply points out that the Colorado statute differs from the Wisconsin statute. Respondent argues that the prohibition against remarriage in the Colorado statute has no extraterritorial effect, and that the courts of Colorado have so interpreted it. Respondent contends that just as in the Means case, supra, cited by appellant, the appellate court accepted the interpretation placed on the Wisconsin statute by the Supreme Court of Wisconsin, so should we accept the interpretation placed on the Colorado statute by the Supreme Court of Colorado.

In Griswold v. Griswold, 23 Colo.App. 365, 129 P. 560, the Court of Appeals of Colorado said, at page 564: "The provision of our statute invoked for the purpose of nullifying the New Mexico marriage, while it forbids the parties to a divorce suit to remarry any other person within one year, does not in terms suspend the operation of the decree, does not denounce a remarriage within the prohibited time as void, or a nullity, nor make such act criminal, nor attach any penalty to a violation of such statute. (In this respect it contrasts with, and may be tested by, section 4163 prohibiting certain marriages and in terms declaring them absolutely void.) Nor does it in terms apply to such marriage elsewhere than in the state of Colorado. It does not purport to suspend the operation of the decree. It deals with divorced persons. It expressly treats the marriage as dissolved; the decree absolute, final and conclusive, to the extent that even the parties thereto must contract a new marriage as between themselves if they wish to resume their marital relations. The statutory inhibition does not affect the decree." And again, 23 Colo.App. 365, 129 P. at page 566: "To summarize: (1) The marriage contract in question was valid under the laws of New Mexico, and therefore is valid in this state by virtue of express provision contained in section 4165 above quoted. (2) The provisions of section 2122, prohibiting remarriage within one year from date of divorce, have no extraterritorial effect, do not suspend the operation of the decree dissolving the bonds of matrimony, and do not affect the marriage contracted in New Mexico, nor in any manner repeal or amend said section 4165."

The Supreme Court of Colorado held to the same effect in Loth v. Loth's Estate, 54 Colo. 200, 129 P. 827, and in Bauer v. Abrahams, 73 Colo. 509, 216 P. 259.

In view of the decisions of the courts of last resort of Colorado, we are unable to agree with appellant's contention that the decedent Winder could not contract a marriage outside of Colorado on May 4, 1911.

[17] Appellant, in a supplemental brief, also contends that the 1911 marriage be-

tween A. H. Winder and respondent was invalid on the ground that it was performed in Nebraska under a license issued in the State of Iowa. The marriage certificate, which was admitted in evidence without objection, shows that the marriage was performed in Council Bluffs, Iowa, which is across the Missouri River from the City of Omaha. Appellant argues that an unsigned deposition of respondent, which was introduced in evidence, stated that she was married in Omaha. It was for the trial court to determine as between the marriage certificate signed by the minister who performed the ceremony and the recollection of an aged woman, some 37 years after the ceremony.

In her reply brief respondent makes the contention that the evidence would support a conclusion by the trial court that a common-law marriage arose between respondent and A. H. Winder subsequent to the death of Herbert A. Haley, which, according to the evidence, occurred on January 26, 1935. Respondent bases this contention on the evidence that after said date she and Winder took vacation trips each year out of California and on some of those trips they stayed overnight in Colorado, Arizona and Nevada, states which up to 1943 recognized common-law marriages. We do not believe that, under the authorities hereinbefore cited, such trips, which were merely out of California for brief vacations, could be considered as a basis for establishing a common-law marriage, but in view of our conclusion already reached upon the other points we deem it unnecessary to discuss this contention further.

[18] Appellant's final contention that irregularities on the part of the trial court prevented appellant and here sister from having a fair trial has little merit. The record shows, as hereinbefore set forth, that after two continuances were granted appellant and her sister appeared with counsel on July 6, 1948; that on that date new counsel was substituted, and said counsel requested a continuance. The matter was partially heard and then continued to July 8, and then continued to August 5, at which time further evidence was introduced. The record shows no request for a further continuance, and no affidavits were filed. There is nothing in the record to show any abuse of discretion or that appellant was in any way deprived of an opportunity to present her case.

[19] There was no prejudicial error in admitting respondent's testimony as to "why she lived with Haley as husband and wife." The answers given were certainly material in explaining the relationship of respondent and Haley during that time, even though the form of the question may have been objectionable.

[20] Appellant also contends that the court committed prejudicial error by failing to make specific findings on what appellant claims are the material issues. The matters before the court were (1) respondent's petition for letters of administration, (2) appellant's and Beatrice Martens' petition for letters of administration, and (3) appellant's and Beatrice Martens' opposition to respondent's petition. The only allegations in the opposition to respondent's petition were that respondent is not the surviving wife of A. H. Winder and that appellant and her sister are his daughters. The only issue to be determined was whether or not respondent is the surviving widow, and the order made by the court upon that issue was fully as broad as the pleadings in the matter. There is no merit in this contention of appellant.

[21] After the oral argument before this court, appellant filed a "Petition to Reviewing Court to Make Findings of Fact, with Draft of Proposed Findings." Appellant has therein specified 19 separate questions upon which she requests this court to make "separate findings of fact in its decision." Appellant has, of course, mistaken the function of an appellate court, which is to determine whether the order of the trial court is properly supported, but we believe that we have in our opinion answered most of the questions asked by appellant in said petition.

In the instant case a most unusual factual situation was presented to the trial court. Appellant has made an able argument as to why the trial court should have decided in her favor, and this same argument was no doubt presented to the trial court by the counsel who then represented appellant. However, we are convinced that the question presented was primarily one of fact for the trial court and that its decision is supported by the record. The following language from Mazzenga v. Rosso, supra, 87 Cal.App.2d at page 792, 197 P.2d at page 771, is quite apropos: "As noted in respondent's brief, the above argument is, in effect, merely that the trial court 'made its findings upon the *wrong version* of the conflicting evidence.' Since the record discloses substantial evidence in support of the judgment below, such contention on appellant's part, cannot, under the long established rules of appellate procedure, prevail."

In view of the foregoing, the order appointing respondent administratrix is affirmed.

PETERS, P. J., and BRAY, J., concur.

---

98 Cal.App.2d 133

SAUNDERS v. SAUNDERS.

Civ. 7729.

Sac. 6049.

District Court of Appeal, Third District, California.

June 17, 1950.

Jesse Saunders, executor of the estate of Henry Middleton Saunders, deceased, filed first and final account to which the surviving wife, Catherine R. Saunders, filed objections. The Superior Court, Sacramento County, Peter J. Shields, J., rendered a decree of distribution favorable to other beneficiaries, and the surviving wife appealed. The District Court of Appeal, Adams, P. J., held that the record supported the trial court's finding that a note given to decedent and wife for the purchase price of community property constituted separate property of the husband and wife and hence that a half interest therein passed to beneficiaries other than the wife under the husband's will.

Judgment affirmed.

1. Husband and wife 🔑49½(7), 262(1)

Where note given for purchase price of community property recited a promise to pay principal sum to husband and wife "each an undivided one-half interest as separate property," presumption arose that each spouse took a one-half interest in the note as separate property, and in absence of other showing as to circumstances pertaining to execution and delivery of note, or to show that husband caused note to be worded as it was, there was no showing of gift of one-half interest to wife, and court properly found that the other half interest remained separate property of husband.

2. Husband and wife 🔑276(3)

Where husband executed will reciting that all property of estate was community property, confirming to wife her one-half of community property and bequeathing the remaining one-half to his own relatives, but spouses subsequently took a note for purchase price of community property, under which each spouse took a one-half interest in the note as separate property, and after husband's death the surviving wife purchased a one-half interest in such note from the estate, money paid by wife was not community property but was payable to husband's relatives. Probate Code, § 201.

3. Husband and wife 🔑256

The terms of written instrument determine nature of rights acquired by husband and wife, in absence of any other evidence, though consideration for the instrument was community property.

4. Husband and wife 🔑262(1)

The presumption that property acquired by husband and wife, by its terms conveying joint tenancy, is separate property, may be rebutted but in absence of rebutting testimony must prevail.

5. Appeal and error 🔑1008(1)

Trial court's finding that property was separate rather than community is binding upon reviewing court when it finds support in the record.

◆

Busick & Busick, Sacramento, for appellant.

J. M. Inman, Sacramento, for respondent.

ADAMS, Presiding Judge.

On June 4, 1944, Henry Middleton Saunders executed a will in which he set forth that all of the property of his estate was the community property of him and his wife, Catherine Rose Saunders, and in which he confirmed unto his wife her one-half of the community property. The remaining one-half of said estate he bequeathed to various of his own relatives, one of whom, a nephew, he named as executor. Apparently he thus conformed to the provisions of section 201 of the Probate Code which provided, and still provides, that upon the death of either husband or wife one-half of the community property belongs to the survivor and the other one-half is subject to the testamentary disposition of the decedent.

At the time of the execution of the will Saunders and his wife were the owners of an apartment house which had been bought with the earnings of both, and was community property. In April, 1946, this apartment house was sold, and as part of the consideration therefor the buyers executed a promissory note which recited a promise to pay to Henry M. Saunders and Catherine R. Saunders, his wife, "each an undivided one-half interest as separate property," the principal sum of $12,500.

On August 6, 1946, Henry M. Saunders died and his will was thereafter admitted to probate. The aforesaid note was appraised at $11,750. A one-half interest therein was offered for sale. The surviving wife bought such interest, paying therefor the sum of $6,641, and the sale was confirmed to her. When the executor filed his first and final account, in which he asserted that the $6,641 was part of decedent's estate to be distributed to beneficiaries other than the widow, Mrs. Saunders filed written objections asserting that the said money was community property, and that she was entitled to one-half thereof, to wit, $3,320.50 more than the account allowed her. The trial court held that the money which she had paid into the estate was the separate property of the husband, and ordered it paid to the beneficiaries under the will, other than the surviving wife. From the decree of distribution this appeal was taken.

[1] Appellant argues that the note became the community property of the spouses. She then goes on to say that the husband caused a one-half interest in the note to be made payable to appellant as her separate property, and that this constituted a gift to the wife by the husband, wherefore said one-half became her separate property; but that the other one-half remained community property. But in this course of reasoning appellant ignores the wording of the note itself, and also assumes, without any evidence to support such assumption, that the deceased husband caused the note to be worded as it was, and thus made a gift of a one-half interest in the note to her. The only testimony appearing in the record is that of the appellant, which was that the apartment house, in part payment for which the note was given, was acquired during the marriage with the earnings of both husband and wife, and was community property; and testimony of appellant's attorney pertaining to the purchase by appellant, in the probate proceedings, of one-half interest in the note. There is nothing in the record as to the circumstances pertaining to the execution and delivery of the note, and nothing whatever to show that the husband caused same to be worded as it was. Any theory of a gift by the husband to the wife is without support in the record.

The trial court in its decree of distribution referred to the note itself and the provision thereof that it was payable to the payees "each an undivided one-half interest as separate property." The one-half interest which was sold by probate sale, and purchased by appellant, was held to be the separate property of the husband, apparently by reason of the written instrument—the note itself.

[2, 3] We think that the trial court's determination was correct. It has been held in numerous cases that though a written instrument, such as a deed, for instance, has been given, the consideration for which was community property, the terms of that instrument, in the absence of any other evidence, determine the nature of the rights acquired by the grantees. In Delanoy v. Delanoy, 216 Cal. 23, 26, 13 P.2d 513, 514, the court said: "On this appeal it is urged that, inasmuch as the property was purchased with community funds the interest of the husband therein was community property. Defendant contends that since the property was so purchased, and the deed taken in the name of husband and wife as joint tenants, she owned her interest therein as her separate property, and her husband's interest was community property. This court has recently determined that in the absence of any evidence of an intent to the contrary, when property is purchased with community funds and the title is taken in the name of the husband and wife as joint tenants, the community interest must be deemed severed by consent, and the interest of each spouse therein is separate property. Siberell v. Siberell, [214 Cal. 767] 7 P.2d 1003."

In Launer v. Griffen, 60 Cal.App.2d 659, 664, 141 P.2d 236, 238, it was said: "When property is conveyed to a husband and wife as joint tenants, the form of conveyance is such as to destroy the statutory presumption that the property is community (Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003), and that thereby such deed creates a joint tenancy in which the interests of husband and wife are separate property."

In Re Rauer's Collection Co., 87 Cal.App.2d 248, 196 P.2d 803, the court held that where property is deeded to husband and wife as joint tenants they are presumed to hold separate interests in the property in joint tenancy, and the fact that it was purchased with community funds does not of itself overcome such presumption.

In Wallace v. Riley, 23 Cal.App.2d 654, 664, 74 P.2d 807, the legal presumption which arises from joint tenancy deeds was held applicable to a bank account in the names of the spouses as joint tenants.

[4] Of course it does not necessarily follow that the foregoing presumption may not be rebutted and a conclusion reached in a given case, on testimony so rebutting it, that property acquired by a deed by its terms conveying a joint tenancy was in fact community property; but in the absence of testimony so rebutting the presumption arising from the deed itself, the presumption must prevail.

[5] In the case before us we think that a presumption arises from the language of the note that each of the spouses took a one-half interest in the note as separate property, and that the trial court's finding to that effect finds support in the record, and is binding upon this court. In Estate of Trelut, 26 Cal.App.2d 717, 723, 80 P.2d 147, and In re Estate of Ades, 81 Cal.App.2d 334, 337, 184 P.2d 1, it was said that a finding of a trial court that property is either separate or community in character is binding upon an appellate court if supported by sufficient evidence, or based upon conflicting evidence, or on evidence that is subject to different inferences. Also see In re Estate of Smith, 86 Cal.App.2d 456, 472–473, 195 P.2d 842; Todd v. McColgan, 89 Cal.App.2d 509, 514, 201 P.2d 414.

We think that the trial judge, in the case before us, was justified in drawing the inference from the form of the note that the spouses agreed to transmute their community interest in the property sold into equal separate property shares in the note, as they had a right to do; and that the finding of the trial court that they did so, in the absence of evidence to the contrary, cannot be said to be without support in the record.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

COBARRUBIA et al. v. BUCHANAN et al.*

Civ. 4048.

District Court of Appeal, Fourth District, California.

June 13, 1950.

Rehearing Denied July 10, 1950.

Hearing Granted Aug. 10, 1950.

Monica Cobarrubia and others brought an action against Roy Buchanan and another for damages for death of plaintiffs' father alleged to have resulted from negligence of the named defendant in driving a truck owned by the other defendant. The Superior Court, Fresno County, Philip Conley, J., gave judgment for the defendants and the plaintiffs appealed. The District Court of Appeal, Griffin, J., held that the giving of defendants' instructions on contributory negligence, imputed negligence, assumption of risk, and unavoidable accident, was unwarranted by the evidence and was error.

Reversed.

1. Automobiles ⚷224(4)

There is no duty under law to investigate condition of brakes before accepting ride in truck.

2. Automobiles ⚷244(56)

In action to recover damages for death of occupant of truck which was struck by truck driven by defendant, where it appeared that deceased was riding behind cab of truck with sideboards three feet high and it was not shown that deceased ever drove automobile or could judge speed, evidence did not justify finding that deceased was guilty of contributory negligence.

3. Negligence ⚷122(1)

Burden of proving contributory negligence rests upon defendant.

4. Trial ⚷252(8)

In action to recover damages for wrongful death of occupant of truck struck by another truck driven by defendant which was turning off of boulevard at intersection, where there was no evidence to support reasonable inference that anything decedent did or omitted to do contributed proximately to accident, giving of instructions on contributory negligence, imputed negligence and assumption of risk was unwarranted.

5. Appeal and error ⚷882(12)

Where party offers instruction on subject he is estopped from urging error in submission of question to jury.

6. Appeal and error ⚷882(12)

Where trial court's instruction on question of unavoidable accident was not warranted by evidence and plaintiffs had offered no instruction on such question, plaintiffs were not estopped on appeal from urging error in submission of question of unavoidable accident to jury.

7. Trial ⚷252(8)

Where evidence clearly showed that accident was result of negligence of defendant truckdriver or of driver of truck in which plaintiffs' decedent was riding and there was no evidence that accident was unavoidable, it was error to instruct on unavoidable accident.

John D. Chinello, Fresno, for appellants.

John Said, Fresno, for respondents.

GRIFFIN, Justice.

Plaintiffs, as surviving children of Fernando Rodriguez, deceased brought this action for wrongful death of their father. His death was ascribed to the negligence of defendant Roy Buchanan in driving a Chevrolet pick-up truck owned by defendant Robert F. Brown, which collided with a Ford pick-up truck owned and driven by one Frank Hernandez. The decedent was riding in the rear of the Ford truck with other workmen. The answer of defendants sets up six claimed affirmative defenses: (1) unavoidable accident; (2) contributory negligence of Hernandez imputable to decedent under the doctrine of respondeat superior; (3) contributory negligence of Hernandez imputable to decedent under the doctrine of joint venture or enterprise; (4) contributory negligence of decedent in riding in the truck operated by Hernandez; (5) contributory negligence of decedent in knowingly and negligently riding in a negligently operated truck; and (6) assumption of risk by decedent.

---

* Subsequent opinion 228 P.2d 825.

The jury returned a verdict in favor of defendants. Plaintiffs appealed.

The accident occurred on Kearney Boulevard at Grant Avenue in Fresno. Kearney Boulevard is an east-west highway. The center area is planted to trees and is referred to in the record as the "tree lane." North of the tree lane the highway is for the use of trucks and is referred to in the record as the "truck line". The paved roadway thereof is about 10 feet wide with abutting shoulders 3 to 6 feet wide. Eastbound trucks used the south half of the truck lane and westbound trucks used the north half thereof. South of the tree lane the highway is for the use of vehicles other than trucks and is referred to in the record as the "boulevard lane" and the paved roadway is about 10 feet wide with abutting shoulders. Grant Avenue is a north-south highway. It intersects the north line of Kearney Boulevard and crosses the truck lane, the tree lane through a break therein, and the boulevard lane to, but not beyond the south line of Kearney Boulevard, forming a "T" intersection. There are no stop signs at that intersection. Fig trees planted on the property adjacent to the northeast corner of the intersection render the intersection a blind one for approaching westbound traffic in the truck lane. The thick growth of eucalyptus and other trees in the tree lane render the intersection a blind one for northbound traffic on Grant Avenue approaching the truck lane. Buchanan drove the Chevrolet easterly in the boulevard lane, gave a signal for a left turn at Grant Avenue, crossed the tree lane, and as he was about to cross the truck lane he collided with the Ford Truck which was proceeding westerly in the truck lane. Each driver gave his version of the facts surrounding the accident and each blamed the other. It is obvious, from the evidence, that it was sufficient to support a finding of negligence as to defendant Buchanan and that such negligence was the sole proximate cause of the accident, or that Hernandez, the driver of the Ford, was negligent and that his negligence was the sole proximate cause of the accident, or that the concurring negligence of both drivers was the proximate cause of the accident.

The evidence bearing on the status of decedent as an occupant of the Ford truck may be thus summarized. Decedent had worked for Hernandez at a ranch for about 2 weeks before the accident and during that period he rode to work in the Ford driven by Hernandez in substantially the same manner, and over the same route as he did on this particular date. The testimony was that decedent did not tell Hernandez how to drive nor did he complain or have reason to complain about the way Hernandez drove.

Plaintiffs contend that there was no sufficient evidence that deceased was guilty of contributory negligence, or that the negligence of Hernandez, if any, was imputable to the deceased or that he assumed the risk of the injury or that the accident was unavoidable and that therefore the trial court prejudicially erred in giving instructions on these questions and submitting these issues to the jury. Instructions on contributory negligence, requested by defendants, were given in the ordinary form and included the statement: "The rider in a vehicle being driven by another has the duty to exercise ordinary care for his own safety. Ordinary care may require of the driver that he protest against obvious negligence of the driver if he has a reasonable opportunity to do so."

In this connection it is particularly contended that there was no evidence to support a reasonable inference that negligence, if any, on the part of Hernandez, was obvious to the decedent, or, if obvious, that decedent had reasonable or any opportunity to protest or that anything decedent did or omitted to do contributed proximately to the accident, citing Edwards v. Freeman, 34 Cal. 2d 589, 212 P.2d 883. In connection with these instructions defendants also offered and the court gave an instruction, which plaintiffs claim to be erroneous, that if the jury found that the Ford truck in which the decedent was riding "was being operated at and immediately prior to the collision at an excessive rate of speed, and that such excessive speed was a proximate cause of the collision", and if they further found that decedent "knew of and consented to such excessive speed, then the plaintiffs may not recover, although you also find that the defendant, Roy Buchanan, operated the Chevrolet pick-up in a negligent manner." It is also argued that this instruction was wholly without evidentiary support and that it permitted the jury to impute negligence of Hernandez to the decedent and that it was therefore prejudicial error to give it. This was followed by an additional instruction on assumption of risk which stated in effect that if Rodriguez knew that the Ford truck was being operated at a dangerous and excessive rate of speed and he consented thereto, he is deemed in law to have assumed all risks incurred by reason of such excessive speed. Then follows an instruction offered by defendants and given by the court on unavoidable accident, stating that plaintiffs could not recover if the accident was unavoidable.

[1-4] The only evidence pointed to by defendants, which in any way supports these instructions, is that Rodriguez had been riding in the rear of the open truck which was surrounded by side-boards about three feet high. There was evidence that the deceased was seated in the truck somewhere behind the cab and that he had been thus riding with Hernandez, past this intersection, almost daily for two weeks without making any complaint or protest as to the manner of his driving. It is defendants' argument that since there was testimony by defendant, who was called under section 2055 of the Code of Civil Procedure, that Hernandez was then driving between 45 and 55 miles per hour and since he admitted driving from 25 to 35 miles per hour and slowing down at the intersection, and since he admitted traveling at about that same rate of speed each time he passed that intersection, the jury had the right to believe that Hernandez had been driving past that particular intersection for the two weeks prior thereto at 45 to 55 miles per hour and that since Rodriguez never protested then or on prior occasions about traveling at such a speed at that intersection, his failure to protest under the circumstances constituted evidence of contributory negligence on his part. Although Hernandez testified that the brakes on his Ford truck were in "good condition", both before and after the accident, there was some evidence of an intermittent skid mark by one of the tires of the Ford truck but no skid marks from the other three tires. Based on this evidence defendants argue that the brakes must have been defective. Assuming this evidence to be true, there was no evidence showing that deceased had knowledge of any such defective condition of the brakes, either before or on the day of the accident. The law did not charge decedent with the duty of investigating the condition of the brakes before accepting a ride in the truck. Yates v. Brazelton, 108 Cal.App. 533, 291 P. 695. Likewise, there is no evidence that the deceased ever drove an automobile or that he was familiar with or could judge the speed of cars or had any opportunity to do so on this occasion. He was not sitting in the front seat with the driver and observing the speedometer or roadway. The facts are much different from the facts considered in Matsumoto v. Renner, 90 Cal.App.2d 406, 202 P.2d 1051, and Boyson v. Porter, 10 Cal.App.2d 431, 52 P.2d 582, relied upon by defendants. Here, deceased was riding some place in the truck behind the cab, and, so far as the record discloses, he was not making any observation of the road, the speed of the truck, or the approach of any vehicle, and judging from the height of the side-boards and cab, he may not have been able to see the roadway or the intersection. The evidence produced falls far short of showing competent evidence sufficient to justify a jury in holding that deceased was guilty of contributory negligence. The burden of proving contributory negligence of decedent was upon the defendants. Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826. Under this authority the state of the evidence entitled plaintiffs to the benefit of the presumption that the decedent was not guilty of contributory negligence. There was no evidence in the case contrary to the presumption. There was no evidence to support a reasonable inference that negligence, if any, on the part of Hernandez, was obvious to the decedent or, if obvious, that the decedent had reasonable or any opportunity to protest. In fact, there was no evidence in the case to support a reasonable inference that anything the decedent did or omitted to do contributed proximately to the accident. The giving of defendants' instructions on contributory negligence, imputed negligence and assumption of risk, was unwarranted by the evidence and was error.

In Edwards v. Freeman, supra, the passenger was in the back seat combing her hair. Her son was driving the car and an accident occurred. In an action by the mother against the driver of the other car, for damages, that driver claimed contributory negligence on the part of the plaintiff and the court, in effect, instructed the jury that there was no sufficient evidence of contributory negligence on her part. On appeal the trial court's ruling was sustained. See, also, Crawford v. Rose, 2 Cal.App.2d 734, 737-738, 39 P.2d 217; Binford v. Purcell, 2 Cal.App.2d 87, 91, 37 P.2d 732; Fugelsang v. Steiner, 115 Cal.App. 167, 174-175, 1 P.2d 553; Hedding v. Pearson, 76 Cal.App.2d 481, 173 P.2d 382; Oettinger v. Stewart, 24 Cal.2d 133, 139, 148 P.2d 19, 156 A.L.R. 1221; Queirolo v. Pacific Gas & Electric Co., 114 Cal.App. 610, 615-616, 300 P. 487; Swink v. Gardena Club, 65 Cal.App.2d 674, 680-681, 151 P.2d 313; Dowd v. Atlas Taxicab and Auto Service Co., 187 Cal. 523, 202 P. 870; Lowe v. Lee, 95 Cal.App.2d 685, 213 P.2d 767.

[5] However, in this action, in connection with the contributory negligence and imputed negligence instructions offered by defendants and given, *plaintiffs* also offered an instruction on the same subject. It reads in part: "A passenger or guest in an automobile of another who neither exercises nor has the right to exercise any control over the conduct of the driver, does not become responsible for the negligence of the driver, nor can the negligence of the driver of the automobile be imputed to him. A passenger or guest under such circumstances is only responsible for his own negligence, if any, in not exercising such care for his own safety as a reasonably careful and prudent person would exercise under the same or similar circumstances."

It is contended by defendants that since plaintiffs offered instructions on these subjects they are estopped from urging error in the submission of these questions to the jury.

[6, 7] There is authority for this general proposition of law. Collins v. Graves, 1936, 17 Cal.App.2d 288, 61 P.2d 1198; Ray v. Kennedy, 1938, 24 Cal.App.2d 583, 76 P.2d 147; Gray v. Ellis, 1913, 164 Cal. 481, 486, 129 P. 791; Eubanks v. Milton G. Cooper & Sons, Inc., 1945, 68 Cal.App.2d 366, 373, 156 P.2d 775; Cedzo v. Bergen, 1942, 53 Cal.App.2d 667, 128 P. 683. However, defendants offered and the court gave an instruction on the question of *unavoidable accident*. Plaintiffs offered no instruction on this question, therefore they would not be bound by the estoppel rule in this respect.

The evidence clearly shows that the accident was the result of the negligence of defendants or of Hernandez or both. There was no evidence that the accident was unavoidable.

In Hyman v. Market Street Ry. Co., 41 Cal.App.2d 647, 107 P.2d 485, the vice of giving such an instruction, where there was no evidence supporting it, is discussed. In that case a passenger was injured as the result of a collision of two street cars. There it was held that the giving of such an instruction, under the facts of that case, was both error and prejudicial, where there was no evidence, direct or indirect, that the collision was the result of such an accident. See, also, Scandalis v. Jenny, 132 Cal.App. 307, 22 P.2d 545.

Respondents rely upon the general statement in Stevenson v. Fleming, 47 Cal.App.2d 225, 117 P.2d 717, and Matsumoto v. Renner, 90 Cal.App.2d 406, 202 P.2d 1051, to the effect that where negligence and contributory negligence or unavoidable accident are raised by the pleadings, defendants are entitled to have the jury instructed as to this theory of the case, but in addition to this general rule there should be added the statement that to warrant the giving of such an instruction there must be sufficient evidence upon which the jury could make such a finding. See, D'Avanzo v. Manno, 16 Cal.App.2d 346, 60 P.2d 524, and 24 Cal.Jur. p. 805, sec. 78, where it is said: "Even though a request is pertinent to an issue presented by the pleadings, refusal of it is proper if such issue is wholly unsupported by the evidence. In fact, the refusal of requests in such cases is not only proper, but their allowance, constitutes error which, if prejudicial, warrants a reversal." See, also, Scandalis v. Jenny, supra; Sills v. Forbes, 33 Cal.App.2d 219, 91 P.2d 246; Kinnear v. Martinelli, 84 Cal. App. 721, 258 P. 686; 24 Cal.Jur. pp. 827-828, sec. 93; 10 Cal.Jur. Ten-Year Supp. p. 701, sec. 95; 3 Cal.Jur. p. 855, sec. 86.

Under the facts of the instant case we reach the conclusion that the jury might well have been misled and that prejudicial error resulted.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

98 Cal.App.2d 121

In re PEREZ' ESTATE.

ACUNA et al. v. PEREZ.

Civ. 17680.

District Court of Appeal, Second District, Division 2, California.

June 15, 1950.

Hearing Denied Aug. 10, 1950.

Proceeding in the matter of the estate of Daniel Perez for the appointment of an administratrix, opposed by Amelia Acuna and others. The Superior Court for Los Angeles County, Alfred E. Paonessa, J., made an order appointing Rita Perez, and the opponents appealed. The District Court of Appeal, McComb, J., held that the administratrix' Arizona marriage to decedent was valid in California.

Affirmed.

1. Marriage 🔑3

Where man and woman were residents of California and unable to marry there because doctor refused to give woman a health certificate, and within one month both went to Arizona and were married in accordance with laws of that state and then returned to California on following day, marriage was valid in California even if entered into in Arizona for purpose of evading California laws. Civ.Code, § 63.

2. Courts 🔑95(1)

If rule of law is clearly established by decision of California courts, those courts are not at liberty to overrule the rule in favor of one followed in decisions of other states.

◆

Benjamin F. Kosdon and Daly B. Robnett, Los Angeles, for appellants.

David C. Marcus, Los Angeles, for respondent.

McCOMB, Justice.

This appeal is from an order appointing respondent administratrix of the estate of Daniel Perez, deceased.

Facts: Respondent and deceased were residents of the state of California. On or about August 11, 1948, respondent went to a physician for the purpose of obtaining a health certificate so that she might obtain a license to marry Daniel Perez. The doctor refused to give her such certificate because of the fact that he found she was afflicted with a communicable disease. She knew that without such certificate she could not get a license to marry in the state of California. Thereafter within approximately a month she and Daniel Perez went to the state of Arizona where they were married on August 21, 1948, in accordance with the laws of that state, and the following day they returned to the state of California where they lived until the date of Mr. Perez' death on April 1, 1949. Respondent applied for letters of administration of decedent's estate on the ground that she was his surviving widow. Appellants, who are the surviving children and heirs at law of decedent, filed a contest to respondent's application for letters of administration upon the ground that she was not the lawful widow of decedent. After trial the probate court made an order appointing respondent administratrix of decedent's estate.

Question: Was the Arizona marriage of respondent and decedent void because it was contracted between the parties for the specific purpose and with the specific intent of evading the laws of California?

[1] This question must be answered in the negative. If parties who are residents of and domiciled in California, where their marriage would have been invalid, are married in another state in conformity with the laws of such state, even though they have entered such state with the avowed purpose of evading the laws of the state of California, such motive does not invalidate the marriage. (McDonald v. McDonald, 6 Cal.2d 457, 459, 58 P.2d 163, 104 A.L.R. 1290; Civil Code, sec. 63.[1])

It is evident that the foregoing rule is applicable in the present case and that the marriage contracted between respondent and decedent, even though it would have been invalid in California and although they went to Arizona for the purpose of evading the laws of California, was a valid marriage since it conformed with the laws of the state in which it was contracted.

[2] *Authorities relied on by appellants:* Eggers v. Olson, 104 Okl. 297, 231 P. 483; State v. Kennedy, 76 N.C. 251, 22 Am.Rep. 683; In re Takahashi's Estate, 113 Mont. 490, 129 P.2d 217; State v. Fenn, 47 Wash. 561, 92 P. 417, 17 L.R.A.,N.S., 800; Estate of Stull, 183 Pa. 625, 39 A. 16, 39 L.R.A. 539, 63 Am.St.Rep. 776; Kinney v. Commonwealth, 30 Grat. 858, 71 Va. 858, 32 Am.Rep. 690; Johnson v. Johnson, 57 Wash. 89, 106 P. 500, 26 L.R.A.,N.S., 179; Williams v. Oates, 27 N.C. 535; Pennegar v. State, 87 Tenn. 244, 10 S.W. 305, 2 L.R.A. 703, 10 Am.St.Rep. 648; State v. Tutty (C.C.), 41 F. 753, are inapplicable to the instant case because if a rule of law is clearly established by a decision of the courts of California we are not at liberty to overrule it in favor of one followed in decisions of other states. (Schneider v. Schneider, 82 Cal.App.2d 860, 862, 187 P.2d 459.) Hence the authorities relied on by appellants which might support a different rule must be disregarded by this court.

Crouch v. Crouch, 28 Cal.2d 243, 169 P.2d 897, is not here in point for the reason that such case dealt with the question of collaterally attacking a divorce decree, not as in this case a marriage. Neither is Perez v. Sharp, 32 Cal.2d 711,[2] 198 P.2d 17, in point. Such case merely declares unconstitutional the California miscegenation marriage statutes.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

98 Cal.App.2d 140

PEOPLE v. SCHUMAN.

Cr. 2199.

District Court of Appeal, Third District, California.

June 20, 1950.

Hearing Denied July 13, 1950.

Proceeding on the application of Robert G. Schuman for issuance of a writ of error coram nobis to review a conviction. The Superior Court of Sacramento County, Grover W. Bedeau, J., denied the issuance of the writ, and defendant appealed. The District Court of Appeal, Adams, P. J., held that petition did not lie where alleged errors were known to defendant during trial, since they were available to him for presentation to trial court for consideration on a motion for new trial and to District Court of Appeal on appeal.

Appeal dismissed.

See also 93 Cal.App.2d 259, 208 P.2d 1043.

---

[1] Section 63 of the Civil Code of California reads: "Marriages contracted without the state. All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted are valid in this state."

[2] Erroneously cited by appellants as Perez v. Lippold, 32 Cal.2d 911.

1. Criminal law ⚷997

Writ of error coram nobis may not be resorted to for relief from alleged errors otherwise reviewable.

2. Criminal law ⚷997

Purpose of writ of "error coram nobis" is to secure relief, where no other remedy exists from a judgment rendered while there existed some fact which would have prevented its rendition if trial court had known it and which, through no negligence or fault of defendant, was not then known to the court.

3. Criminal law ⚷997

Writ of error coram nobis would not lie to review conviction where alleged errors were known to defendant during trial, since they were available to him for presentation to the trial court for consideration on a motion for new trial and to District Court of Appeal on appeal.

◆

Robert G. Schuman, in pro. per.

Fred N. Howser, Attorney General, Doris H. Maier, Deputy Attorney General, for respondent.

ADAMS, Presiding Justice.

This is an appeal from a judgment of the Superior Court of Sacramento County, which denied to Schuman the issuance of a writ of error coram nobis sought therefrom. The People have filed herein a motion to dismiss said appeal on the ground that the record relied upon shows no grounds for the issuance of a writ of error coram nobis, and that such appeal is without merit.

Schuman was convicted in the Superior Court of Sacramento County in 1942. He appealed from the judgment of conviction and same was affirmed by this court May 18, 1944. People v. Shuman, 64 Cal.App.2d 382, 148 P.2d 875. On that appeal Schuman was represented by two attorneys. Since that time appellant has filed four petitions for writs of habeas corpus in this court, similar petitions in the Superior Court of Sacramento County, the United States District Court, and the United States Court of Appeals; also petitions for hearing by the Supreme Court of this state, and various other petitions, all of which have been denied. In one or another of those proceedings most, if not all, of the eighteen alleged errors relied upon in the case now before us have been presented. All pertain to the original trial and were or could have been presented for review on the appeal from the original judgment, or could have been raised on motion for a new trial. No one of them is, therefore, reviewable on this proceeding.

[1, 2] It is now well established, by decisions of the Supreme Court of California, that in this state the writ of error coram nobis may not be resorted to for relief from alleged errors otherwise reviewable. Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it, and which, through no negligence or fault of defendant, was not then known to the court. That remedy is one of narrow scope, and the limitation of matters thereby reviewable has been settled by several recent decisions of our appellate courts. People v. Adamson, 34 Cal.2d 320, 210 P.2d 13; People v. Shorts, 32 Cal.2d 502, 513, 197 P.2d 330; People v. Tuthill, 32 Cal.2d 819, 198 P.2d 505; People v. Malone, 96 Cal.App.2d 270, 215 P.2d 109; People v. Chapman, 96 Cal.App.2d 668, 216 P.2d 112.

[3] The alleged errors upon which petitioner relies in his petition for writ of error coram nobis were obviously known to him during the trial, since all pertain to the trial itself. They were available to defendant for presentation to the trial court for consideration on a motion for a new trial and to this court on appeal. They do not come within the scope of review on the writ asked for in this proceeding. We therefore hold that it was not error to deny the writ in the lower court, and that the motion to dismiss this appeal should be granted.

The appeal is dismissed.

PEEK and VAN DYKE, JJ., concur.

98 Cal.App.2d 119

KLEINBERG et al. v. UNDERWRITERS AT LLOYD'S LONDON.

Civ. 17588.

District Court of Appeal, Second District, Division 2, California.

June 15, 1950.

Action by Herman Kleinberg, Lillian Kleinberg and Henry Feltenberg, doing business as Henry's Liquors against the Underwriters At Lloyd's London, an association, to recover on a policy insuring against loss by theft. The Superior Court, Los Angeles County, Warren Steel, J., entered judgment in favor of the defendant and plaintiffs appealed. The District Court of Appeal, McComb, J., held that evidence sustained trial court's finding that specific sum taken from office of liquor store was money belonging to persons doing a separate and distinct business from that of plaintiffs and that loss did not fall within terms of policy.

Judgment affirmed.

Insurance ⚿665(4)

In action to recover on a policy insuring plaintiffs, operators of a liquor store, against loss by inside or outside holdup in amount not exceeding $5,000, evidence sustained finding that specific sum taken by bandits from office of liquor store belonged to persons doing a separate and distinct business from that of plaintiffs and that therefore loss did not fall within terms of policy.

◆

Louis Titlebaum, Los Angeles, for appellants.

Reed & Kirtland, and Henry E. Kappler, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover on a policy insuring against loss by theft, plaintiffs appeal.

Facts: On or about January 9, 1947, defendant issued to plaintiffs, Herman Kleinberg, Lillian Kleinberg and Henry B. Feltenberg, doing business as Henry's Liquors, a policy insuring them against loss by inside or outside holdup in an amount not exceeding $5,000. Plaintiff Herman Kleinberg and his wife owned a gasoline station which was immediately adjacent to the liquor store where they did business as the H. & L. Service Station. They also operated a check cashing service. There was no connection between the H. & L. Service Station and the business known as Henry's Liquors.

On or about January 1, 1948, bandits entered the premises and took money totaling $1132.48 and merchandise of the value of $88.67 from Henry's Liquors store for which defendant reimbursed plaintiffs. In addition the bandits took the sum of $2,683 in cash from the office of the liquor store which sum is the subject of the present litigation. The trial court found that the $2,683 was money belonging to persons doing a separate and distinct business from that of plaintiffs, and that therefore the loss did not fall within the terms of the policy issued by defendant.

Question: Was there substantial evidence to sustain the above findings of the trial court?

This question must be answered in the affirmative bearing in mind the rule set forth in Estate of Isenberg, 63 Cal.App.2d 214, 217, 146 P.2d 424.

It is conceded that defendant issued the policy of insurance mentioned above to plaintiffs, and that the loss incurred by Henry's Liquors store in the sum of $1,132.48 and merchandise of the value of $88.67 was paid by defendant. It is also conceded that the sum of $2,683 which is the subject of the present suit was money belonging to and used in the check cashing business. A witness, Crandall, testified that he had a conversation with plaintiff Herman Kleinberg with reference to the ownership of the check cashing activity and that said plaintiff stated, "that the check cashing business had nothing whatever to do with the liquor store operation; that that was his personal business." Also Mr. and Mrs. Kleinberg informed witness Mushet in a conversation after the holdup "that the check cashing business was theirs, and not a part of Henry's Liquor store."

Clearly such evidence sustained the trial court's finding that the check cashing business was not the business of plaintiffs, and that therefore the loss incurred in connection with such business was not covered by the policy of insurance issued by defendant and the court properly gave judgment against plaintiffs.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

98 Cal.App.2d 163

NICHOLSON v. SMITH et al.

Civ. 7685.

District Court of Appeal, Third District, California.

June 22, 1950.

Rehearing Denied July 21, 1950.

Hearing Denied Aug. 17, 1950.

Action by Mercer Nicholson against M. C. Smith and Pearline Smith on a note. The action as to Pearline Smith was dismissed during trial. The Superior Court, Del Norte County, Samuel F. Finley, J., rendered judgment for the plaintiff and defendant M. C. Smith appealed. The District Court of Appeal, Adams, P. J., held that evidence sustained finding that there was no agreement to extend time of payment.

Judgment affirmed.

1. Bills and notes 🔑136, 137(1)

A note is a "contract in writing" within statute providing that a contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise, and promisor may not alter terms of note by parol so as to extend its due date. Civ.Code, § 1698.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Contract In Writing".

2. Bills and notes 🔑139(1)

An extension of time for payment of a note, without consideration for such extension, may not be relied on by promisor. Civ.Code, § 1698.

3. Bills and notes 🔑516

In action on a note, evidence sustained finding that promisee did not agree to an extension of time for payment of note.

◆

Wm. W. Speer, Crescent City, G. H. Van Harvey, San Francisco, for appellant.

Ernest Mitchell, Eureka, for respondent.

ADAMS, Presiding Justice.

In this case, on November 30, 1944, one M. G. Lind, owner of property called Ocean Fish Market, leased same to Roy Watson for five years. On May 25, 1946, Watson sold the lease to M. C. Smith. The latter paid for the assignment of the lease, partly in cash and partly by his note for $1700.00, the due date of the note being January 1, 1947. On February 20, 1948, the note being unpaid, Watson assigned same to Mercer Nicholson who filed this action on said note on March 1, 1948. While Mrs. Smith was made a defendant in the action, as to her it was dismissed during trial.

Shortly after the execution of the note by Smith, M. G. Lind, the original lessor, sold the Ocean Fish Market to James F. Tracy. On August 20, 1946, Tracy brought an action against both Watson and Smith, seeking a cancellation of the original lease on the ground that the lessees had committed waste thereon in violation of the terms of the lease. Defendants answered denying waste. It was stipulated that that action had not been disposed of when the action before us was tried on April 19, 1948.

In defense of this action on the promissory note, defendant Smith testified that after the execution of the note Watson agreed with him, orally, that payment of the note need not be made until the action brought by Tracy was concluded. Watson denied this. There was, therefore, a conflict of evidence on this point. There was no evidence that any consideration was given to Watson for any extension of the due date of the note.

The trial court rendered judgment in favor of plaintiff Nicholson. It relied upon section 1698 of the Civil Code, holding that the note, being a contract in writing, could not be altered by an unexecuted oral agreement. Smith has appealed therefrom.

[1] We think that the judgment must be affirmed. A promissory note is a contract in writing within the provisions of section 1698 of the Civil Code, and the promisor may not alter the terms thereof by parol so as to extend its due date. Henehan v. Hart, 127 Cal. 656, 657, 60 P. 426; Middlecamp v. Zumwalt, 100 Cal.App. 715, 724, 280 P. 1003; Rottman v. Hevener, 54 Cal.App. 474, 479, 202 P. 329; Rathbun v. Security Mfg. Co., 82 Cal.App. 793, 795, 256 P. 296; Hall v. Remp, 73 Cal.App.2d 377, 381, 166 P.2d 372; Columbia Casualty Co. v. Lewis, 14 Cal.App.2d 64, 76, 57 P.2d 1010; Alameda County Title Ins. Co. v. Panella, 218 Cal. 510, 514, 24 P.2d 163.

[2] Also, an extension of time for payment, without consideration for such extension, may not be relied upon. Middlecamp v. Zumwalt, supra; Smith v. Parlier Winery, Inc., 7 Cal.App.2d 357, 361, 46 P.2d 170.

[3] And finally, the testimony as to the granting of any extension being conflicting, the trial court's decision in favor of plaintiff finds adequate support in the testimony denying an agreement to extend.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

---

98 Cal.App.2d 70

In re MERRITT'S ESTATE.
PACIFIC STATES CORPORATION v. MERRITT.

Civ. 14369.

District Court of Appeal, First District, Division 1, California.

June 12, 1950.

Proceeding in the matter of the estate of H. C. Merritt, Jr., on settlement of the final account of Helen Merritt as executrix. The Superior Court in and for the City and County of San Francisco, T. I. Fitzpatrick, J., rendered a decree settling the final account, and from that portion awarding compensation to the executrix and her attorney for extraordinary services, the Pacific States Corporation, a principal creditor, appealed. The District Court of Appeal, Peters, P. J., held that although the estate was insolvent, an award of the entire estate as payment for extraordinary services was not an abuse of discretion.

Decree affirmed.

1. Costs ⇨9

In a probate matter, it is particularly within power of trial judge who has all records before him to fix and determine what fees are proper. Probate Code, §§ 902, 910.

2. Executors and administrators ⇨501, 510(10)

Exercise by trial court of its discretion in making allowances to executrix and attorney for estate for extraordinary services will be interfered with only when amount of allowance is so far out of line as to constitute clear and manifest abuse of judicial discretion. Probate Code, §§ 902, 910.

3. Executors and administrators ⇨216(2), 497

In determining amount of allowances to executrix and attorney for estate, trial court will take into consideration value of property, time occupied, and nature of services and necessity, and even where litigation engaged in or services rendered turn out to be entirely valueless, executrix and attorney may be entitled to extraordinary fees. Probate Code, §§ 902, 910.

4. Executors and administrators ⇨216(2), 497

Award of fee to executrix or attorney for estate for extraordinary services will not be approved unless there is some competent evidence introduced of the nature, extent and value of the services. Probate Code, §§ 902, 910.

5. Executors and administrators ⇨216(2), 497

Where estate valued at more than one million dollars was insolvent, and executrix and attorney for estate participated in seven different actions by and against the estate, and services rendered were extensive and time consuming and required to protect preferred and general creditors other than major general creditor, and executrix and attorney received usual fees, allowance of one half each to executrix and attorney of extraordinary fee of slightly more than $14,000 which amounted to entire estate remaining after payment of claims of preferred creditors and expenses of administration was not an abuse of discretion. Probate Code, §§ 902, 910.

◆

Derthick & Cusack, Los Angeles, attorneys for appellant.

Young, Hudson & Rabinowitz, San Francisco, attorneys for respondent.

PETERS, Presiding Justice.

This is an appeal by the Pacific States Corporation, principal creditor of the Estate of H. C. Merritt, Jr., from the decree settling the final account of the executrix, and from that portion of the decree awarding compensation to the executrix and her attorney for extraordinary services.

The estate is insolvent. On distribution it developed that the approved claims of the general creditors against the estate totaled $1,070,044.79. The sole remaining asset of the estate, after paying all preferred creditors and the expenses of administration, was $14,253.20. After a contested hearing, the probate judge found that this sum was too small to compensate the executrix and her attorney for their extraordinary services to the estate, but held that since that sum was the only money available it should be divided equally between the executrix and her attorney, awarding each $7,126.60. The sole point raised by appellant is that to award all of the assets of the insolvent estate to the executrix and her attorney, for extraordinary services, was, under the circumstances, so unreasonable as to constitute an abuse of discretion as a matter of law.

The facts are as follows: Helen Merritt is the surviving wife of H. C. Merritt, Jr. The Pacific States Corporation, the appellant, is largely owned by H. C. Merritt, Sr. Helen was appointed executrix of her husband's estate on August 21, 1945, and served continuously until finally discharged in April of 1949, a period of three years and eight months. Francis W. Murphy, all during the administration of the estate, was the attorney for the executrix. The affairs of the estate were in a badly muddled condition, and the estate was clearly insolvent. After the preferred creditors were paid, there were unpaid and approved general creditors' claims totaling $1,070,044.79, of which amount $1,002,784.36 represents the unpaid claims of appellant. At the time of hearing the final account the sole asset of the estate was $14,253.20 in cash. During the administration of the estate, the executrix, as widow, was allowed a family allowance, receiving a total of $25,500. The statutory compensation allowed her amounted to $2,253.51. Her attorney received an equal sum.

The hearing on the final account was heard on the entire records of the estate and on the final account and report of the executrix. The final account is 50 pages in length, and the report is 64 pages long. The nature of the various services rendered are there set forth in detail. It is unnecessary to do any more than briefly summarize these services.

During the course of administration three separate sales of real property were made, in which notices of sale were prepared and published, returns of sale made, and confirmations, after notices and hearings, sought and secured from the probate court. Four pieces of automotive equipment were separately sold in which notices of sale were given, bids called for, returns of sale made, and, after notices and hearings, confirmations sought and secured. In similar fashion some personal property located in Madera County, and some other personal property coming into the estate by virtue of a claim against one Felix Smith, was sold. One hundred shares of stock of the Cuban Atlantic Sugar Company were sold, after filing a petition and receiving authority of the court to sell. Some livestock totaling 1451 head were sold in 35 different sales, and there were 33 separate sales of other personal property connected with the ranch. The estate realized $76,000 from these sales, which was $20,000 more than the appraised values of the properties.

The report also sets forth that the executrix and her attorney had more than 500 conferences in regard to settling the estate, and that the number of hours spent were beyond calculation. The executrix spent 63 days in trips away from her home in administering the estate.

In addition to the services to which reference has already been made, the executrix and her attorney were involved in considerable litigation on behalf of the estate. Appellant attacks the wisdom of this litigation and contends that the results secured were negligible. For purposes of clarity these various actions will be separately numbered.

Action number 1 was by appellant corporation against respondent as executrix, and was filed in San Francisco. This action grew out of the fact that when Merritt, Jr., died, various head of livestock were pastured on lands of appellant, who had a claim for $14,263.87 against the estate for feed, pasturage, and care of these animals. The executrix was in doubt whether she or the estate had title to this livestock and many months were required to investigate the facts and to determine ownership. During this period of discussion many of the animals were sold, with the consent of appellant, and the moneys received placed in a separate account, which appellant finally attached. The complaint was in two counts, one based on the agister's lien with interest, totaling $15,137.57, and in the other appellant claimed title to all of the livestock on the theory that they had been purchased with appellant's funds. The executrix finally determined that the livestock had been the property of her husband, that she had no personal claim thereto, and that appellant's claim for feed, etc., was meritorious. She finally petitioned the court for permission to compromise this claim, and did compromise it for $12,637.57, which sum was paid to appellant. The appellant argues that this litigation was really to determine whether the respondent individually owned the cattle, and that any services rendered by or to her in this proceeding were for her benefit in her individual capacity. While respondent settled the claim for about $2,500 less than was owed, and thus saved the estate that amount, this was done, according to appellant, by respondent breaking her word to appellant to pay the full amount of the claim. Of course, the compromise did successfully dispose of the claim that appellant owned the cattle.

Action number 2 was also by appellant against respondent, as executrix, and was also filed in San Francisco. This was an action in six counts. Count one was based on promissory notes executed by the deceased in the sum of $1,008,208.02, plus interest for several years. The other five counts were for various sums totaling about $600,000, it being claimed that in five separate transactions the deceased had misappropriated these sums belonging to appellant. Respondent petitioned for approval to compromise this $1,650,000 action for $1,012,784.36. The compromise was allowed and appellant secured a money judgment in that amount. By this compromise, all claims against decedent based on his alleged fraud and deceit were deleted, and the total claim of appellant compromised for over $600,000 less than was claimed by appellant. Appellant has recovered $10,000 in partial satisfaction of this judgment. Appellant contends that, had the claim on the promissory notes been properly investigated prior to its disallowance, it would have been allowed in full. Even as to the claim based on the notes, however, it was compromised for over $50,000 less than claimed. As to the claims based on fraud totaling over $600,000, and not allowed in the compromise, appellant claims that it would never have made these claims had the note claim been allowed. This is all conjecture and surmise. It was for the trial court to determine whether these and the other services were of value to the estate.

Action number 3 was brought by the executrix in San Francisco against appellant to recover from it the value of decedent's services under a contract by which decedent was entitled to receive a percentage of the net profits Pacific States Corporation made on certain farm lands owned by Pacific States. The complaint asked for an accounting and for the agreed compensation. Appellant denied the alleged indebtedness and pleaded the judgment in action numbered 2 as an offset. Because of the death of decedent, proof was difficult to secure, and the action was finally compromised, with the approval of the court by allowing the executrix a $10,000 credit on the judgment in action number 2. Appellant surmises, but offers no proof, that this claim could and should have been settled without litigation.

Action number 4 was filed in San Francisco against the executrix. It appears that decedent had opened an account with the bank under the account name of "Ranch Managers," and had deposited therein checks payable to Pacific States Corporation in the total amount of $228,435.52. Decedent thereupon withdrew this money. Pacific States Corporation claimed decedent had no authority to withdraw the money, and filed suit against the bank to recover the total sum. The bank thereupon filed a contingent claim in the estate to protect itself in the event Pacific States Corporation recovered against the bank. The executrix rejected the claim and the bank brought this action against the estate. The bank and Pacific States Corporation settled their dispute by the bank paying appellant $50,000. The executrix had no defense against a claim in this amount and petitioned the probate court for permission, which was allowed, to permit judgment to be entered against the estate for this sum.

Appellant claims that this litigation was totally unnecessary, because the executrix had to admit that whatever amount the bank had to pay appellant was a just claim against the estate. The executrix contends that, in view of the large contingent nature of this claim, her resistance was justified.

Action number 5 was brought against the estate by the divorced wife of decedent to recover from the estate money claimed to be due under a property settlement. The plaintiff in that action filed a claim for $900, and requested that $41,000 be impounded to provide a fund from which future payments could be made. The claim was rejected, and the executrix filed a motion to modify the interlocutory. A hearing was had on this motion, and the matter submitted. Thereupon, the divorced wife brought the present action. Before trial the executrix, after negotiations, offered to settle this claim for $10,000, which offer was accepted, approved by the court, and judgment against the estate entered in that amount. Thereafter, this judgment was fully satisfied by paying to the divorced wife $3,755.40 in cash and by assigning to her certain promissory notes held by the executrix for the estate totaling $7,000. This settlement was authorized by the court. The claim of the divorced wife was admittedly a preferred claim. The resistance to this action saved the estate over $30,000. Appellant urges that this action involved no unusual issues, and that no great amount of time was involved in handling it.

Action number 6 was brought in San Francisco by the executrix against the Copper Mountain Products Company, it being alleged that the corporate defendant owed the estate some $32,000 on a certain promissory note executed by it in favor of decedent. This action was finally settled, so far as the estate is concerned, by assigning the promissory note to one Felix Smith as part of a transaction, under which Smith purchased some real and personal property and some stock belonging to the estate.

Action number 7 was brought in San Francisco by the estate against the Red Star Mining Co., and resulted in a judgment against the mining company for $43,954.16. Executions were issued, and then it was found that the mining company was insolvent and that any attempt to collect the judgment would result in bankruptcy. Finally, the executrix sought and secured approval of the court to sell this judgment, and certain stock appraised at nothing, to one Oliver for $1,500.

This summary serves to indicate how difficult and burdensome the handling of this estate was. The probate court knew of the difficulties presented, and it was for that court to determine whether the various actions of the executrix and her attorney were necessary, and to evaluate them. Running through appellant's argument is the thought that, because it was by far the largest general creditor, it profited but little from the actions of the executrix, and that, had practically nothing been done by the executrix, the total result, so far as it was concerned, would have been but little different from the results secured after all of these actions. Appellant asks us to engage in hindsight and to infer that most of the actions of the executrix were unnecessary and should not have been taken. It must be remembered that the executrix owed a duty to the preferred creditors and to the other general creditors as well as to appellant. This duty she and her attorney seem to have performed remarkably well. It is not for us to engage in inferences against those indulged in by the trial judge, who was in a much better position than are we to evaluate the necessity and value of these services.

Appellant's main argument is that it can find no precedent for awarding to an executrix and her attorney of an insolvent estate the entire estate as payment for extraordinary services. It contends that the litigation brought no new assets into the estate, and that, as widow of the decedent, executrix received a very generous family allowance. It further contends that all of the actions, with the exception of the action brought by the divorced wife of decedent, could have been avoided, and that all of the litigation was not worth the fees allowed.

[1-3] The statement of facts is sufficient to refute most of appellant's arguments. The fixing of fees for the extraordinary services of executrix are provided in section 902 of the Probate Code, and for her attorney by section 910 of that code. Section 902 provides that an executrix shall be entitled, in addition to the statutory fees, to "Such further allowances * * * as the court may deem just and reasonable for any extraordinary services," while section 910 provides that the attorney, in addition to statutory fees, is entitled to "such further amount as the court may deem just and reasonable for extraordinary services." It is hornbook law that "In a probate matter it is particularly within the power of the trial judge, who has all of the records before him, to fix and determine what fees are proper." In re Guardianship of Vaughan, 14 Cal.App.2d 594, 58 P.2d 742, see, also, Estate of Hardenberg, 18 Cal.App.2d 307, 310, 63 P.2d 1200; Estate of Keith, 16 Cal.App.2d 67, 70, 60 P.2d 171; In re Guardianship of Jacobson, 30 Cal.2d 312, 317, 182 P.2d 537. Whether the claim on appeal is that the allowances for extraordinary services was too high or too low, the appellate courts are most reluctant to disturb the determination of the probate court, for the reason that the amount of such allowances rests peculiarly in the discretion of the trial court. Such discretion will be interfered with only when the amount of allowance is so far out of line as to constitute a clear and manifest abuse of judicial discretion. In re Estate of Broome, 162 Cal. 258, 263, 122 P. 470; In re Estate of Parker, 186 Cal. 671, 672, 200 P. 620; In re Estate of Iser, 52 Cal.App. 405, 408, 198 P. 1014. It is primarily for the probate court to determine the necessity for and to value the services of the executrix and her attorney. The trial court will, and presumably here did, take into consideration the value of the property, the time occupied, the nature of the services and their necessity. In re Estate of Richmond, 9 Cal.App. 413, 415, 99 P. 558. Even where the litigation engaged in, or the services rendered, turn out to be entirely valueless, which was not the case here, the executrix and her attorney may be entitled to extraordinary fees. In re Estate of Allen, 42 Cal.App.2d 346, 108 P.2d 973.

Appellant places great reliance on the Estate of Lundell, 95 Cal.App.2d 352, 212 P.2d 914. There, the attorney for the executors settled a $150,000 claim of the estate against certain insurance companies, without suit, for $100,000. He was allowed $12,000 as a fee for extraordinary services. The appellate court did reverse this allowance on the ground that there was no evidence before the probate court of the extent or value of the services rendered. A hearing was denied in the Supreme Court, 214 P.2d 23. The appellate court states the general rules above set forth, but found an abuse of discretion sufficient to shock the conscience.

[4] That case differs from the present one. Here, unlike the Lundell case, the executrix and her attorney offered detailed evidence of the nature and extent of the services rendered. The Lundell case simply stands for the proposition that an award of a fee for extraordinary services will not be approved unless there is some competent evidence introduced of the nature, extent and value of the services. That this is the proper interpretation of the Lundell case, and that the rule there announced is so limited, is illustrated by the recent decision of the Supreme Court, March 3, 1950, in Warner v. Warner, 34 Cal.2d 838, 215 P.2d 20. That was an appeal from an order fixing attorney's fees *pendente lite* in a divorce action. It was contended on appeal that the allowance was too great and the Lundell case was relied upon in support of this argument. In disposing of this argument Mr. Justice Traynor, speaking for the majority of the court, held that the Lundell case "is not in point. In that case, an order awarding $12,000 extraordinary attorney's fees was reversed for the reason that the trial court abused its discretion in making the award without competent evidence to justify its conclusion that services of that value had been rendered." 215 P.2d at page 23. Mr. Justice Carter, specially concurring, did so on the sole ground that the decision in the Lundell case "is in clear conflict with the holding of this court in the case at bar as well as the settled rule in cases of this character." 215 P.2d at page 23. Only one justice—Mr. Justice Schauer—was of the opinion that the facts in the Warner case showed an abuse of discretion.

[5] The services here rendered were extensive, time consuming, varied, and valuable. The trial court was in a much better position than we are to evaluate them and to determine their necessity. The amount allowed for these services is certainly not, as a matter of law, too large. It is true that the estate is insolvent, and that the allowance of the entire estate for extraordinary fees is unusual. Undoubtedly, the probate court took those factors into consideration. But most of the activities of the executrix and her attorney were required because of what the probate court apparently thought were the exorbitant claims of appellant. It was the duty of the executrix and her attorney to resist these claims to protect the preferred and other general creditors. No abuse of discretion appears.

The decree is affirmed.

BRAY, J., and SCHOTTKY, Justice pro tem., concur.

---

97 Cal.App.2d 923

DRINKHOUSE v. BIRCH RANCH & OIL CO. et al.

Civ. 4055.

District Court of Appeal, Fourth District, California.

June 9, 1950.

F. R. Drinkhouse, as trustee for liquidation of the business and disposition of the assets of a joint venture between two oil companies, sued the Birch Ranch & Oil Company and others to cancel an oil lease given defendant corporation by plaintiff's predecessor trustee and quiet title to the leased land. From a judgment of the Superior Court, Kern County, W. L. Bradshaw, J., for defendants, plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that the trust agreement did not impliedly authorize such predecessor trustee to make the lease after his cotrustee's death and that he violated the express terms of the trust in purporting to act as surviving trustee, so that the lease was invalid.

Judgment reversed.

1. Trusts ⚿205

A trust agreement for sale of assets of joint venture of two corporations, one of which was in process of liquidation, division of proceeds between them, and transfer of assets remaining after liquidating corporation's dissolution to two trustees, appointed by respective corporations, for disposition in accordance with agreement, did not impliedly authorize trustee representing continuing corporation's minority interest to make oil lease of land included in such assets after other trustee's death.

2. Trusts ⚿205

A trustee, appointed by one of two corporations to dispose of remaining assets of joint venture between them after dissolution of one of them in accordance with their trust agreement for sale of assets and division of proceeds between them, had no right to make lease of land, included in such assets, as surviving trustee after other trustee's death, in view of provision in trust agreement for filling trustee vacancies in manner continuing all interested parties' representation. Civ.Code, §§ 2287, 2288.

3. Trusts ⚿242

Where trust agreement provides for exercise of two or more trustees' powers by not less than number of trustees originally named, such power cannot be exercised after death of one or more trustees unless and until new trustees are appointed to fill vacancies. Civ.Code, § 2287.

◆

West, Vizzard, Howden & Baker, Bakersfield, for appellant.

W. E. James, Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title to certain land as against any claims of the defendants arising from an oil and gas lease.

In 1924, the Calivada Oil Company and the Nevada Hills Mining Company executed a joint venture agreement involving several properties, including the land here in question. On May 15, 1928, these corporations executed an agreement providing for a division between them of the assets belonging to the joint venture which then stood in the name of Calivada Oil Company, including this land. This agreement, after reciting that it was for the purpose of settling differences which had arisen between them, and that the Calivada Oil Company was in the process of liquidation and did not propose to engage in any business other than such as was incidental thereto, provided that the assets of the joint venture should be disposed of and the proceeds divided, 61.54% to be paid to the Calivada and 38.46% to the Nevada Hills Company, and that when all of the assets of the joint venture had been thus divided the agreement should terminate.

This agreement also provided that Calivada might continue with dissolution proceedings, and that if it was dissolved before the assets of the joint venture were fully divided it should transfer any remaining assets to John Lawton Butler, thereby appointed by Calivada, and Warren B. Richardson thereby appointed by Nevada Hills, as trustees, setting forth the interest of the parties and providing for the disposition of such remaining assets in accordance with the provisions of that agreement. It further provided that in the event of the death, resignation or inability to act of either of the trustees thus appointed, the corporation by whom said trustee was appointed should appoint another person to act in his place with like duties and powers, and in the event that either corporation had at that time been dissolved the appointment of such a successor-trustee must be made by a majority vote of the persons who were directors of the corporation at the date of its dissolution.

On November 13, 1928, the Calivada Company conveyed the property to Butler and Richardson, in trust, for the purposes set forth in the prior agreement. This conveyance, which was recorded on November 26, 1928, referred to the agreements above mentioned and recited that the May 15, 1928, agreement had provided that such a conveyance in trust might be made to John Lawton Butler, appointed by Calivada and Warren B. Richardson appointed by Nevada, as trustees, upon the trusts and for the purposes and uses therein specified. It also stated that this conveyance was made pursuant to and in accordance with the provisions of the agreement of May 15, 1928. It further provided that (a) "as speedily as possible the trustees shall convert into cash all property of the joint venture * * * which is hereby transferred * * *" and as often as they have $1,000 on hand shall divide the proceeds between the two corporations, or to their stockholders, in the proportion of 61.54% to the Calivada Company and 38.46% to the Nevada Hills Company or its successor; (b) that during the life of the trust the trustees shall collect the income of the trust property, if any, and shall pay all taxes and charges; (c) that when all the property of such joint venture shall have been thus divided the trust shall terminate; and (d) that the trustees shall not be liable for any depreciation in the value of the property during the continuance of the trust.

Calivada was voluntarily dissolved, and at the time of the trial of this action its board of directors was in existence for the purpose of winding up its affairs.

On February 1, 1931, Butler and Richardson, as trustees, leased the land in question under an oil and gas lease to A. Otis Birch. In 1939, that lease was surrendered and Butler and Richardson, as trustees, gave a new oil and gas lease to Birch-Royer Oil Company. Butler died in September, 1942, and no trustee was appointed in his place. On August 4, 1943, Richardson, purporting to act as surviving trustee, extended the time for the commencement of the drilling of a well, under the 1939 lease, to August 1, 1944. On November 12, 1946, Richardson, purporting to act as surviving trustee, gave a new lease to Birch Ranch and Oil Company, running for two years and so long thereafter as oil or gas should be produced. Some oil was produced under the 1946 lease, and some royalty was paid to Richardson as surviving trustee, but the production was not in paying quantities.

Under the 1939 and 1946 leases Butler and Richardson, as trustees, or Richardson as surviving trustee, received $1,600 as rental at the rate of $200 per year for eight years, in lieu of drilling. On December 18, 1947, Richardson, in consideration of $200 thus paid to him, extended the time for commencing operations to January 1, 1949, with a provision that by paying another $200 prior to that date the time for drilling could be further extended to January 1, 1950. A tender of this amount was made prior to January 1, 1949, but was refused by the plaintiff. Being uncertain as to the outcome of this action, the defendants have conducted no further operations on the premises since that date.

Richardson purported to act as surviving trustee until some time after June, 1948, when he resigned. On September 13, 1948, the plaintiff was appointed by the court as sole trustee and this action was begun on the same day for the purpose of cancelling the 1946 lease. Based on the facts above stated the court found that the 1946 lease was valid and in full force and effect, and entered judgment accordingly. The plaintiff has appealed from the judgment and the appeal is presented on an agreed statement.

The appellant contends that the trust agreement authorized the trustees to do only such acts as were necessary to convert the corpus of the trust into cash; that since there is no conflict in the evidence, consisting solely of the trust agreements, this court is not bound by the trial court's construction thereof; and that the record demonstrates that the surviving trustee lacked the power to execute the 1946 lease. The respondents contend that the power to make such a lease may be implied from the language of the trust conveyance providing for a distribution to the beneficiaries "if, when, and as often" as $1,000 in cash is on hand; for collection of "income" of the trust property; and that the trustee shall not be liable for any depreciation in value of the trust property. It is further argued that for some fifteen years the trust agreement was construed by the parties as giving the trustees the right to make such a lease. While it appears that the two trustees actually made such leases over a period of some years there is no evidence that the beneficiaries of the trust ever knew of their action in this regard, or that any rental or royalty thus received was distributed to them.

[1] The trust conveyance of November 13, 1948, made solely by Calivada, clearly disclosed that the assets conveyed were a part of a joint venture in which the other corporation owned an interest, and that it was made pursuant to the prior agreement between the two corporations. It fully referred to the agreement of May 15, 1928, purported to be made pursuant to and in accordance therewith, and disclosed that it was made as a part of the settlement of differences between the two corporations each of which had appointed one of the trustees named "upon the trusts and for the uses and purposes specified in said agreement of May 15, 1928." That agreement clearly disclosed that its purpose was to wind up the affairs of the joint venture, to go out of the oil business, and to reduce the assets to cash and distribute them as rapidly as possible. Calivada had only such power to make this trust conveyance as was given it by the agreement of May 15, 1928, and the trust conveyance disclosed this fact. Permission to make the conveyance included provisions to protect both corporations and particularly provided that each should be represented and should continue to be represented by a separate trustee appointed, and to be appointed, by it. The trust conveyance and the agreement of May 15, 1928, must be construed together in determining the powers given to these trustees. When a vacancy did occur Richardson, who represented the minority interest, continued to act as the sole trustee in violation of the agreement which was made a part of the trust and, so far as the record discloses, without the knowledge of the beneficiaries or of those holding a majority interest in the trust, thus leaving the large Calivada interest unrepresented.

This trust was created to liquidate the business of the joint venture and to dispose of its assets promptly, and not to continue business or enter into new commitments which might well run for many years in the future. Under these circumstances, the power to make such a lease may not be implied from the trust agreement and the trust instrument should not be thus construed.

[2] A further consideration, but one apparently not presented to the trial court, is the fact that Richardson, in purporting to act as surviving trustee in making the 1946 lease, violated the express terms of the trust. Apparently, it was assumed that he had such right under section 2288 of the Civil Code, which provides that on the death of one of several cotrustees the trust survives to the others. While the trust itself may survive for some purposes, the application of this section is limited by the terms of the trust agreement. Section 2287 of that code provides that the court shall appoint a trustee whenever there is a vacancy and the declaration of trust does not provide a practical method of appointment. The declaration of trust here clearly disclosed that it was governed by the agreement of May 15, 1928, which specifically provided for the filling of vacancies in a manner continuing the representation of all parties interested. This agreement was repeatedly referred to in the trust conveyance.

[3] Not only does section 2287 recognize the right of the Calivada interests to appoint a new trustee to succeed Butler, but under general rules a surviving trustee cannot act under such circumstances. In section 195 of the Restatement of the Law of Trusts it is said: "If it appears from the terms of the trust that a power conferred upon the trustees was to be exercised by a number of trustees not less than the number originally named, the power cannot be exercised unless and until new trustees are appointed to fill vacancies." In an article in 142 A.L.R. at page 1099, it is stated that where provision for the appointment of successor-trustees discloses an intention that the trust should be executed only by the full number of trustees originally appointed a surviving trustee cannot act without a substitution being made, citing O'Brien v. Battle, 98 Ga. 766, 25 S.E. 780; Van Order v. Bailey, 104

N.J.Eq. 585, 146 A. 419; Central Trust & Sav. Co. v. Walters, 314 Pa. 418, 171 A. 890; Sheppard v. Blitz, 168 Or. 691, 126 P.2d 509; Massachusetts General Hospital v. Amory, 12 Pick., Mass., 445. The trust agreement here clearly provided that the powers of the trust shall be exercised only by two trustees, by expressly providing that any vacancy shall be filled by the party making the original appointment to that place. It fully disclosed conflicting interests as between the two parties to the joint venture, and a fixed intention that the interest of each should continue to be represented in the administration of the trust.

Upon the record before us, the validity of this lease cannot be upheld and the evidence is not sufficient to support the judgment. Other questions, including the propriety of the court's order appointing the appellant as sole trustee, and his right to maintain this action, are not now before us.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

---

97 Cal.App.2d 915

NATIONAL DOLLAR STORES, Limited, v. WAGNON et al.

Civ. 4050.

District Court of Appeal, Fourth District, California.

June 9, 1950.

Action in unlawful detainer by the National Dollar Stores, Limited, against W. B. Wagnon, Sr., and another, to obtain restitution of rented premises. From a judgment of the Superior Court, Fresno County, George M. DeWolf, J., for plaintiff, the defendants appealed. The District Court of Appeal, Mussell, J., held that plaintiff was not estopped to maintain the action.

Judgment affirmed.

1. Estoppel 🔑85

Landlord was not estopped from maintaining an action for restitution of rented premises or declaring a forfeiture of the lease or recovering rent, taxes, and insurance premiums agreed to be paid by the tenants, because of negotiations looking to the modification of the lease, where landlord made no representations to the tenants that it had accepted their proposals to modify the lease, and the proposed modifications had only reached the discussion stage, and the landlord had not consented to any change in the terms of the lease.

2. Estoppel 🔑60

Certainty is the essential to all estoppels.

3. Estoppel 🔑85

Mere oral promise of landlord to defer payment of monthly rents was not sufficient to create an estoppel against the landlord to recover possession of the premises where tenants did not change their position in reliance upon the oral deferment but merely continued their efforts to complete negotiations with the landlord for a modification of the lease.

4. Landlord and tenant 🔑33

Oral negotiations looking to modification of lease by which tenants would demolish the old building and erect a new one were insufficient to vary the terms of the written lease which provided that none of the terms could be modified or altered except by a written instrument.

5. Estoppel 🔑87

While the doctrine of estoppel may be applied with respect to representations of a party to prevent the operating of a fraud upon one who has been led to rely upon them, where defendants have it within their power to guard against the alleged fraud at all times the doctrine is not applicable.

6. Estoppel 🔑58

One of the essential elements of estoppel is that party relying thereon has been prejudiced as result of another party's acts.

7. Estoppel 🔑52

The doctrine of estoppel in pais is an equitable one.

8. Estoppel ⚷85

Landlord was not equitably estopped to obtain restitution of rented premises on default of tenants to pay rent or taxes required to be paid by the lease where tenants failed to pay and tender rent or taxes after they were served with notice of default, and their offer to sign a note therefor could have been repudiated by them at any time and there was no false statement or concealment by the landlord.

9. Estoppel ⚷118

Evidence did not establish contention of tenants that they relied upon landlord's alleged representation that it had accepted a "note and assignment" of tenants as security for an additional 60-day deferment of rents as basis for an equitable estoppel against landlord to recover possession of the rented premises from the tenants for nonpayment of rent and taxes.

10. Estoppel ⚷119

Where defendants contended that the trial court found as true facts sufficient to constitute an estoppel in pais against plaintiff, the question was one of law for the court, and where the jury found that the plaintiff was not estopped, such was a finding by it as to the defense of equitable estoppel.

11. Landlord and tenant ⚷94(3)

Notice to tenants to quit rented premises, demanding $4,000 on account of rent, specifying amount of prorated taxes required to be paid by tenant and stating amount due on account of fire insurance and public liability insurance, was sufficiently definite.

12. Appeal and error ⚷891

An application by plaintiff for leave to produce additional evidence was properly denied where the evidence sought to be introduced was immaterial.

◆

Rowell & Guerard, Aubrey H. Seed, Fresno, for appellants.

Eckhart A. Thompson, Frank C. Lerrigo, Fresno, Gavin McNab, Schmulowitz, Sommer & Wyman, by Nat Schmulowitz and Sidney F. DeGoff, all of San Francisco, for respondent.

MUSSELL, Justice.

Plaintiff leased to the defendants the premises in Fresno commonly known as the "old Post Office property". The lease was for five years from September 15, 1948, at a monthly rental of $1,000. It provides that defendants shall pay the taxes and carry certain insurance; that if the lessees shall default in the payment of rent, taxes, insurance premiums, or any other moneys, and such default shall continue for 30 days after written notice from the landlord specifying such default, then lessor has the right, at its election, to declare the lease at an end, reenter the property and eject all parties; that within 60 days after obtaining possession, tenants shall commence the erection of a one story building substantially covering all the land not occupied by the old post office building; that if defendants shall default in the performance of any covenant other than the one involving the payment of money, and such default shall remain uncured for 60 days after written notice specifying such default, then plaintiff shall have the right, at its election, to terminate the lease; that none of the covenants, terms or conditions of the lease may be waived, modified or altered, except by written agreement.

Defendants entered into possession under the terms of the lease on or about February 1, 1949, and paid the rent for February and March of that year. On or about April 21st, plaintiff addressed a letter to the defendants requesting a payment on account of the prorated taxes which had not been paid and reminded defendants of their obligation to pay insurance premiums. On or about June 6, 1949, plaintiff served defendants with a preliminary notice of default, specifying that defendants were in default in the payment of rent for April, May and June in the sum of $3,000 and taxes in the sum of $2,983.03; that they were in default in the procurance of insurance and payment of premiums thereon and in the commencement of the construction of improvements around the old post office building; and that upon the expiration of 30 days after the notice, it was plaintiff's intention to terminate the lease and recover possession.

More than 30 days later and on or about July 15, 1949, plaintiff served on defendants the usual three-day notice to quit, specifying liability for rent in the sum of $4,000; taxes in the sum of $2,983.03; fire insurance premiums in the sum of $17.74; and public liability insurance premiums in the sum of $3.65. The defendants failed to pay the rent and further sums specified in the notice and this action was commenced.

Trial was had by the court with a jury and at the conclusion of the testimony, the plaintiff moved the court for a directed verdict. This motion was granted and the jury was instructed to return a verdict in favor of the plaintiff, as follows: For rent, April to July 20, 1949, in the sum of $3,666.66; for real estate taxes to June 30, 1949, in the sum of $2,983.03; for premiums on fire insurance to June 30, 1949, $17.74; and premiums on public liability insurance to June 30th in the sum of $3.65. The jury returned a verdict as instructed and added to it the following finding: "And we do hereby further find that the plaintiff, National Dollar Stores, Ltd. is not estopped to recover the whole or any part of said sum from the defendants, or either of them".

The defendants were permitted to file an amendment to the answer to conform to proof. Findings of fact and conclusions of law were signed by the court, providing, among other things, that plaintiff was entitled to restitution of the premises and a forfeiture of the lease; that plaintiff was not estopped from maintaining the action or declaring a forfeiture of the lease or from recovering the aforesaid amounts of rent, taxes and insurance premiums. Judgment was entered accordingly.

Defendants assert that the court erred in directing the jury to return a verdict for plaintiff, and while they do not contend that the conditions of the lease relative to the payment of rent, taxes and insurance were met by them, they argue that the issues raised by the special defense should have been submitted to the jury.

The evidence relied upon to establish the defense of estoppel is, briefly, as follows: That immediately after obtaining possession of the premises, the defendants sublet various portions of the building thereon and were negotiating with various other prospective subtenants and on or about February 8, 1949, they contacted certain builders and investors from Oakland, Messrs, O'Shea, Cianciarulo and Beckett. These men came to Fresno and went over the premises with the defendants. They expressed an interest in financing improvements if defendants could secure permission to wreck the old building and erect a new one. A meeting was then arranged with the board of directors of plaintiff corporation regarding that plan. The meeting took place during the latter part of March, 1949. Considerable discussion was there had by and between the parties. Plaintiff's chairman, Mr. Shoong, first told Mr. O'Shea that there would be no modification; that the lease would have to stand as it was then written. The cost of demolishing the existing building was discussed and the plaintiff proposed that it would allow up to $15,000 on the cost thereof; that it would abate five (5) months rent during construction of a new building; that it would extend the term of the lease to 25 years, under certain conditions, and that some concession would be made in the matter of rents. No specific amount of rent was mentioned and nothing was agreed upon as to any change of rent. These proposals and negotiations were all oral and no final agreement was ever executed embodying them.

Relying upon these incomplete negotiations, the defendants, with the knowledge of the plaintiff, commenced negotiations for financing a new building and did not pay the April rent.

About April 21st the plaintiff requested a payment of the real estate taxes and during that month demanded payment of the April rent. Defendant Wagnon, Sr., then contacted the plaintiff and proposed to give the corporation a promissory note for the rent for the months of April, May and June, 1949, and for the taxes. He offered to secure the note by assignment of defendants' interest in an apartment house. Defendant Wagnon, Sr., told Mr. Shoong that he was in the process of effecting a change in plans; that he needed to complete certain subleasing and financing; that he would be required to go to the middle west or east to complete the transaction; that it would take at least 60 days to complete his negotiations; and that if plaintiff would accept this note and assignment deferring rent due up to July 1, 1949, that he, defendant Wagnon, Sr., would undertake to complete the new plan. The promissory note and assignment to secure it were unsigned and were not accepted by plaintiff as payment of the rents and taxes. After Mr. Shoong examined the unsigned documents, he said to Wagnon, Sr. "I can't use this for money—Go see Sibley." Wagnon exhibited the documents to Sibley, who said "I'm not a lawyer but they look allright. I will see National Dollar this afternoon. See me tomorrow." Wagnon, Sr. testified that at his meeting with Sibley the following day, Sibley "Just smiled and said—raised his hand like that (indicating) and said, 'It is allright. Go ahead.' I then asked him if it was necessary for me to go and sign these papers; if I should not go and sign these papers? He said it was not necessary; to go ahead. He said, 'You know we are in a depression, or very close to one', or something of the kind and that, 'It is very hard—harder now than it has been to get tenants, and you better work fast. It is getting tougher all the time.' And that was the general gist of the short conversation. Did not last over probably 3 or 4 minutes." (Rep.Tr. p. 76, lines 24-27; p. 77, lines 1-11; see also Cl.Tr. p. 32, lines 19-25.)

After these conversations with Mr. Shoong and Mr. Sibley, defendant Wagnon, Sr., believing that he had made arrangements for the satisfaction of rent demands until July 1st, began to put into effect plans for demolishing the existing building on the premises and the leasing, financing and construction of a proposed new $125,000 building. These plans were never consummated, no rent was paid and the construction of the $30,000 building, as required by the lease, was never commenced.

[1] The trial court found the foregoing facts to be true, but concluded that plaintiff was not thereby estopped from maintaining the instant action. We are in accord with the conclusion reached by the trial judge. The evidence was insufficient as a matter of law to create an estoppel. Plaintiff made no representations to defendants that it had accepted defendants' proposals to modify the lease. The uncontradicted testimony shows that the proposed modifications had only reached the discussion stage and that plaintiff had not consented or agreed to any change in the terms of the lease. Estoppel cannot be established from such preliminary discussions and negotiations. As was said in Toms v. Hellman, 115 Cal.App. 74, at page 78, 1 P. 2d 31, at page 33: "An agreement that parties will, in the future, make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties; but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon. Shepard v. Carpenter, 54 Minn. 153, 55 N.W. 906. See, also, Ridgeway v. Wharton, 6 H.L. Cases 263; 10 Reprint 1297."

[2] It is apparent that no agreement was entered into which was certain as to its terms, with respect to the amount of rent to be charged if, as and when the new building was completed, the type of building to be erected or the conditions of a new lease. Certainty is essential to all estoppels. Orange Cove Water Co. v. Sampson, 78 Cal.App. 334, 347, 248 P. 526.

[3-5] If, as is contended by defendants, the conduct of plaintiff constituted a deferment of the April, May and June rents, such deferment was only until July 1st and

there was ample time after the notice of default to permit defendants to pay the amounts due. Defendants made no effort to comply with the terms of the lease after the notice of default, relying upon an alleged oral agreement to excuse their nonperformance. The oral agreement was insufficient to vary the terms of the lease, which provided that none of its terms could be waived, modified or altered except by a written instrument. Harloe v. Lambie, 132 Cal. 133, 136, 64 P. 88. The mere oral promise to defer payment of the April, May and June rents, if made, is not sufficient to create an estoppel under the circumstances here shown. Rottman v. Hevener, 54 Cal. App. 474, 480, 481, 202 P. 329; Thomson v. Langton, 45 Cal.App. 415, 417, 187 P. 970. Moreover, defendants did not change their position in reliance upon the alleged oral deferment, but merely continued their efforts to complete negotiations with plaintiff for a modification of the lease and to work out some definite plan which they could present to plaintiff's board of directors for approval. Such continued effort on their part was for their own benefit and neither at plaintiff's request nor for plaintiff's benefit. While the doctrine of estoppel has been applied with respect to representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them, where, as here, defendants had it in their power to guard against a forfeiture of the lease at all times, the doctrine is not applicable. Lindemann v. Coryell, 59 Cal.App. 788, 792, 793, 212 P. 47; Hosner v. Skelly, 72 Cal.App. 2d 457, 463, 164 P.2d 573.

[6-8] The record is uncontradicted that at no time did defendants offer to pay the rent for the months of April, May or June or to pay the so-called unexecuted "promissory note". The mere nonpayment of the rent and taxes could not have been prejudicial as defendants had the right and could have paid the rent at any time on or prior to July 18, 1949, when the three-day notice to pay rent, taxes and insurance expired. As was said in Kindig v. Palos Verdes Homes Ass'n, 33 Cal.App.2d 349, 354, 91 P.2d 645, 647: "One of the essential elements of estoppel, that the party relying thereon has been prejudiced as a result of another party's acts, is not present in this case, and, therefore, this doctrine has no application."

The doctrine, of *estoppel in pais,* upon which defendants rely, is an equitable one. Smith v. Anglo-California Trust Co., 205 Cal. 496, 504, 271 P. 898; American National Bank v. A. G. Sommerville, Inc., 191 Cal. 364, 373, 216 P. 376. Defendants were required to comply with the express terms of their agreements and to pay or tender payment of the rent and taxes, particularly after having been served with the notice of default. Their failure to do so renders their claim of equitable estoppel untenable. Connecticut Mutual Life Ins. Co. v. Most, 39 Cal.App.2d 634, 642, 103 P.2d 1013.

As was said in Toms v. Hellman, 115 Cal.App. 74, 84, 1 P.2d 31, 35: "Estoppels must be mutual; and, since the contract was unenforceable against appellants because of its uncertainty and its contemplation of a subsequent contract, as pointed out above, and could have been repudiated by them, they cannot urge that respondents were estopped because of their attempted compliance with its terms."

In the case before us the "note and assignment" were never executed by the defendants, or either of them, and did not bind them. Their offer to sign the note and assignment could have been repudiated by them at any time.

Another element of estoppel is lacking in this case, namely: any false statement or concealment by plaintiff. The absence of this element, is fatal to defendants' contentions. City of San Diego v. Cuyamaca Water Co., 209 Cal. 105, 149, 287 P. 475.

[9] Defendants claim that they relied upon plaintiff's alleged representations that it had accepted the "note and assignment" as security for an additional 60 days deferment. The record shows that the three-day notice to surrender the premises and election to terminate the lease was not signed by plaintiff until July 7, 1949, nor served until July 15th. Suit thereon was not commenced until July 21st. Actually, therefore, the defendants received more time to pay the rent and taxes than they now claim

they were misled into believing that they did receive. In this connection, defendant Wagnon, Sr. testified that he intended the note and assignment to take the place of money but that they were not intended to modify any of the terms of the lease. This testimony clearly indicates that the defendants did not intend the note and assignment to modify any of the terms of the lease or change any of the plaintiff's remedies. The conversation had by the defendants with Mr. Sibley, in which Sibley said "It is allright, go ahead", indicates to us that no modification of the existing lease was agreed to. We conclude that the defendants failed to establish the defense of equitable estoppel.

[10] The defendants find no fault with the findings of fact signed by the trial court upon the pleadings, including the amendment to the answer made to conform to the proof, but contend that the court found as true facts sufficient to constitute an estoppel in pais. The question was then, under the circumstances, one of law for the court. The jury, by its amendment to the verdict, found that the plaintiff was not estopped to recover the rents, insurance and taxes. This was a finding by it as to the defense of equitable estoppel.

[11] It is claimed that the notice to quit the premises, dated July 7, 1949, was fatally defective in that it did not demand any specific sum to be paid to the landlord, on account of either fire or public liability premiums paid by the landlord for the tenants' account, and that there was no demand served specifying the exact sums due. The notice, however, demanded $4,000 on account of rent, specified the amount of prorated taxes, and stated the amount due on account of first insurance and public liability insurance.

The lease expressly declares that the rent shall be $12,000 per year, payable in twelve monthly installments of $1,000 and it is not denied that the rent due, owing and unpaid amounted to $4,000.

Paragraph 24 of the lease requires the landlord to give the tenant written notice, "specifying such default" and if the default continues for thirty days thereafter, then the landlord has a right to terminate the lease. Plaintiff gave the preliminary notice, which specified the nonpayment of insurance premiums, by specifically directing defendants' attention to the provisions of the lease, paragraphs 7 and 16, relating to the payment of insurance, to which reference was therein made. The full amount of the insurance premiums was set forth in the three-day notice and the defendants were given an additional time to comply therewith. We conclude, therefore, that the notice was sufficient.

[12] An application was made by the plaintiff for leave to produce additional evidence in connection with the unsigned promissory note and assignment, alleged by defendants to have been given as security for the payment of the April, May and June rent. Inasmuch as the documents were unsigned and were not accepted, the evidence sought to be introduced is immaterial and the application is denied.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

---

98 Cal.App.2d 137

PEOPLE v. FELT.

Cr. 2183.

District Court of Appeal, Third District, California.

June 17, 1950.

John R. Felt was convicted in the Superior Court of Stanislaus County, H. L. Chamberlain, J., of forgery, and he appealed. The District Court of Appeal, Van Dyke, J., held that evidence showing that check had been altered and passed as genuine when there was no account in drawee bank in name of drawer and that no such name was to be found in the register of voters and a local directory sufficiently established the corpus delicti so as to make admissible defendant's extrajudicial statement connecting him with the offense as abettor, and that evidence was sufficient to support defendant's conviction, in that he aided and abetted the commission of the offense.

Affirmed.

1. Criminal law ⚿535(2)

Proof of corpus delicti in the prosecution of abettor need not include proof of guilty participation.

2. Criminal law ⚿535(2)

Proof that crime charged was actually committed by means of some criminal agency is usually sufficient to establish corpus delicti.

3. Criminal law ⚿517(4)

In forgery prosecution charging defendant with participation in cashing forged check, evidence showing that check had been altered and passed as genuine when there was no account in drawee bank in name of drawer and that no such name was to be found in the register of voters and a local directory, sufficiently established corpus delicti so as to make admissible defendant's extrajudicial statement admitting participation as abettor in the offense.

4. Forgery ⚿44

Evidence supported conviction of forgery on ground that defendant aided and abetted cashing of a forged check.

* * *

F. M. Brack and A. M. Frad, Modesto, for appellant.

Fred N. Howser, Attorney General, by Gail A. Strader, Deputy, for respondent.

VAN DYKE, Justice.

Appellant was charged with the crime of forgery. He was tried by a jury and convicted. He appeals from the judgment and order denying his motion for a new trial.

Prior to the introduction in evidence of an extrajudicial statement made by appellant to an officer, the following had been shown. Under date of June 11, 1949, a check had been written, drawn on the Bank of America, Modesto Branch, directing payment of fifty-six dollars "for Labor" to J. R. Felt. The signature read "L. D. Jondrsdon." On the same day appellant and another man traveled by cab from Modesto to Riverbank. While the driver and the other waited in the cab appellant entered the store of one Rabbiosa and attempted to cash the check. Rabbiosa suspected the validity of the document and called the bank. He was told there was no account in the name of the drawer, whereupon appellant suggested there might be a mistake in spelling the name. Rabbiosa asked the bank to check several different spellings but no account was reported under any of them. The check then bore the endorsement "J. R. Felt." Appellant told Rabbiosa he was John Felt and he wanted the money in order to pay a sum he owed to one of Rabbiosa's employees. Appellant returned to the cab and told the driver to drive them to a grocery store in Modesto. There both appellant and his companion went into the store. They returned to the cab and were driven to a second store. There the companion went into the store and cashed the check, bought groceries to the amount of three dollars and eighty cents, and returned to the cab. He handed twelve dollars to appellant, who then paid the cab fare. When the check was cashed it bore the additional endorsement, "L. D. Johnson." On presentation to the bank the check was dishonored. The name of the drawer did not appear in the county register of voters nor in a published directory of Stanislaus County. The records of the bank for three years back disclosed no account in that name.

When this proof had been given an extrajudicial statement of appellant was admitted over his objection that the corpus delicti had not been proved. Appellant told the officer that he had endorsed the check; that it had been written in his presence by a man he did not know; that he and the writer had taken the check to Rabbiosa's store where he attempted to cash it; that after calling the bank the storekeeper told him there were no funds in bank under the drawer's name; that the two men then returned to Modesto and he told his companion that market where the check was cashed would probably cash it; that his companion went in and cashed it; that appellant received twenty-six dollars of the amount derived. Appellant did not testify.

[1–3] Appellant first contends that the evidence did not sufficiently establish the corpus delicti so as to make admissible the statement he made. In his argument in support of this contention appellant says that since he neither, so far as the evidence showed, drew the check nor cashed it, he could only be convicted as an abettor, and therefore proof of the corpus delicti as to him must have included some proof of his having abetted the commission of the crime. This contention cannot be sustained. Proof of the corpus delicti, in the prosecution of an abettor, need not include proof of guilty participation. People v. Cowling, 6 Cal.App.2d 466, 471, 44 P.2d 441, 443. Therein the court said: "* * * the *corpus delicti* was conclusively proved by two witnesses to the actual robbery, before the statements of the defendants were offered in evidence. Nothing then remained to show their guilt of the crime of robbery except to prove that they aided and assisted in the commission of the offense, although they were not actually present when the store was robbed. * * * The mere connection of the accused persons with the commission of the offense with which they are charged is not an essential part of the *corpus delicti*. Proof of the *corpus delicti* does not necessarily include the fact that the accused persons participated in the commission of the crime. People v. Ward, 134 Cal. 301, 306, 66 P.2d 372. It is usually sufficient for the purpose of establishing the *corpus delicti* to prove that the crime charged in the information was actually committed by means of some criminal agency." Reverting to the state of the evidence, when the statement was admitted it had been shown that the check had been uttered and passed as genuine when there was no account in the drawee bank in the name of the drawer and that no such name was to be found in the register of voters and a local directory. That was enough to justify admission of appellant's statement.

[4] Appellant next contends that the evidence as a whole was not sufficient to support the verdict. Specifically, appellant says there was no proof that he aided and abetted the commission of the crime. This contention likewise cannot be sustained. Appellant himself attempted to cash the check and then learned, if he did not know it before, that it was spurious. After receiving this information appellant continued his travels with his companion, gave the check to him and suggested the very market where the check was successfully passed as a good place to try. Appellant accepted part of the proceeds. There was other evidence from which the inference of guilty participation could fairly be drawn. We hold the proof sufficient.

Appellant complains of the refusal of the court to give certain instructions he requested and of certain modifications by the court of other instructions requested, which, as modified, the court did give. We have carefully considered these claims of error and the whole charge as given, and find no error. We think it unnecessary to discuss these contentions of appellant more specifically. We find the jury to have been fully and fairly instructed as to all essential matters.

The judgment and order denying new trial are affirmed.

ADAMS, P. J., and PEEK, J., concur.

98 Cal.App.2d 65

NEALIS v. CARLSON (GUIDOTTI, Intervenor).

Civ. 14222.

District Court of Appeal, First District,
Division 1, California.
June 12, 1950.

Proceeding on a motion by Edith C. Nealis against Thomas M. Carlson, as administrator of the estate of Carl H. Nealis, deceased, to vacate a final decree of divorce on the ground that it was secured by fraud wherein Janet Guidotti intervened. From a decree of the Superior Court in and for the

City and County of San Francisco, Theresa Meikle, J., denying relief the plaintiff appealed. The District Court of Appeal, Peters, P. J., held that the laches of plaintiff barred her right to relief.

Affirmed.

1. Divorce ⚷177

In divorce action where findings are not essential and no reference is made in the minute order for the preparation of a formal order, the only appealable order is a minute order and the formal order later filed is functus officio. Rules on Appeal, rule 2, (a), (b) (2).

2. Judgment ⚷375

A court possesses inherent power to set aside a final decree secured by fraud.

3. Judgment ⚷380, 386(2)

On a motion to set aside a final decree on the ground that it was secured by fraud the court is entitled to consider the realities and equities of the situation and may deny relief to a petitioner because of laches or by reason of an estoppel. Civ.Code, § 133.

4. Equity ⚷72(1)

The doctrine of laches is usually applied where a plaintiff with knowledge that his rights have been invaded or his trust repudiated, has submitted to unconscionable delay, during which other rights have arisen founded somewhat upon his silence and acquiesence.

5. Equity ⚷67

"Laches" is such neglect or omission to assert a right as taken in conjunction with the lapse of time, more or less great and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Laches".

6. Divorce ⚷165(4)

Where husband secured a final decree of divorce based upon a false affidavit respecting sums paid to the wife but thereafter paid all the amounts due wife and continued to do so until his death and wife had actual knowledge of the decree in 1939 but waited eight years before taking any action to have the decree set aside during which time the husband adopted the respondent and made her the major beneficiary of his estate, right to have the decree set aside was barred by laches. Probate Code, § 201.

7. Equity ⚷84

The existence of laches is determined by the trial court in light of the circumstances of the particular case.

8. Divorce ⚷165(4)

In determining whether to set aside a decree of divorce because of husband's alleged fraud, in view of wife's laches, that there could be no legal prejudice to the husband and to his successors because of the delay of the wife because neither the husband nor his successor should be permitted to profit by his fraud was a factor that could have induced trial court to grant the motion to vacate but it was not per se conclusive.

◆

Robert E. Hatch, San Francisco, for appellant.

Erskine, Erskine & Tulley, San Francisco, for respondent.

PETERS, Presiding Justice.

[1] This is an appeal from an order of the Superior Court denying a motion of the plaintiff to vacate a final decree of divorce on the ground that it was secured by fraud. After a hearing, the trial court denied the motion to vacate by a minute order dated October 2, 1947. There was no direction in the minute order that a formal order was to be later prepared. Thereafter, on October 30, 1947, the trial court filed a formal written order, complete with findings, denying the motion. The appeal was filed on November 24, 1947. Whichever order was the proper one from which to appeal, the notice of appeal was filed within the 60 days permitted by Rule 2(a) of the Rules on Appeal. In the interests of orderly procedure, however, it should be mentioned that under Rule 2(b)(2), where findings are not essential, and no reference is made in the minute order for the preparation of a formal order, the only appealable order is the minute order, and the formal order later filed is *functus officio*. Pessarra v. Pessarra, 80 Cal.App.2d 965, 183 P.2d 279.

The facts most favorable to respondent, as disclosed from the settled statement and clerk's transcript, are as follows:

The appellant, Edith C. Nealis, married Carl H. Nealis in December of 1917. The parties had two children. On June 9, 1927, Edith secured an interlocutory decree of divorce embodying the terms of a property settlement agreement under which Edith received all of the community property, custody of the children and an award of $150 per month as alimony and support for the children. On August 27, 1935, on the motion of the husband, the trial court entered a final decree of divorce which severed the marriage relationship and continued the property, custody, alimony and support provisions of the interlocutory. In support of the motion to have the final decree entered, Carl filed an affidavit in which, among other things, he averred that all of the requirements of the interlocutory "have been fully complied with on the part of the moving party herein, and he is not in default in any thereof." This averment was false, in that on that date Carl was in arrears in alimony and support payments in the total sum of $330. As a matter of fact, on that date there were pending two proceedings before the trial court growing out of the divorce. On April 3, 1935, Carl had filed a notice of motion to modify the judgment by reducing the $150 monthly award to $75. On August 16, 1935, Edith had filed an affidavit charging that her husband was $330 in arrears in his payments. Neither of these proceedings was ever passed upon by the court.

The appellant, the wife, had no actual notice of the entry of the final decree in 1935, although she admitted that she had heard rumors that it had been entered. She testified that she did not learn that the final decree had been entered until the death of Carl in 1946. She also testified that the arrearage existing in 1935 had never been paid. There is, however, most substantial evidence to the contrary. There is ample evidence to support the implied finding that after the entry of the final decree Carl made up all arrearages in the payment of alimony and support, continued to make all payments called for by the decree, and that he gave his children other substantial sums in excess of those provided for in the decree. There is in evidence three receipts for alimony and support signed by Edith, in which, as early as 1939, she acknowledged "receipt of all monies [sic] due me under and by virtue of an interlocutory decree and final decree of divorce." Thus, as early as 1939, Edith knew, and acknowledged she knew, that a final decree of divorce had been secured, and likewise admitted, in writing, that all payments due had been made.

After the divorce had become final, Carl, the husband, adopted the respondent to whom he left, by will, the major portion of his substantial estate. She has been permitted to intervene in this proceeding, and is the real respondent in interest. Carl died May 6, 1946. Over thirteen months later, and on June 28, 1947, Edith filed a notice of motion to vacate the final decree on the ground that it had been obtained by fraud on the part of Carl. This motion was denied, and this appeal taken.

It is Edith's theory that if she can have the final decree set aside, she will be entitled to one-half of the estate of Carl under section 201 of the Probate Code. She contends that since the final decree was obtained by the fraud of Carl practiced upon her and the Court, such decree must be vacated, and that any delay that occurred in enforcing her rights did not prejudicially affect Carl. It was the opinion of the trial court, as expressed in its formal findings contained in the abortive formal order of October 30, 1947, that, while Carl committed a fraud on both the Court and the wife, Edith was in no position to raise the point because she learned of the final decree in 1939 but took no steps to protect her rights until June of 1947. The Court expressly found that this constituted inexcusable laches.

It seems to be the thought of appellant that, where a final decree is secured based upon a false affidavit, regardless of the passage of time and any change of position of the parties, the court must, as a matter of law, set the decree aside. That is not and should not be the law.

[2, 3] It is, of course, true that a court possesses inherent power to set aside a final decree secured by fraud. Miller v. Miller,

26 Cal.2d 119, 156 P.2d 931; Rhea v. Millsap, 68 Cal.App.2d 449, 156 P.2d 941. But because a court possesses power to act in a certain way does not mean, necessarily, that it must act in that way. A court, on such a motion, is entitled to consider the realities and equities of the situation, and may deny relief to a petitioner because of laches, or by reason of an estoppel.

What are the basic facts here that determine the equities of the problem? Carl, in 1935, secured a final decree based upon a false affidavit. Shortly thereafter he paid all sums due to his wife and children, and continued to do so until his death. By 1939, he was completely in the clear. The wife heard rumors of the final decree as early as 1935, but certainly had actual knowledge of it as early as 1939, because she signed at least three documents acknowledging receipt of all sums due her under both the interlocutory and final. Had she acted promptly, and had she had the final decree set aside in 1939, Carl could immediately have petitioned for the entry of another final decree, because at that time he was not in default, and admittedly there never was a reconciliation. But, instead of acting promptly, appellant waited thirteen months after Carl died, and eight years after she had knowledge that a final had been secured, before she asserted any claim at all. During that eight-year period Carl adopted the respondent, drafted a will leaving respondent the major portion of his estate, and died. If the decree were now vacated, the trial court in its discretion, and in order to do equity, could, under section 133 of the Civil Code, enter a new final decree *nunc pro tunc* that would effectively dispose of any claim of appellant. If the decree were now set aside, respondent, a completely innocent party, because of appellant's undue delay and at a time now too late to alter legal relationships, might be deprived of the major portion of her inheritance contrary to the deceased's wishes.

[4-6] These circumstances certainly justified the trial court in denying relief on the ground that appellant was guilty of laches. In Hovey v. Bradbury, 112 Cal. 620, 625, 44 P. 1077, 1078, the court stated the well-settled rule that the doctrine of laches "is usually applied where a plaintiff, with knowledge that his rights have been invaded or his trust repudiated, has submitted to unconscionable delay, during which other rights have arisen, founded somewhat upon his silence and acquiesence." In 10 Cal.Jur. p. 530, § 68, the proper rule, amply supported by authorities, is stated as follows: "A person is in equity guilty of laches only where he has, by his conduct or negligence and delay, induced or suffered another to do or abstain from something whereby he might be injured should he be allowed to enforce his rights." Another good statement of the rule is to be found in 10 Cal.Jur. p. 520, § 60: "Laches is defined as 'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.' "

[7] It is also well settled that: "The existence of laches is determined by the trial court in the light of the facts and circumstances of the particular case." Austin v. Hallmark Oil Co., 21 Cal.2d 718, 734, 134 P.2d 777, 786.

[8] Appellant urges that there could be no legal prejudice to Carl and to his successors by reason of the delay, because neither Carl nor his successors should be permitted to profit by Carl's fraud. That is a factor that could have induced the trial court to grant the motion to vacate, but it is not *per se* conclusive. A person is not placed forever entirely outside the protection of the law in a particular transaction, because, forsooth, some time in the distant past he was guilty of an improper act. The claimed fraud should have been and was weighed by the court, and it found that the equities in favor of respondent far outweighed those in favor of appellant. With this conclusion we agree.

It is no answer to say, as does appellant, that the fraud was on the Court as well as upon the plaintiff, and that the Court, in order to vindicate its own honor, should vacate the decree, regardless of the laches of appellant. A court should, of course, preserve its integrity, but it is neither proper nor necessary to sacrifice justice in order to vindicate the honor of the court.

The order appealed from is affirmed.

BRAY, J., and SCHOTTKY, Justice pro tem., concur.

97 Cal.App.2d 909

PENAAT v. ZEISS, Registrar of Contractors, et al.

Civ. 14214.

District Court of Appeal, First District, Division 2, California.

June 9, 1950.

Rehearing Denied July 8, 1950.

Hearing Denied Aug. 3, 1950.

Suit by William H. Penaat against E. E. Zeiss, Registrar of Contractors, and others, to review by mandate the proceedings of the Contractors State License Board suspending plaintiff's license as a contractor for one year. The Superior Court in and for the City and County of San Francisco, Theresa Meikle, J., sustained the ruling of the License Board, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that sections of Business and Profession Code, which plaintiff allegedly violated, were constitutional, that accusations were sufficient, and that evidence supported findings of guilt.

Judgment affirmed.

1. Constitutional law 🔑287
Licenses 🔑7(1), 8(1)

Statute providing that doing of any willful or fraudulent act by licensee as a contractor which injures another, constitutes a cause for disciplinary action, is not a penal statute, and is constitutional, and rules covering due process in criminal proceedings do not apply to proceedings under it. Business and Professions Code, § 7116.

2. Licenses 🔑38

Under statute providing that doing of any willful or fraudulent act by licensee as a contractor which injures another constitutes cause for disciplinary action, accusation that contractor defrauded purchasers by collecting more than ceiling price was sufficient. Business and Professions Code, § 7116.

3. Constitutional law 🔑287
Licenses 🔑7(1), 8(1)

Statute providing that aiding or abetting an unlicensed contractor to evade provisions of licensing chapter or allowing contractor's license to be used by unlicensed contractor shall constitute a cause for disciplinary action is not a penal statute, and is constitutional, and rules covering due process in criminal proceedings do not apply to proceedings thereunder. Business and Professions Code, § 7114.

4. Licenses 🔑38

Under statute providing that aiding or abetting an unlicensed contractor to evade provisions of licensing chapter or allowing contractor's license to be used by an unlicensed contractor shall constitute a cause for disciplinary action, accusation that defendant knowingly defrauded purchasers by collecting more than ceiling price was sufficient. Business and Professions Code, § 7114.

5. Constitutional law 🔑287
Licenses 🔑7(1), 8(1)

Statute providing that willful failure or refusal without legal excuse by a licensee as a contractor to prosecute a construction project with reasonable diligence, causing material injury to another, constitutes a cause for disciplinary action, is not a penal statute, and is constitutional, and rules covering due process in criminal proceedings do not apply to proceedings thereunder. Business and Professions Code, § 7119.

6. Licenses 🔑38

Under statute providing willful failure or refusal without legal excuse by a licensee as a contractor to prosecute a construction project or operation with reasonable diligence causing material injury to another constitutes a cause for disciplinary action, accusation charging lack of diligence in that course of construction lasted from July, 1946, to March, 1948, sufficiently apprised defendant that he was charged with an unreasonable delay in construction. Business and Professions Code, § 7119.

7. Licenses ⚷38

In review of proceedings of Contractors State License Board which suspended petitioner's license as a contractor for one year, evidence supported findings that petitioner knowingly defrauded purchasers by collecting more than ceiling price, that he allowed his license to be used by unlicensed person, and that petitioner was not diligent in prosecuting a construction project, which lack of diligence caused material injury to another. Business and Professions Code, §§ 7114, 7116, 7119.

8. Administrative law and procedure ⚷749

Where proceedings before trial court are merely a review of evidence taken by Contractors State License Board, unless it appears that there is no substantial evidence to support judgment, reviewing court will resolve all doubts in favor of that judgment.

◆

C. Huntington Jacobs, San Francisco, for appellant.

Fred N. Howser, Attorney General, Carl W. Wynkoop, William M. Bennett, Deputies Attorney General, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued under section 1094.5 of the Code of Civil Procedure to review by mandate the proceedings of the Contractors State License Board suspending for one year his license as a contractor. In the superior court after a full hearing the evidence was found sufficient and the ruling of the License Board was sustained. The accusations upon which the proceedings were founded charged a violation of three separate sections of the Business and Professions Code. The three accusations were consolidated for hearing and resulted in one judgment, hence one appeal covering all three accusations. The appeal is taken on the clerk's transcript and a narrative statement which states that the cause was heard in the superior court on the transcript of evidence heard before the reviewing board. The accusations separately charged violations of sections 7116, 7114 and 7119 of the Business and Professions Code and the appeal attacks each on identical grounds: that the sections are unconstitutional, that the accusations are insufficient, and that the evidence does not support the findings of guilt.

Reserving a statement of the facts until later we may dispose of the attacks upon the form of the accusations. Section 7116 of the Business and Professions Code (hereinafter called the Code) provides: "The doing of any wilful or fraudulent act by the licensee as a contractor in consequence of which another is substantially injured constitutes a cause for disciplinary action." During the hearing before the hearing officer counsel for the board asked leave to amend the accusation charging fraud in the collection of sums from the owners in excess of the ceiling prices fixed by government authority. The request was granted and the accusations ordered "deemed to have been amended" to that extent.

[1] The appellant argues that section 7116 is unconstitutional because it makes any act which is "wilful or fraudulent" a subject of disciplinary action and that, since it is penal in its nature, it does not define the "crime" with sufficient particularity. The premise is wrong. This is not a penal statute and the rules covering due process in criminal proceedings do not apply. Webster v. Board of Dental Examiners, 17 Cal.2d 534, 537, 110 P.2d 992.

[2] There is no uncertainty in section 7116 because of the words "wilful or fraudulent". The appellant was accused of having knowingly defrauded the purchasers by collecting more than the ceiling price. He was tried on that charge and whatever might have been the result if he had been charged only with a "wilful" injury is no part of this case.

There is no contention that the evidence does not fully support the accusation that appellant charged the three veterans $500, $800, and $600 respectively over the authorized ceiling price fixed by the Veterans' Administration.

[3, 4] The second accusation charged a violation of section 7114 of the Code which provides that the "Aiding or abetting an unlicensed person to evade the provisions of this chapter or * * * allowing one's license to be used by an unlicensed person * * *" shall constitute "a cause for disciplinary action." The same attacks are made on the constitutionality of the statute and as to the uncertainty of the pleadings. What we have said as to section 7116 applies here.

There was no uncertainty at the time of the hearing that appellant was charged with having knowingly aided one Mealey, an unlicensed contractor, to use appellant's license in the construction of three homes in Burlingame on Mealey's offer to bring a foreman and crew of a friend of his from the East Bay.

There was evidence that appellant agreed with Mealey that he would permit the latter to use his license on payment of $250 or $500 per house built by Mealey. There was evidence that appellant told a witness that he had a deal with Mealey whereby Mealey would build these houses and pay him a fixed commission for the use of his license. Evidence sufficient.

[5, 6] Section 7119 of the Code reads: "Wilful failure or refusal without legal excuse on the part of a licensee as a contractor to prosecute a construction project or operation with reasonable diligence causing material injury to another constitutes a cause for disciplinary action." The accusation charged lack of diligence in that "the course of construction lasted from July, 1946, to March, 1948." The issue was thus framed whether the admittedly long delay in construction was without legal excuse or, conversely, whether the construction was "with reasonable diligence." These are not mystic words. The appellant knew that he was charged with an unreasonable delay in the construction and went to the proof of that issue. The evidence fully supports the finding.

[7, 8] We have said that the evidence supports the several accusations because respondents have pointed to evidence sufficient for that purpose. We have not read the transcript of proceedings before the board to see if there might be a conflict, and it is not our duty to do so. When the proceedings before the superior court are merely a review of the evidence taken by the respondent board it is not the purpose of the law to give the petitioner a third trial on an appeal from the judgment. In such a case, and unless it appears that there is no substantial evidence to support the judgment, the reviewing court will resolve all doubts in favor of that judgment. Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

YATES v. REID et al.*

Civ. 17676.

District Court of Appeal, Second District,
Division 2, California.
June 13, 1950.

Rehearing Denied June 29, 1950.
Hearing Granted Aug. 10, 1950.

Action by Charles E. Yates against H. K. Reid and Victor B. Reid for damages alleged to have been suffered by reason of defendants' abandonment of lease. The Superior Court of Los Angeles County, Joseph Marchetti, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Wilson, J., held that the evidence supported finding of trial court that when landlord re-entered property he took possession and operated it on his own account and not on account of defendants.

Judgment affirmed.

1. Trial 🔑398

Generally, where determination of material matters, one way or the other, is essential to correctness of judgment, and findings on such matters are inconsistent, judgment cannot be upheld.

---

* Subsequent opinion 224 P.2d 8.

2. Trial ⚿398

Generally, where there are specific findings as to a particular matter in issue and also a general finding to effect that all allegations in certain paragraph or cause of action relating to same matter are true or untrue, and such findings are inconsistent with one another, the specific findings will control.

3. Trial ⚿398

Where trial court made a specific finding that landlord reentered premises on his own account and not for benefit of tenants, and that by his action landlord accepted surrender of lease, and a general finding that allegations in tenants' answer were true, one of which allegations was that landlord reentered premises and operated property on behalf of tenants, findings were inconsistent and specific findings would prevail.

4. Landlord and tenant ⚿110(2)

In action for damages alleged to have been suffered by reason of tenants' abandonment of a lease, evidence sustained finding of trial court that when landlord reentered property he took possession and operated it on his own account and not on account of tenants.

◆

Arthur T. Stewart, Los Angeles, for appellant.

Albert E. Wheatcroft, Los Angeles, for respondents.

WILSON, Justice.

Plaintiff has appealed from that portion of the judgment that he take nothing from defendants on his complaint for damages alleged to have been suffered by reason of defendants' abandonment of a lease. Defendants have appealed from that portion of the judgment that they take nothing on their cross-complaint. The latter appeal has not been prosecuted and will be dismissed.

By an agreement of lease dated September 28, 1945, plaintiff leased to defendants for the term beginning October 15, 1945, and ending January 14, 1950, a parcel of real property with the improvements thereon at a rental of $300 a month for the first three months and $450 a month thereafter.

Defendants went into possession of the property and continued to occupy it until June 15, 1947, when they vacated the premises. The rent was paid as provided in the lease to and including June 14, 1947. On or a few days after the date of abandonment plaintiff went into possession of the property and continued to occupy it until April 7, 1948, when he leased it to one Martha Moore at a monthly rental of $300 for the remainder of the term of defendants' lease and two months in addition. On the same day plaintiff served a notice on defendants to the effect that he had re-let the premises at the monthly rental mentioned and demanding payment from defendants of the difference between the amount called for by their lease and the amount which Mrs. Moore had agreed to pay.

On May 20, 1948, plaintiff served a second notice on defendants declaring their lease to be terminated "as of date hereof" upon the ground that they had abandoned the property on June 15, 1947, and again demanding payment of the difference between the Yates and the Moore leases for the remainder of defendants' term.

As one ground for reversal plaintiff contends that the findings are conflicting and inconsistent. The court made a specific finding that on and after June 15, 1947, plaintiff, without notice to defendants, entered upon the leased premises, took possession thereof and operated the hotel and other appurtenances "for and on his own account and benefit"; that plaintiff's re-entry was not for the purpose of diligently seeking new tenants or protecting or preserving the premises and was not for the benefit of defendants or on their account; that by such re-entry and possession plaintiff accepted the surrender of the lease and by virtue thereof the lease was terminated on June 15, 1947; that the leasing of the premises to Martha Moore was not on account of or for the benefit of defendants but was on plaintiff's own account and benefit.

By a general finding the court found that the allegations contained in the answer of defendants and in the separate defense therein set forth are true except that it is not true that plaintiff is indebted to defendants in any sum whatsoever. The defense referred to in the last mentioned finding alleges that on June 15, 1947, plaintiff re-entered the premises and operated the hotel and other appurtenances on behalf of defendants until April 1, 1948. This allegation, which is included in the general finding that the entire defense is true, is in conflict with the specific findings above set forth to the effect that plaintiff's possession was on his own account.

[1–3] The general rule is that where the determination of material matters, one way or the other, is essential to the correctness of the judgment, and findings on such matters are inconsistent, the judgment cannot be upheld. Another rule as firmly established is that when there are specific findings as to a particular matter in issue and also a general finding to the effect that all allegations in a certain paragraph or cause of action relating to the same matter are true or untrue, and such findings are inconsistent with one another, the specific findings will control. Wilson v. Wilson, 76 Cal.App.2d 119, 129, 172 P.2d 568; Wood v. Keller, 72 Cal.App.2d 14, 17, 163 P.2d 904; Lobb v. Brown, 208 Cal. 476, 481, 281 P. 1010; Wallace Ranch Water Co. v. Foothill Ditch Co., 5 Cal.2d 103, 118, 53 P.2d 929. Therefore the general finding will be disregarded and the special finding of fact that the plaintiff re-entered the premises on his own account and not for the benefit of defendants, and that by his action he accepted surrender of the lease as of June 15, 1947, will prevail.

[4] Plaintiff maintains that the findings are not supported by the evidence. The lease contained a provision that no re-entry of the property by the lessor shall be construed as an election on his part to terminate the lease unless written notice to that effect is delivered to the lessee. Plaintiff testified that after he took possession of the premises he applied for a license for a lunchroom in July. The license was issued on August 11, 1947, authorizing plaintiff to transact the business of trailer camp, hotel and lunchroom. He rented trailer space and cabins to travelers, served sandwiches and soda water, which had not been served by defendants while they occupied the property, he procured a beer license, which defendants had not had, he installed a sign "vacancies" in front of the property, and continued so to operate the business until he leased it to Mrs. Moore on April 7, 1948. He did not serve a notice on defendants that he was taking possession on their account until the day on which he executed the lease to Mrs. Moore and did not, until that date, make a demand on defendants for payment of rent. This evidence amply sustains the finding that when plaintiff re-entered the property he took possession and operated it on his own account and not on account of defendants.

Judgment affirmed. Defendants' appeal is dismissed.

MOORE, P. J., and McCOMB, J., concur.

GEORGE et al. v. COLVIN et al.

COLVIN et al. v. GEORGE et al.

Civ. 14175.

District Court of Appeal, First District,
Division 1, California.
June 12, 1950.

Action by Antonio George and Lucia D. George against Elbert M. Colvin and others to recover down payment made to defendants for the purchase of house and to terminate plaintiff's obligations under a contract to purchase the house. Defendants Elbert M. and Leona J. Colvin filed a cross-complaint and S. Iacobucci and Jane Doe Iacobucci were brought in as parties on ground that it had been agreed by and

between the parties that the down payment was to be retained by defendants as liquidated and agreed damages in event plaintiffs failed to complete the purchase. The Superior Court, Santa Clara County, John D. Foley, J., entered judgment awarding plaintiffs the return of the down payment and that defendants Colvin take nothing by reason of their cross-complaint and defendants and cross-complainants Colvin appealed. The District Court of Appeal, Schottky, J. pro tem, held that restrictions on the lot as to type and place of construction, and restrictions which prohibited commercial enterprises or the keeping of animals or creatures of any kind for commercial purposes were encumbrances which substantially interfered with uses owner might reasonably wish to make of property and that title was unmarketable.

Judgment affirmed.

1. Vendor and purchaser 🔑**130(8)**

Any title that is not free from encumbrances cannot be considered a marketable title.

2. Vendor and purchaser 🔑**334(5)**

Where vendors agreed to convey a marketable title to certain realty located in unincorporated area, near a commercial area, but realty was restricted as to where a building could be placed and as to type of building and no commercial enterprises could be carried on and no cloven-footed animals could be kept or any fowl, animal or creature of any kind kept or bred for commercial purposes, restrictions substantially affected uses which purchasers reasonably might have wished to make of property and purchasers were entitled to recover down payment.

3. Vendor and purchaser 🔑**130(1, 2, 8)**

A vendee in an executory contract for sale of realty is entitled to a marketable title, which means a title in fee, free from encumbrances, and free from any restrictions which affect full enjoyment of property and restrictions as to use to which premises may be put, or as to location, character or kind of buildings, depth of foundations, which may be erected in or on realty, render title unmarketable, and this is true without reference to beneficial purpose of restriction.

4. Vendor and purchaser 🔑**138, 186**

A building restriction which seriously impairs value of realty will excuse performance on part of purchaser, although he had actual knowledge of restriction at time of contract, and fact that purchaser knew of building restrictions does not preclude him from objecting to title on that account.

5. Vendor and purchaser 🔑**138**

In action against vendors to recover down payment made on purchase price of certain realty, knowledge of purchasers of restrictions on use of realty did not amount to an estoppel to demand marketable title or waiver even if knowledge of purchaser's agents could be imputed to purchaser especially since statements made to agents indicated that there were zoning restrictions and not that they were restrictions in chain of title.

6. Vendor and purchaser 🔑**341(3)**

In action against vendors to recover down payment of certain realty on ground that vendors failed to convey marketable title, evidence sustained finding that purchasers did not repudiate contract and thereby release vendors from any obligation to perform.

7. Stipulations 🔑**14(10)**

In action against vendors to recover down payment made for purchase of certain realty, on ground that vendors failed to convey marketable title, where it was stipulated that no deed of any kind was tendered at all by vendors and that they would not raise defense that suit was filed prematurely and stipulation was made so that realty could be resold which it was, it was inferable that vendors either would not or could not perfect title and that they chose to proceed to trial on basis that title was marketable without removal of restrictions, and whether they could have removed restrictions as they neither did nor offered to do, was immaterial.

◆

Bohnett, Hill, Cottrell & Bohnett, L. D. Bohnett, San Jose, for appellants.

Crist & Stafford, John M. Donegan, Palo Alto, for respondents.

SCHOTTKY, Justice pro tem.

Elbert M. Colvin and Leona J. Colvin were owners of a house and lot near Los Altos in Santa Clara County. Antonio George and Lucia D. George were the agents for S. Iacobucci and Jane Doe Iacobucci, the parents of Mrs. George. The Iacobuccis desired to purchase a home in that vicinity and move from Rhode Island. By written deposit receipt dated December 1, 1947, the Colvins agreed to sell said house and lot to the Georges, who were acting for the Iacobuccis, for $11,500, and the buyers made a $4,000 down payment which was held in escrow. The written agreement contained the provision "that in the event the title to said property shall not prove marketable and said sellers shall not perfect, or be able to perfect same within 90 days from this date, the purchaser shall have the option of demanding and receiving back said deposit and shall be released from all obligation hereunder."

The Iacobuccis moved into the house on December 15, 1947, and the Colvins moved into a trailer in a trailer court. On or about January 13, Mr. Iacobucci went to the Love Realty Company and had a conversation with one Nicholson, the agent who consummated the sale. There is a dispute as to whether Mr. Iacobucci at that time and during a visit later with Mr. and Mrs. Colvin stated that he was not going through with the contract. Iacobucci testified: "I think I went in [to the office of Love Realty Company] to find out if I could sell the property. That is what I tried to do. * * * I told him that I would like to pull out." Mr. and Mrs. Iacobucci and Mr. and Mrs. George called on the Colvins at the home of a son of the Colvins on the night of January 15, 1948. Mr. Iacobucci testified: "I went in there and told the Colvins I couldn't find work here and I would like to pull out if I could. I am willing to pay you [for] your troubles, what I have gone through." They could not come to an agreement. Mrs. Colvin stated: "I will see my attorney and see what he says." The following day Mr. Iacobucci consulted his attorney.

On February 5, 1948, an action was commenced by Antonio George and Lucia D. George against the Colvins, praying for the return of the $4,000 and the termination of their obligations under the contract. The complaint alleged that under the contract of December 1, 1947, the Colvins were to convey a marketable title to the plaintiffs within 90 days; "That the defendants Colvin cannot convey marketable title in that said property is subject to a right of way over the northerly 1.6 feet thereof and subject to building and other restrictions"; and "That defendants Colvin have not and cannot within said time convey marketable title and have waived the right to ninety (90) days time within which to so clear said title."

The defendant's answer admitted the agreement to convey a marketable title "within ninety days upon payment by plaintiffs of the full purchase price of said property," denied that the property was subject to a right of way, admitted the restrictions, but alleged that they did not detract from the marketability of the title to the property, and denied "the allegations set forth in Paragraph VI of said complaint, except that said defendants admit that they consented that suit might be commenced prior to the expiration of said ninety day period and waived no other rights." As a separate defense the answer alleged an estoppel—that prior to the execution of the contract the plaintiffs were put on inquiry as to the restrictions on the property and had actual knowledge that the property was restricted to use for residential purposes, and that due to plaintiffs' insistence the defendants gave immediate possession and thereafter sold their furniture at a loss and were subjected to the inconvenience of living in a trailer.

S. Iacobucci and Jane Doe Iacobucci were brought in as parties by a cross-complaint filed by the defendants on the ground that it had been agreed by and between the parties that the $4,000 down payment was to be retained by the defendants as liquidated and agreed damages in the event the plaintiffs failed to complete the purchase, and "that said agreement was incorporated in and became a part of said written contract for the sale and purchase of said real property"; that the damage suffered by the defendants by reason of their removal from the house, selling of the furniture at a loss and living in a trailer exceeded $4,000; that the defendants executed "a good and sufficient deed" to the plaintiffs and placed it in escrow and have at all times been "ready, willing and able to do, and did do and perform, all things required by them to be done by the terms of said agreement of sale and purchase"; and that on or about January 13, 1948, the plaintiffs notified the defendants that they would not complete the purchase according to the terms of the contract and since then have refused to perform. The defendants by their cross-complaint asked that they be declared the sole owners of the deposited money, that they have costs and such other relief as might be proper.

The answer to the cross-complaint alleged the inability of the defendants to furnish a marketable title, and by a supplemental answer it was alleged that the defendants and cross-complainants had "sold the real property herein for the sum of Ten Thousand Dollars ($10,000) net to them, less cost of title policy and revenue stamps upon the deed."

Prior to the trial the easement for a right of way was removed by a quitclaim deed and was not involved in the action.

The trial court found in favor of plaintiffs and in a memorandum opinion based its decision upon the grounds that the restrictions made the title unmarketable and that the evidence did not establish any estoppel. Judgment was entered awarding plaintiffs the return of the $4,000 down payment and that defendants Colvin take nothing by reason of their cross-complaint. Defendants' motion for a new trial was denied and defendants and cross-complainants Colvin have appealed from the judgment.

Appellants contend that the judgment should be reversed, and make the following points: (1) The title was at all times marketable; (2) respondents are estopped to claim unmarketability by reason of restrictions; (3) respondents repudiated their contract and thereby released appellants from performance; (4) the evidence is insufficient to support certain findings. We shall discuss these points in the order of their statement.

The restrictions upon the lot here involved were, briefly stated, as follows: No building shall be built within 20 feet of the northerly line of said lot; there shall only be single family dwellings which shall be on a plot of not less than 5,000 square feet nor closer than five feet to any interior side boundary line; no commercial enterprises shall be carried on, nor anything be done that might be or become an annoyance or nuisance; any structure shall be of a certain minimum floor size and cost no less than a set minimum, and no cloven-footed animals shall be kept nor shall any fowl, animal or creature of any kind be kept or bred for commercial purposes.

[1, 2] Any title that is not free from encumbrances cannot be considered a marketable title and we think there can be no doubt that the restrictions hereinbefore set forth substantially interfere with many uses which an owner reasonably might wish to make of the property, which was in an unincorporated area and which was near a commercial area. As was said in the case of Whelan v. Rossiter, 1 Cal.App. 701, at page 704, 82 P. 1082, 1083: "Building restrictions and the like contained in grants of real estate are incumbrances on the title." And in Tandy v. Waesch, 154 Cal. 108, 97 P. 69, our Supreme Court, in referring to restrictions far less stringent than the ones in the instant case, said, 154 Cal. at pages 110-111, 97 P. at pages 70: "The restrictions, reservations, and covenants constituted incumbrances upon the title of defendant, which, not being removed, justified plaintiff in seeking a recovery of his partial payment under defendant's contract to convey to him a title 'free and clear of all incumbrances.' Indeed, this proposition is not seriously disputed; but, if it were, it finds abundant support. Quatman v. McCray, 128 Cal. 285, 60 P. 855; Whelan v. Rossiter, 1 Cal.App. 701, 82 P. 1082; Goldstein v.

Hensley, 4 Cal.App. 444, 88 P. 507; Wetmore v. Bruce, 118 N.Y. 319, 23 N.E. 303; Ayling v. Kramer, 133 Mass. 12; Brewster on Conveyancing, § 201; Warvelle on Vendors, § 312."

In 25 California Jurisprudence, at page 635, section 132, it is stated that "A title to be good and marketable must be free from encumbrances," and on page 637, section 134, of the same volume, "Building restrictions and the like contained in grants are encumbrances on the title."

[3] We believe that the general rule, sustained by the great weight of authority, is correctly set forth in 57 American Law Reports, at page 1414, as follows: "The rule that the vendee in an executory contract for the sale of land is entitled to a marketable title, which means a title in fee simple, free from encumbrances, entitles a vendee to a title free from any restrictions which affect the full enjoyment of the property; hence, restrictions as to the use to which the premises may be put, or as to the location, character or kind of buildings, depth of foundations, etc., which may be erected in or upon the land, render the title unmarketable. And this is true without reference to the beneficial purpose of the restriction. It is no defense to show by the opinion of experts that the value of the property is not diminished by the restrictions. But it has been held that a building restriction which operates to the mutual benefit of different owners does not render the owner's title unmarketable."

Appellants argue that the true rule in California is stated in the following language in Staton v. Buster, 79 Cal.App. 428, at page 432, 249 P. 878, 880: "Much learning has been expended in giving definitions as to good and marketable titles. The following appears to be one supported by the weight of authority, to wit: '"A marketable title," to which the vendee in a contract for the sale of land is entitled, means a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept.' Todd v. Union Dime Sav. Inst., 128 N.Y. 636, 28 N.E. 504; Cummings v. Dolan, 52 Wash. 496, 100 P. 989, 132 Am.St.Rep. 986." However, a reading of that decision shows that it did not involve building restrictions at all. The vendor tendered a deed to real property signed only by himself and the vendee contended that it did not convey a marketable title because it was not signed by the vendor's wife also. The appellate court held that the wife had nothing to convey and that her signature was not necessary to make the title marketable. The court then went on to give the quotation hereinabove set forth. We do not believe that the quoted language from Staton v. Buster can be held to sustain appellants' argument that their title was a marketable one.

Appellants also argue that the restrictions did not render the title unmarketable because such restrictions are "substantially the same" as those in the county zoning ordinance, and appellants quote the following from 57 American Law Reports, at page 1419: "It would seem that a restriction does not affect the marketable quality of the title, where the vendee is not thereby required to do, or refrain from doing, anything which the law itself does not require." However, as pointed out by respondents, the restrictions set up by the deed are considerably more stringent than those provided in the ordinance, and the former, not the latter, provide for race restrictions, limitations as to the cost of buildings, more stringent set-back lines, absolute prohibitions on commercial or manufacturing enterprises (ordinance permits "home occupations"), and more stringent restrictions on the keeping of fowl and livestock, the ordinance allowing fowl and cloven-footed animals, such as cows and goats, both for use and commercial purposes.

[4, 5] The appellants' next contention is that the respondents are estopped to assert the unmarketability of the title by reason of restrictions because (1) they knew it was a restricted area, (2) the appellants had suffered serious loss and hardship by immediately moving out at the respondents' insistence, (3) all elements of estoppel are present and to allow recovery to the re-

spondents would be to work a fraud and hardship upon appellants. The trial court found that the respondents were not estopped from asserting defects in the title nor had they waived their "right to have marketable title." The only evidence of the respondents' knowledge of restrictions was as follows: Mr. Colvin testified that, "Talking about the location and I told them that it was a nice location for the reason that it was restricted and it couldn't be any shacks built around there." Such was stated in the presence of Mr. and Mrs. George and Mr. Nicholson. He also stated that, "Well, I said that I—our reasons for selling the property, that we were buying a duplex in Redwood City, that we would like to have bought the lot across the street and put a duplex there, but it was a restricted district and we couldn't put a duplex on there." Substantially the same testimony was given by Mrs. Colvin. It might be that the knowledge, if any, of the Georges could be imputed to the Iacobuccis, since the Georges were their agents, but even knowledge of the Iacobuccis would not amount to an estoppel to demand marketable title or a waiver. The general rule, as stated in 57 American Law Reports, at page 1425, is as follows: "A building restriction which seriously impairs the value of the property will excuse performance upon the part of the vendee, although he had actual knowledge of the restriction at the time of the contract. And it is the general rule that the fact that the vendee knew of building restrictions does not preclude him from objecting to the title on that account, * * *." Such rule is also given in 55 American Jurisprudence, Vendor and Purchaser, section 251, at page 706. The statements made to the Georges, moreover, would lead one to suppose only that there were zoning restrictions, not that there were restrictions in the chain of title. Any hardship suffered by the Colvins would not be as great as that suffered by the Iacobuccis should they be required to sacrifice their life savings because they failed to go through with a contract which the Colvins were unable to perform.

[6] Appellants' third major contention is that respondents repudiated the contract and thereby released the appellants from any obligation to perform. However, there is a clear conflict in the evidence as to whether Mr. Iacobucci said he would not continue with the contract or whether he merely asked whether he could be relieved from the contract. The trial court resolved this conflict in favor of respondents and held that there had not been a repudiation.

[7] Appellants next contend that the evidence is insufficient to support the finding "that defendants Colvin agreed that they would not and they did not, raise the defense that this action was brought prior to ninety (90) days from and after December 1, 1947, and that they were unable to and did not perfect said title within said ninety (90) days."

On the trial it was stipulated that no deed of any kind was tendered at all by appellants. It was also stipulated that the appellants would not raise the defense that the complaint was filed prematurely, before the 90 days in which the appellants had to tender marketable title had elapsed. The latter stipulation was made so that the property could be resold, which it was, for $10,000. From this stipulation it is fairly inferable that appellants either would not or could not perfect title. Certainly if they had any intention of removing the restrictions they would have alleged in their pleadings or asserted at the trial that they would remove the restrictions. It is clear that appellants were convinced that their title was marketable without the removal of the restrictions, and that they chose to proceed with the trial on that basis. Hence it is quite immaterial whether or not they could have removed the restrictions as they neither did so nor offered to do so.

No other points require discussion.

In view of the foregoing, we conclude that the record and the authorities amply support the conclusion of the trial court that respondents were entitled to the return of their $4,000 down payment, and that the judgment should be and hereby is affirmed.

PETERS, P. J., and BRAY, J., concur.

98 Cal.App.2d 124

PEOPLE v. WOCHNICK.

Cr. 4435.

District Court of Appeal, Second District, Division 2, California.

June 16, 1950.

Hearing Denied July 13, 1950.

Wallace A. H. Wochnick was convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., of murder in the first degree, and from the judgment of conviction and an order denying his motion for a new trial the defendant appealed. The District Court of Appeal, Wilson, J., held that the results of lie detector tests were not admissible as evidence and that it was prejudicial error to admit such results in evidence indirectly in the form of a reported accusatory statement, and that such evidence should have been rejected upon the further ground that the statement did not constitue an accusatory statement.

Reversed and remanded.

1. Criminal law ⚷388

Systolic blood pressure deception test for determining truthfulness of testimony has not yet gained such standing and scientific recognition as to justify admission of expert testimony deduced from tests made under such theory.

2. Criminal law ⚷388, 1169(5)

Introduction in evidence of results of lie detector test, even though admitted indirectly in form of purported accusatory statement, was prejudicial error and was not cured by trial court's specific instruction that jury should not consider portion of statement relating to lie detector test.

3. Criminal law ⚷407(1)

Conversation with defendant in which witness had explained modus operandi of lie detector test and enumerated instances in which violent reaction of graph indicated that defendant was not speaking truth and asked defendant if he could explain these things and defendant had replied that he could not, was not admissible as accusatory statement.

4. Criminal law ⚷407(1)

Accusatory statements and defendant's response thereto are admissible under exception to hearsay rule if defendant's conduct or response is such as to give rise to inference of acquiesence in truth of statement or guilty consciousness, but such statements are admitted only as basis for showing that accused's reaction to questions or his response thereto were not consonant with those of innocent man and are not substantive evidence.

◆

Ellery E. Cuff, Public Defender of County of Los Angeles, Noel B. Martin, Deputy Public Defender, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Dan Kaufmann, Deputy Attorney General, for respondent.

WILSON, Justice.

Defendant was charged with the murder of one James Kibrick. He pleaded not guilty and on a trial before a jury was convicted of murder in the first degree and was sentenced to the state prison for life. His motion for a new trial was denied. This appeal is from the order denying the motion for new trial and from the judgment.

The only ground for appeal assigned by defendant which we need to consider is that the trial court erred in admitting testimony of the details and results of a lie detector test to which defendant had been subjected.

Kibrick received the injuries which caused his death in his liquor store on the corner of Temple and Fremont streets in the city of Los Angeles. He had been severely beaten and cut, apparently with broken liquor bottles, about his face, head and hands and although those injuries alone would have probably caused his death, the immediate cause was a wound from a knife which had been plunged into his chest, piercing his heart. The knife belonged to the victim and was customarily kept beside the cash register.

Philip Anast testified he called at the liquor store to make a delivery and saw the victim lying on his back behind the counter in a pool of what seemed to be blood and other liquid; that defendant was straddling the legs of the victim in a more or less squatting position and it appeared to him as if defendant was just releasing the shirt front of the person on the floor. Defendant told the witness the man had been beaten and Anast ran out to call the police. When he returned to the store the victim was sitting in a chair between the counter and the shelves. He arose as they entered and Anast noticed what seemed to be a cigar butt protruding from the victim's shirt. He later identified the object as the taped handle of a knife.

Defendant testified that when he entered the store he saw no one; he turned to look back whereupon a man brushed by his right side and hit his shoulder and went past him toward the open door; he heard a moan which came from behind the counter; he looked over the counter and saw a man lying in the alleyway between the counter and the shelving and he went around to assist; he straddled and kneeled on one knee over the man and brushed the glass from under his hands and from his neck and endeavored to lift the victim to a sitting position; as he did so he noticed a big gash in the man's neck and decided it was a matter for the police and a doctor; as he stood up he noticed Anast.

At the time of trial defendant testified he did not see the knife protruding from the vicinity of Kibrick's heart as he bent over him but in a statement previously given to one of the officers he said that when he brushed the glass off Kilbrick he felt an instrument.

Defendant assigns as error the admission, over the repeated objections of his counsel, of the evidence of officer Zander in which he repeated a conversation between himself and defendant. The officer testified that he told defendant he had been placed on the lie detector for a test; that defendant having dealt with machinery the major portion of his life he was sure defendant would understand that a certain motivating force brings a certain effect provided the machinery is in operating order; he then explained to him the workings of the polygraph or lie detector; that it was a machine manufactured to register reactions, respiratory rate, pulse rate, and certain electrical emanations from the body and upon a basis of those factors the machine drew a graph from which certain conclusions could be drawn; that it is based on the premise that it takes more effort to state an untruth than it does a truth and that the effort is reflected on the graph; he stated to defendant that when he was asked his age, address and questions of that nature he of course answered truthfully and his answers established on the machine a normal indication of the effort required to answer truthfully a normal question; that defendant had said at one time that the reason he went into the store was because he noticed a similarity between his name and that of the person who conducted the store, yet when the operator of the machine gave him various names and he came to the name of the victim there was no indication on the graph that he had ever heard or seen that name before or had any knowledge of it; he said to defendant that they showed him five knives, one of which was the knife that was removed from the body of the victim; the operator showed him one knife at a time and asked him if he had ever seen that knife before and in each instance defendant stated he never had; when they showed him the knife that was removed from the body of the victim there was a violent reaction on the graph of the machine which indicated that his answer was an untruth; they showed him the same five knives again; the operator would take a knife from the drawer and lay it on the table in his hand; the second knife shown him was the knife removed from the body of the victim; in this instance the reaction was normal on the graph and operator looked up and saw defendant had his eyes closed; the operator said nothing but continued to tap the table with his empty hand and would ask him if he had seen this knife before and the graph indicated a normal reaction; then when he had repeated that method five times he asked defendant to open his eyes, held the knife in front of him and asked him the same question again, showing him each individual knife; the reaction was the same as it was the first time the knives were shown him—when they exhibited the knife that was removed from the body of the victim there was a violent reaction on the graph indicating a guilty knowledge. The officer testified he then stated to defendant: "Mr. Wochnick, if you can explain these things to me—maybe you have a logical explanation. Maybe you have an explanation you have not told me about yet. If you can explain these things to me, I wish you would. Maybe the whole thing is wrong"; defendant answered, "Mr. Zander, I cannot explain that."

Defendant contends that by the introduction of the foregoing testimony under the guise of an accusatory statement, the prosecution was able to place in evidence the damaging and prejudicial results of the polygraph or so-called lie detector; that the results of such a test are not admissible as evidence and it was therefore prejudicial error to admit them indirectly in the form of a purported accusatory statement.

The question of the admissibility in evidence of the results of the polygraph or so-called lie detector test has not been decided in this state. In the case of People v. Houser, 85 Cal.App.2d 686, 193 P.2d 937, such evidence was admitted pursuant to a signed stipulation and the court stated the defendant could not on appeal assert that the results of the tests were inadmissible as evidence. In other jurisdictions the courts, with but one exception, People v. Kenny, 167 Misc. 51, 3 N.Y.S.2d 348, which was not appealed, have uniformly sustained the trial court's rulings in refusing to admit evidence of such examinations. In Frye v. United States, 54 App.D.C. 46, 293 F. 1013, 34 A.L.R. 145; State v. Bohner, 210 Wis. 651, 246 N.W. 314, 86 A.L.R. 611; People v. Forte, 279 N.Y. 204, 18 N.E.2d 31, 119 A.L.R. 1198, and People v. Becker, 300 Mich. 562, 2 N.W.2d 503, 139 A.L.R. 1171, the defendants sought to introduce in their own behalf evidence of lie detector tests. The courts in these cases all held there was not sufficient scientific recognition of the efficacy of the machine to warrant the judicial acceptance of its recordings as evidence. In State v. Cole, 354 Mo. 181, 189 S.W.2d 541, Id., Mo.Sup., 188 S.W.2d 43, a motion was made by defendant that the lie detector machine be used in testing the truth of all witnesses. The court stated that while no doubt the lie detector is useful in the investigation of crime and may point to evidence which is competent, it has no place in a court room.

In State v. Lowry, 163 Kan. 622, 185 P.2d 147, following a first trial the court suggested to both the complaining witness and the defendant that they submit to a lie detector test before the second trial. The test was submitted to by both parties but there was no agreement that the results might be used as evidence. The outcome of the test was admitted at the second trial over the defendant's objection and on appeal the court stated, 185 P.2d at page 151: "We are not ready to say that the lie detector has attained such scientific and psychological accuracy, nor its operators such sureness of interpretation of figures on a dial that the testimony here in question was competent, over objection, for submission to a jury holding the fate of the defendant in its hands. * * * The conclusion here reached is in line with the almost unanimous holding of other courts and with the conclusions of law writers generally."

[1] We are in accord with the views expressed in the foregoing cases that "the systolic blood pressure deception test for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory."

[2, 3] Respondent argues that the results of the lie detector test were not placed before the jury; that the mere fact that the occasion for the conversation between defendant and a police officer was the giving of a lie detector test would not require the exclusion of such conversation if it were otherwise admissible and that moreover the trial court specifically instructed the jury it could not consider that portion of the conversation relating to the lie detector test as indicating whether or not there was any reaction to any technical test.

Despite the instruction of the court, the evidence of the partial results of the lie detector test with respect to defendant's reaction upon being shown the murder weapon was indelibly implanted in the minds of the jurors and could not but have had a prejudicial effect.

Not only was the evidence of the results of the lie detector test inadmissible but the testimony should have been rejected upon the further ground that it did not constitute an accusatory statement. The witness related that he told defendant some of the evidence had not been satisfactorily explained; that a number of questions had been asked as to his name and address and other questions of that nature which the machine indicated he had answered truthfully but when certain other questions were put to him there was a violent reaction on the graph of the machine indicating his answers were untrue; he thereupon stated: "Mr. Wochnick, if you can explain these things to me, I wish you would. Maybe the whole thing is wrong"; defendant answered: "Mr. Zander, I cannot explain that."

[4] Accusatory statements and the defendant's response thereto are admissible under an exception to the hearsay rule, as an admission, if the defendant's conduct or response is such as to give rise to an inference of acquiescence in the truth of the statement or guilty consciousness. The statement is admitted not as substantive evidence but merely as a basis for showing the accused's reaction to the questions or his response thereto were not consonant with those of an innocent man. There was nothing equivocal or evasive in defendant's reply. Officer Zander referred to defendant's occupation as an engineer and stated that having dealt with machinery the major portion of his life he would understand that a "certain motivating force brings a certain effect provided the machinery is in operating order." He explained the modus operandi of the lie detector test and enumerated the instances in which the violent reaction of the graph in the machine indicated defendant was not speaking the truth. He then asked defendant if he could "explain these things." Defendant made a most natural reply which was that he could not explain it. There was nothing in defendant's answer which would indicate either acquiescence in the truth of the statement or a consciousness of guilt and the court therefore erred in admitting the evidence as an accusatory statement. Furthermore, the admission into evidence of this testimony placed before the jury the result of the lie detector test, which in itself was inadmissible for the reasons hereinabove stated, and constitutes prejudicial error.

Judgment and order reversed and cause remanded for a new trial.

MOORE, P. J., and McCOMB, J,. concur.

---

98 Cal.App.2d 91

FERNANDEZ v. CONSOLIDATED FISHERIES, Inc.

CITY & COUNTY OF SAN FRANCISCO v. CONSOLIDATED FISHERIES, Inc.

Civ. 14233.

District Court of Appeal, First District,
Division 1, California.

June 13, 1950.

Hearing Denied Aug. 10, 1950.

Action by Ramon Fernandez against Consolidated Fisheries, Inc., a corporation, for personal injuries. The Superior Court in and for the City and County of San Francisco, Theresa Meikle, J., after a verdict for defendant, granted plaintiff's motion for a new trial, and defendant appealed. The City and County of San Francisco, a municipal corporation, was permitted to intervene for expenses and compensation paid plaintiff under compensation law. The District Court of Appeal, Peters, P. J., held that giving of instruction that plaintiff was a trespasser toward whom only duty was to refrain from wilful acts was prejudicial error.

Order granting a new trial affirmed.

1. Negligence 🔑**32(1), 33(1)**

An owner or occupier of realty owes a duty toward a trespasser to refrain from wilful or wanton conduct, and toward a licensee a similar duty, plus the affirmative duty to warn of unusual dangers, while toward an invitee, he owes a duty to exercise ordinary care and prudence. Civ. Code, § 1714.

2. Negligence ⚷33(1)

A landowner has a duty to exercise reasonable care toward known trespassers insofar as affirmative acts are concerned. Civ.Code, § 1714.

3. Negligence ⚷6

Statute making one responsible not only for result of his wilful acts, but also for injuries occasioned to others by his want of ordinary care or skill in management of his property or person, applies except where the automobile guest statute is applicable. Vehicle Code, § 403; Civ.Code, § 1714.

4. Appeal and error ⚷1064(1)
Automobiles ⚷246(4)

In action by street sweeper for injuries sustained when defendant's truck dragged him along street after he attempted to open truck door and inform truck driver that driver had lost a box lying on street, giving of instruction that sweeper was a trespasser toward whom only duty was to refrain from wilful act, without giving instruction that if defendant knew or should have known of plaintiff's presence, defendant had duty to exercise reasonable care, was prejudicial error.

◆

Hadsell, Sweet, Ingalls & Murman, San Francisco, for appellant.

Melvin M. Belli, San Francisco, James Sykes, San Francisco, for respondent Ramon Fernandez.

Dion R. Holm, City Attorney, Lawrence S. Mana, Deputy City Attorney of the City and County of San Francisco, San Francisco, for respondent in intervention.

PETERS, Presiding Justice.

In an action for personal injuries the jury brought in a verdict for the defendant. Thereafter, the trial court, on motion of plaintiff, granted a new trial on the sole ground that certain instructions "did not fully state the law on trespass." On all other grounds set forth by plaintiff, the motion was denied. Defendant appeals. The City and County of San Francisco, as employer of the plaintiff, was permitted to intervene for the expenses and compensation it had paid to the plaintiff under the compensation law.

The accident occurred at about 11 a. m. on March 26, 1947, at the intersection of Golden Gate Avenue and Steiner Street in San Francisco. Golden Gate Avenue runs east and west, and is a stop street, while Steiner Street runs north and south. The plaintiff was employed as a street sweeper by the City. As such, it was his duty, among other things, to notify any person who dropped articles in the street to pick them up. On the morning in question, while acting in the course and scope of his employment, and while crossing Steiner Street at its intersection with Golden Gate Avenue, and while in the pedestrian lane, plaintiff testified that he noticed defendant's truck (a ton and a half truck with a flat bed and enclosed cab) approaching the intersection and traveling south on Steiner Street; that when he first saw the truck it was about fifty feet from the pedestrian lane in which he was standing; that just as he saw the approaching truck he saw a box lying in the street in back of the truck; that he did not see the box fall from the truck, but surmised that it had fallen from it; that the box he saw was a large box about four or five feet long; that as the truck came towards him he waved both hands at the driver and yelled "Your box is falling"; that the truck was only ten feet from him at the time; that the driver looked right at him and nodded his head; that the truck proceeded ahead until it came to the arterial stop sign where it came to a full stop with its front part within the marked pedestrian crosswalk; that he walked over to the right-hand door of the cab of the truck, opened the door about six or eight inches, and yelled "You lost a box"; that the driver looked right at him, and, with his right hand, motioned him him to go away; that while he still had his hand on the door handle the truck driver started up very fast; that he was knocked off balance and gripped the door handle to keep from being thrown down; that he was able to hold onto the door handle for ten or fifteen feet, and during all that time yelled at the driver to stop; that he finally lost his grip and fell under the right rear wheel. He suffered very severe injuries.

The truck driver of defendant testified that he was delivering boxes of fish for his employer at the time of the accident; that the cardboard boxes in which the fish were packed were about eight or nine in number, were about four feet long and two feet wide, and were lying on the bed of the truck; that the truck bed had no sides, but boxes were kept from slipping by steel strips in the bed of the truck; that these boxes weighed about 175 to 200 pounds; that as he was driving south on Steiner Street he did not see any box in the roadway; that as he came to the intersection of Steiner and Golden Gate he stopped; that a taxicab was approaching the intersection on Golden Gate from his right; that the taxicab stopped and the driver motioned him to go ahead; that he went through slowly while in low gear; that he heard people yelling, then "The right-hand door of my cab flung open, and almost immediately after the door flung open I run over something"; that he thought the tarpaulin over the fish had caught in the door; that he stopped and saw Fernandez lying in the street. He further testified that as he approached the intersection, and when he stopped there, he did not see Fernandez at all; that the cab door was not opened while he was stopped; that the door was not opened until he was out in the intersection, and occurred almost simultaneously with the bump that indicated he had run over something; that the right window of his cab was closed; that he did not hear Fernandez calling to him and heard no yelling until he had run over Fernandez. He admitted that, after the accident, he saw a carton lying in the street about where Fernandez said it was, but claimed that it was a small box about a foot wide, long and deep; that the box he saw had not fallen from his truck, and was much smaller than any box he had ever carried on his truck.

The taxicab driver testified as to approaching the intersection and stopping to let the truck through, and stated that just as the truck started up he saw Fernandez grabbing the door handle on the right of the cab of the truck; that, according to his best recollection, the truck driver was looking straight ahead; that he did not hear Fernandez yell; that as the truck started up the door appeared shut, but he was not positive as to this; that Fernandez was running beside the truck, apparently trying to better his grip on the door handle, when he slipped and fell.

In its instructions to the jury the trial judge gave three instructions on the law of trespass, all proposed by the defendant. They were:

"I instruct you that the plaintiff Ramon Fernandez, at the time he took hold of the defendant's truck, if he did so, was a trespasser."

"The only duty a motorist owes to a trespasser on his car is not to injure him wilfully."

"The owner of an automobile owes no duty to a trespasser thereon until he actually knows of the presence of such trespasser."

A little over an hour after the jury had retired it returned to the court and asked for further instructions on three matters, one of which was a request for "another instruction as to the trespassing." The court repeated, almost verbatim, the three instructions above quoted. In less than fifteen minutes the jury returned with a verdict for defendant. Thereafter, on motion for a new trial, the motion was granted on the sole ground that the above three instructions did not fully state the law of trespass.

Defendant as appellant, argues that the court abused its discretion in granting the motion for a new trial. In this connection appellant contends that under the first instruction the jury was not to consider it unless it first found that respondent took hold of the truck. It is contended that there is a conflict on this issue, and, because of the general verdict, it must be conclusively presumed that the jury found that respondent did not get hold of the truck. Therefore, so it is contended, instructions 2 and 3 above quoted, even if erroneous, could not have misled the jury. There is no conflict at all in the evidence on the issue of whether respondent got hold of the door handle. Respondent so testified. The truck driver admitted that the door flew open. The cab driver testified that he "noticed somebody grabbing the door of the truck"; that he saw "a man handling or grabbing the door knob"; that Fernandez "was trying to hold tight to the door so he wouldn't lose his grip"; and that it appeared as if Fernandez "was afraid he'd lose his grip." Whatever ambiguities may exist in his testimony were cleared up on cross-examination, where, in response to the question: "He had a good grip on it but was trying to get a better grip on it?", he replied "That's the picture I got of it." There is, therefore, no conflict at all in the evidence on the issue of whether respondent got hold of the door handle. This being so, under instruction number 1 above, the jury was directed to find that respondent was a trespasser. Even if instruction number 1 were correct (and under the facts the respondent might well have been found to be at least a licensee), we are directly presented with the question as to whether the trial court correctly determined that the giving of instructions 2 and 3 above quoted was prejudicially erroneous. By these two instructions the jury was told that the truck driver owed no duty at all to respondent trespasser unless he knew of the respondent's presence, and that the only duty then owed was "not to injure him wilfully." The question as to whether the truck driver did or did not see respondent, on which there was a direct conflict, did not have to be answered by the jury. Under the instructions given, if the jury found that the truck driver did not act wilfully, it would not have to pass on the issue of whether the truck driver did or did not see respondent. Thus, if the duty to a known trespasser is greater than that defined by the court, the court was fully justified in granting the new trial on the ground that the instructions on the issue were incomplete, incorrect and prejudicial.

[1] The law in reference to the duty owed to trespassers, licensees and invitees has largely developed in reference to the duty of an owner or occupier of real property or structures thereon. The statutes of this state do not provide that a different duty is owed to persons in the three named categories. The only relevant statute is section 1714 of the Civil Code, which provides: "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." In spite of this code section, which has been in our law unchanged since 1872, and which states a civil law and not a common law principle, Code Napoleon, § 1383; Louisiana Code 1808, § 2215, our courts, in some cases at least, and in apparent disregard of the section, have followed the common law rule, which purports to make precise and rigid distinctions as to the duty owed by the owner or occupier to invitees, licensees and trespassers. Thus, it has been stated that towards a trespasser the owner or occupier only owes a duty to refrain from wilful or wanton conduct; towards a licensee a similar duty, plus the affirmative duty to warn of unusual dangers, while towards an invitee there is the duty to exercise ordinary care and prudence. See cases collected 13 Cal.L.Rev. 72, 73, footnotes 5, 6 and 7. Such an approach requires a court to first determine the precise status of the visitor, which is sometimes a most difficult task, and then to determine from the cases whether the owner has violated any duty owed to a member of such a class. Such an approach is unrealistic, arbitrary, and inelastic. The point where the duties towards members of each of the classes begins or ends, or where it should begin or end, or where the duty not to act becomes supplemented by the duty to act, is almost impossible of perception. It is no wonder that exceedingly fine distinctions have been developed so that the law is most confused in this field. See note 13 Cal.L.Rev. 72. Many cases, and partic-

ularly the more recent ones, have in fact applied the general doctrine of negligence embodied in section 1714 of the Civil Code rather than the common law rigid categories test. For a good discussion of these problems see Boucher v. American Bridge Co., 95 Cal.App.2d 659, 213 P.2d 537, et seq.

Thus, while there are many cases holding that a land owner is only required to refrain from inflicting wanton or wilful injuries on a trespasser or licensee, see many cases collected 19 Cal.Jur. p. 616, § 52, fn. 13, there are many cases also holding that after "a trespasser is seen in a position of danger, due care must be exercised to avoid injuring him, and it is negligence not to do so." 19 Cal.Jur. p. 616, § 52, at p. 617; see cases collected in fn. 17 on p. 618. This duty of reasonable care not only extends to situations where the land owner knows of a trespasser's presence, but also to situations where he should know of his presence. Thus, the Restatement of Torts, Vol. 2, § 336, declares that if the possessor of land does not know of a trespasser's presence, but "from facts known to him should know or believe that another is or may be" trespassing, he is "subject to liability for bodily harm thereafter caused to the trespasser by the possessor's failure to carry on his activities upon the land with reasonable care for the trespasser's safety." Many California cases are cited as being in accord in the California annotation to this section.

[2] Many courts, in imposing this duty of reasonable care towards trespassers and licensees, have drawn a distinction between active and passive negligence, and have limited the reasonable care test to overt acts of negligence. See annotation 49 A.L.R. 778. California has quite clearly adopted this distinction and imposed a duty to exercise reasonable care towards known licensees or trespassers so far as active operations are concerned. In the well-reasoned case of Oettinger v. Stewart, 24 Cal.2d 133, 138, 148 P.2d 19, 156 A.L.R. 1221, cases to the contrary were expressly overruled. See, also, Harold v. P. H. Mathews Paint House, 39 Cal.App. 489, 493, 179 P. 414; Barnett v. La Mesa Post No. 282, 15 Cal.2d 191, 194, 99 P.2d 650; Yamauchi v. O'Neill, 38 Cal.App.2d 703, 708, 102 P.2d 365; Hamakawa v. Crescent Wharf & Warehouse Co., 4 Cal.2d 499, 503, 50 P.2d 803. This rule imposing a duty to exercise reasonable care towards known trespassers so far as affirmative acts are concerned, is in accord with the modern trend of authorities. See 38 Am.Jur. p. 771, § 109, at p. 773.

Appellant contends that whatever the law may be as to the duty owed to trespassers on real property, that, as to trespassers on vehicles, the only duty is to refrain from wilful or wanton acts whether the trespasser's presence is known or not. In this connection appellant cites Albers v. Shell Co. of California, 104 Cal.App. 733, 286 P. 752, and Sessions v. Southern Pacific Co., 159 Cal. 599, 114 P. 982. These cases undoubtedly held that the only duty owed to trespassers on a truck or train was to abstain from wilful or wanton conduct, even if the presence of the trespasser was known, and even if positive acts were involved. These cases are of the same type and vintage as those cases cited in Oettinger v. Stewart, 24 Cal.2d 133, at page 138, 148 P.2d 19, 156 A.L.R. 1221, and expressly overruled. In so far as they hold that the only duty owed to a known trespasser is to refrain from wilful or wanton acts, they must be deemed to have been overruled.

[3] Appellant nevertheless contends that, whatever the law may be as to land owners, it is logically absurd to apply the reasonable care test to trespassers on automobiles because of the so-called guest law embodied in section 403 of the Vehicle Code. Under that statute the operator of a vehicle is only liable to a guest where the injury results from intoxication or wilful misconduct of the driver. Appellant contends that if a truck driver has a guest riding with him, and a trespasser jumps on the truck and his presence is known to the driver, and if the driver is guilty of ordinary negligence resulting in injuries to the guest and to the trespasser, that if the reasonable care test be applied to the known trespasser, the trespasser can recover while the guest could not. Therefore, says appellant, the only fair test to apply to trespassers on motor vehicles, known to the driver, is the wilful or wanton test. The example is, of course, different from the factual situation

here present. It is conceivable that when such a problem is presented to the courts that it might be held that a known trespasser riding on a truck is there by implied invitation and is therefore a guest within the meaning of section 403 of the Vehicle Code. But even if the logically absurd result envisaged by appellant were to be reached in such a case, it would be no more absurd than many other factually absurd situations created by the guest law. Thus, if a guest is riding in a car, and a stranger to the driver is crossing the street, and the driver is guilty of negligence, and such negligence results in injury to the guest and to the stranger, the stranger can recover but the guest, to whom a high moral duty is owed, cannot recover. If the wilful or wanton test were applied to the present case it would mean that if Fernandez was a trespasser, he could not recover unless the jury found that the truck driver was guilty of wilful or wanton conduct simply because Fernandez touched the door handle, but had he not touched it he could recover if the truck driver was guilty of ordinary negligence. Such a result would be more absurd, logically, than the result given in example presented by appellant. The complete answer to this contention of appellant is that the guest law is statutory. For reasons known to it the Legislature determined to limit liability of host drivers to guests. Section 403 of the Vehicle Code is limited to guests. Section 1714 of the Civil Code is of equal importance, and there the Legislature has seen fit to adopt the rule of ordinary care. That section applies except where section 403 of the Vehicle Code has changed the law.

[4] In the instant case we are not concerned with passive negligence at all. If there was any negligence it was active negligence. Whether Fernandez was a licensee, invitee or trespasser, it should have been left to the jury to determine whether appellant knew or should have known of his presence. The jury should also have been instructed that if they found appellant knew or should have known of Fernandez's presence, then appellant was under a duty to exercise that degree of care a reasonably prudent man would have exercised under the circumstances. To instruct the jury that Fernandez was a trespasser towards whom the only duty was to refrain from wilful acts was clearly erroneous and palpably prejudicial.

The order granting the new trial is affirmed.

BRAY, J., and SCHOTTKY, Justice pro tem., concur.

35 Cal.2d 550

HOUSING AUTHORITY OF CITY OF EUREKA v. SUPERIOR COURT IN AND FOR HUMBOLDT COUNTY.

Sac. 6097.

Supreme Court of California, in Bank.
June 21, 1950.

Rehearing Denied July 20, 1950.

The Housing Authority of the City of Eureka, petitioner, filed an application for a writ of prohibition to restrain the Superior Court of the state of California, in and for the County of Humboldt, respondent, from taking any further action in connection with two cases pending before it in which certain taxpayers of city sought to require city clerk to accept and file a referendum petition and sought to enjoin members of city council from proceeding with housing program. The Supreme Court, Edmonds, J., held that resolution of city council approving Housing Authority for city was not subject to referendum provisions and that members of council could not be enjoined from approving acts of the authority in carrying out a housing program for city, and that therefore a peremptory writ of prohibition would issue.

Writ issued.

Shenk and Carter, JJ., dissented in part.

1. Prohibition 🔑3(1), 5(1), 10(1)

To justify issuance of writ of prohibition, it must be shown that act sought to be restrained is judicial in nature, that there is a lack or an excess of jurisdiction, and that there is no other adequate remedy. Code Civ. Proc. §§ 1068, 1074, 1102.

2. Certiorari 🔑28(1)
Prohibition 🔑10(1)

Generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari.

3. Municipal corporations 🔑108.7

The power of referendum applies only to those acts of a city council that are legislative in character, and executive or administrative acts are not within the scope of that remedy.

4. Health 🔑21

The United States Housing Act and the Housing Authorities Law are constitutional. United States Housing Act of 1937, §§ 1–30, 42 U.S.C.A. §§ 1401–1430; Gen. Laws, Acts 3483–3485.

5. Municipal corporations 🔑108.9

Where the sole basis for a determination by a city council is whether a certain contingent effect exists to warrant local application of state legislation, the exercise of that authority is "administrative" and not "legislative" and therefore not subject to a referendum.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Administrative" and "Legislative".

6. Municipal corporations 🔑108.8

The words "ordinance" or "measure" as used in provision of city charter that referendum procedure shall apply to any "ordinance" or "measure" adopted by city council, are synonymous, each meaning a legislative enactment.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Measure" and "Ordinance".

7. Municipal corporations 🔑108.6
Prohibition 🔑5(3)

A resolution of city council approving Housing Authority for city, was not an "ordinance" or "measure" within meaning of provision of city charter that referendum procedure shall apply to any "ordinance" or "measure" adopted by city council, and prohibition would lie to restrain Superior Court from taking any further action in taxpayer's action to require city clerk to accept and file referendum petition and in suit by taxpayers to enjoin members of city council from proceeding with housing program. United States Housing Act of 1937, §§ 1-30, 42 U.S.C.A. §§ 1401–1430; Gen. Laws, Acts 3483–3485.

◆

Woodman, Leddy & Sautter and Stanley Woodman, Eureka, for petitioner.

William A. O'Brien, San Francisco, amicus curiae on behalf of petitioner.

E. S. Mitchell, Eureka, for respondent.

EDMONDS, Justice.

By writ of prohibition, the petitioner is seeking to restrain the superior court from taking any further action in connection with two cases pending before it. The litigation under attack stems from the Authority's application to the federal government for a loan of money to be used in the construction of low-rent public housing, and the principal question here presented for decision is whether the city council of Eureka, in approving the transaction, was acting in an administrative or in a legislative capacity.

The United States Housing Act of 1937, 42 U.S.C.A. §§ 1401–1430, established a federal housing agency authorized to make loans to state agencies for the purpose of slum clearance and low-rent housing projects. The California Legislature made the benefits of the federal act available to the cities and counties of this state by enacting the Housing Authorities Law, Stats. 1938, Ex. Sess. p. 9, Deering's Gen. Laws 1939 Supp. Act 3483. This statute expressly recognizes the existence of slum and substandard living areas within the state, and ennunciates the government's intention to eliminate them. The legislation created in each city and county of the state a public housing authority, of which the petitioner is one. The exercise of the powers entrusted by the Legislature to these agencies was made subject to the preliminary condition that the local governing body, in each case, must formally resolve that public housing is needed. Subject to this condition precedent to operation, each local authority is given extensive powers to administer the state and federal statutes. The Legislature also enacted two statutes, Stats. Ex. Sess. 1938, pp. 1, 2, Deering's Gen. Laws 1939 Supp. Acts 3484, 3485, authorizing cooperation of the cities and counties with the local housing authorities in reference to tax exemption, dedication of streets, the exercise of eminent domain and other functions.

The federal Housing Act of 1937, as amended in 1949, Public Law 171, 81st Congress, requires, among other things, that the governing body of any municipality in which a Housing Authority has been established must approve its application for a loan. Other conditions for obtaining federal funds are a "No Litigation Certificate" and an agreement between the governing body and the Authority providing for local cooperation.

The Housing Authority of Eureka was approved by Resolution No. 3720 of the city council, which recognized the need for such agency. Eventually the Authority applied to the federal Public Housing Administration for a preliminary loan in the amount of $150,000 to cover the costs of surveys and planning in connection with the development of 500 dwelling units of low rent housing. The city council by resolution approved the application. The resolution, after reciting that the Authority had applied for a federal loan, stated, "* * * there exists in the City of Eureka a need for such low-rent public housing at rents within the means of low-income families, especially families of living or deceased veterans and servicemen * * * and * * * such a condition constitutes a menace to the health, safety, morals and welfare of the inhabitants of the City. * * *" The resolution also declared that the application was approved upon "* * * the distinct understanding that the City of Eureka shall not be obligated to the United States Government or the PHA [Public Housing Administration] for the repayment of any preliminary loans or any other loans or advances made to the local Housing Authority."

Shortly after this resolution was adopted, the City of Eureka and the Authority entered into a cooperation agreement in accordance with the requirements of the applicable statutes. By this contract, the city declared that "Under the constitution and statutes of the State of California, all Projects are exempt from all real and personal property taxes and special assessments levied or imposed by any Taxing Body" for the duration of the facilities' use for low-rent housing purposes or the period during which any bonds issued in connection with the housing should remain outstanding. The city also accepted the standard covenants under the federal law that it would provide the residents of the housing areas public facilities including educational, fire, police and health protection services; sewer systems; maintenance of public streets; street lighting; and garbage disposal. The City also agreed to grant easements, waive certain building laws and within five years to condemn " * * * unsafe or insanitary dwelling units situated in the locality or metropolitan area of the City substantially equal in number to the number of newly constructed dwelling units provided by such Project. * * *"

Upon the filing of these documents, the United States Public Housing Administration issued to the local Authority a Program Reservation whereby the sum of $58,000 was reserved to the Authority for a period of 90 days, conditional upon its being able to furnish a "No Litigation Certificate." On the following day, a referendum petition bearing 1822 signatures was presented to the clerk of the city of Eureka, praying for the submission to the electorate of the question of acceptance or rejection of the resolution of the city council approving the Authority's application for a loan. The referendum petition was filed in reliance upon section 43½ of the Freeholders Charter of Eureka, which provides, in part, as follows:

"If within * * * thirty days a petition * * * signed by [the required number of] qualified electors * * * is filed with the City Clerk, asking that any [ordinance or measure] adopted by the City Council, be submitted to the electorate, then such ordinance or measure must either be repealed or submitted to the electors for approval or rejection * * *; and if such ordinance or measure has not gone into effect before the filing of such petition or petitions, and said petition or petitions are signed by qualified electors of the city, in number equal to 15 per cent of said registration, then such ordinance or measure shall not go into effect until and unless adopted at such election. * * *" The petition which is here in controversy was signed by more than 15% of the electorate.

The city clerk refused to receive or file the petition. Certain electors of the city, acting on their own behalf and also for others similarly interested, then commenced an action in mandate for the purpose of requiring the city clerk to accept and file the referendum petition. Omicini v. Shanahan, No. 24,402. The same group of electors also sued to enjoin the members of the city council from proceeding with the housing program initiated and being carried out by the Authority. Cannam v. Local Housing Authority, No. 24,485. In the first action the superior court issued an alternative writ of mandate. In the second one it ordered the members of the city council to show cause why they should not be enjoined from taking any action in connection with the housing program.

As grounds for relief in the present proceeding, the Authority and the city clerk contend that the provisions of the charter of Eureka are inapplicable to the action of the city council in adopting Resolution 3911 because that body acted under the Federal Housing Act and the Housing Authorities Law of California. The action of the city council was administrative in nature, the Authority argues; therefore the superior court has no jurisdiction to issue a writ of mandate. Another point relied upon is that more than 30 days have elapsed since the resolution was adopted and the question as to the city clerk's duty to accept the referendum petition has become moot. As *amicus curiæ* on behalf of the petitioner here, the Housing Authority of the City and County of San Francisco insists that this proceeding is the only remedy available to prevent the destruction of the Eureka housing program and perhaps of similar programs throughout the state. The superior court has no jurisdiction, it declares, either to require the city clerk of Eureka to file the referendum petition or to enjoin the members of the local legislative body.

Peter Omicini and Curr W. Cannam, who are suing in the superior court, on their own behalf and for the other signatories of the referendum petition, insist that the superior court is not exceeding its jurisdiction, in that it has general power to entertain a mandate proceeding and has not yet issued a peremptory writ. It is argued that this court should not anticipate the final judgment of the superior court, since "An Alternative Writ of Mandate is merely a process which brings the matter before a judicial tribunal," and the superior court has jurisdiction to interpret any provision in the city charter. As further grounds for denying relief, it is argued that section 43½ of the city charter requires the city clerk of Eureka to accept and file any referendum petition presented, the resolution of the city council is of local interest only, and the Authority is responsible for delaying the mandate proceeding by requesting a continuance.

[1] To justify the issuance of a writ of prohibition, it must be shown that the act sought to be restrained is judicial in nature, Quinchard v. Board of Trustees, 113 Cal. 664, 45 P. 856; Duke v. Justice's Court, 42 Cal.App.2d 178, 108 P.2d 707; that there is a lack or an excess of jurisdiction, C.C.P. §§ 1068, 1074, 1102; Brock v. Superior Court, 29 Cal.2d 629, 177 P.2d 273, 170 A.L.R. 521; Howard v. Superior Court, 25 Cal.2d 784, 154 P.2d 849, and that there is no other adequate remedy, Golden State Glass Corp. v. Superior Court, 13 Cal.2d 384, 90 P.2d 75; Consolidated Adjustment Co. of California v. Superior Court, 189 Cal. 92, 207 P. 552; Fletcher v. Superior Court, 79 Cal.App. 468, 250 P. 195.

In the present case it is obvious that in entertaining an action in mandate or for an injunction, the superior court is performing judicial functions. As to the adequacy of any other remedy, it is alleged and not denied that the federal Public Housing Authority issued to petitioner a program reservation of $58,000 for use in effecting the plans and surveys, conditioned upon its being able within 90 days to furnish a "No Litigation Certificate". An extension of time has been granted until there has been a decision in the present proceeding. It is alleged and not denied that funds reserved by the federal government for the Eureka project will not be available if the certificate cannot be provided within the time as extended. Thus, even if the lower court eventually denies a peremptory writ of mandate and refuses to enjoin the city council, the inevitable passage of time may have destroyed petitioner's hopes of obtaining the desired federal low-cost housing plan. It is clear, therefore, that the petitioner's only adequate remedy in this case is the relief which is asked in the present proceeding.

Whether the third and basic requirement for prohibition, that the tribunal be acting without or in excess of jurisdiction, is present, depends upon the legal nature of the city council's act in adopting its resolution approving the Authority's application for a federal loan.

[2] "Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis,* are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on *certiorari* * * * [A] tribunal has jurisdiction to determine its own jurisdiction. * * * But once the tribunal, judicial or administrative, has made this determination of the issue, and has acted to assume jurisdiction of the cause, the rule no longer has any meaning. *The jurisdiction to determine jurisdiction has been fully exercised* by a determination in favor of jurisdiction over the cause; the question is no longer jurisdiction to *determine,* but of jurisdiction to *act.*" Abelleira v. District Court of Appeal, 17 Cal.2d 280, 291, 303, 109 P.2d 942, 948, 132 A.L.R. 715.

In the present case, upon the petition of certain electors, the superior court issued an alternative writ of mandate and an order to show cause. It has therefore assumed jurisdiction of the cause and exercised its jurisdiction to determine its own jurisdiction.

[3] The power of referendum applies only to acts that are legislative in character; executive or administrative acts are

not within the scope of that remedy. Essick v. City of Los Angeles, 34 Cal.2d 614, 213 P.2d 492; Kleiber v. City & County of San Francisco, 18 Cal.2d 718, 722, 117 P.2d 657; Hopping v. Council of City of Richmond, 170 Cal. 605, 150 P. 977. If the resolution of the city council was administrative in nature, the superior court has no jurisdiction to entertain an action for the purpose of requiring submission of that resolution to a referendum vote. If on the other hand, the resolution was a legislative act, then it is clear that section 43½ of the city charter required the city clerk to accept and file the petition presented to her and the superior court may implement that provision.

[4] The United States Housing Act of 1937 is constitutional, City of Cleveland v. U. S., 323 U.S. 329, 333, 65 S.Ct. 280, 89 L.Ed. 274, as is the Housing Authorities Law of the State of California, Housing Authority of the County of Los Angeles v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794. These statutes were analyzed in Kleiber v. City and County of San Francisco, 18 Cal.2d 718, 724, 725, 117 P.2d 657, 660, as follows:

"* * * [T]his court, in determining that the Housing Authorities Law was constitutional, necessarily established that its public purpose and policy was to be effective throughout the state. * * * The act also prescribed the powers, duties and obligations of the authority and of the city in carrying out its salutary purposes. Every necessary legislative act was completed by the legislature. There was nothing left to do except to administer the law. * * * To gain those advantages the city must proceed in the manner specified in the act. Furthermore, since the statute is the only authority under which the city may act in the premises, and the subject matter of the action is of more than local concern, the city is bound to proceed in accordance therewith. * * *

"Pursuant to the act the housing authority and the city may contract to put into effect the purposes and aims of the law. [Listing duties and powers of the city.] It is clear that all of these matters are administrative only for the purpose of giving state-wide effect to the declared legislative policy, and are therefore acts which the legislature may delegate as provided by the statute."

[5] The Kleiber decision is not limited by the language of the San Francisco charter; in broad terms the court determined the nature of local government's acts. When the sole basis for a determination is whether a certain "contingent effect" exists to warrant local application of state legislation, the exercise of that narrow authority is an administrative act and not a legislative one. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S. Ct. 216, 81 L.Ed. 255; J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 48 S. Ct. 348, 72 L.Ed. 624; Kleiber v. City & County of San Francisco, 18 Cal.2d 718, 723, 117 P.2d 657; Housing Authority of Los Angeles County v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794.

[6] Further, it is clear from the wording of the City Charter of Eureka that the electors of that city and the legislators in approving the charter did not intend to extend power of referendum to administrative acts. Section 43½ provides that the referendum procedure shall apply to any "ordinance or measure" adopted by the city council. "The words 'ordinance' and 'measure' are synonymous, each meaning a legislative enactment." Whitmore v. Carr, 2 Cal.App.2d 590, 593, 38 P.2d 802, 804; State ex rel. Johnson v. Chandler, 105 Ohio St. 499, 138 N.E. 67, 69; Essick v. City of Los Angeles, 34 Cal.2d 614, 213 P.2d 492; City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 193, 50 P. 277; McPherson v. Richards, 134 Cal.App. 462, 466, 25 P.2d 534; Weisman v. Board of Building & Safety Com'rs., 85 Cal.App. 493, 259 P. 768. The use of the terms "ordinance" and "measure," clearly show the intent to allow the referendum powers to be used only to review legislative action of the city council. A charter giving a small group of electors the right to demand a vote of the people upon every administrative act of the city council would place municipal government in a straight-jacket and make it impossible for the city's officers to carry on the public business.

But assuming that the Charter of Eureka goes that far, its provisions have been superseded by the more recent state legislation which extends the benefits of the federal housing act to the cities and counties of this state. As held in the Kleiber case, supra, the actions of local governing bodies under the statewide housing laws "* * * are administrative only for the purpose of giving state-wide effect to the declared legislative policy * * *."

[7] For these reasons, the resolution of the city council is not subject to the referendum provisions of the municipal charter and the members of the council may not be enjoined from approving the actions of the authority in carrying out a housing program for the City of Eureka. A peremptory writ of prohibition will issue accordingly.

GIBSON, C. J., and TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

SHENK, Justice (concurring and dissenting).

I concur in the order that the writ of prohibition issue but I do not agree with the reasons on which it is based.

It was clearly announced in Housing Authority of Los Angeles County v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794, and Kleiber v. City and County of San Francisco, 18 Cal.2d 718, 117 P.2d 657, that a measure such as is here sought to be subjected to the referendum is but an administrative step to be taken by the local body under the Housing Authorities Law, Stats. 1938, Ex.Sess. p. 9, Deering's Gen.Laws 1939 Supp.Act 3483.

One of the contentions of the respondent is that the electors of the city have the right to vote on the question whether the city council properly found that there was a slum area and a need of low-rent housing. But that point in the housing project has long since passed. The Housing Authorities Law provides: "§ 4. Creation of Housing Authorities. In each city (as herein defined) and in each county of the State there is hereby created a public body corporate and politic to be known as the 'housing authority' of the city or county; provided, however, that such authority shall not transact any business or exercise its powers hereunder until or unless the governing body of the city or the county, as the case may be, by proper resolution shall declare at any time hereafter that there is need for an authority to function in such city or county." Provisions follow relative to the methods by which the proceeding for investigation and determination of the need may be initiated and concluded. The section then provides: "In any suit, action or proceeding involving the validity or enforcement of or relating to any contract of the authority, the authority shall be conclusively deemed to have become established and authorized to transact business and exercise its powers hereunder upon proof of the adoption of a resolution by the governing body declaring the need for the authority. * * *"

The petition for the writ of prohibition alleges: "That at all times herein mentioned Housing Authority of the City of Eureka was and is a public corporation properly constituted and validly functioning by authority of the Housing Authorities Law of this State, and Resolution No. 3720 of the said City of Eureka." No attempt was made to subject that resolution to the referendum and its validity is not properly under attack here. The allegation admits that the initial step provided for in section 4 of the Housing Authorities Law has been duly taken and has established the Housing Authority of the City of Eureka as a functioning arm of the state to carry out the objectives of the state law.

The injunction proceeding in the Kleiber case involved an attack upon the validity of contracts entered into by the similarly established Housing Authority of the City and County of San Francisco. Neither that case nor any other case should be deemed to have decided that the initial action establishing the housing authority under section four is an administrative act. The action of the governing body under section 4 is undoubtedly a legislative act subject to the referendary provisions of the city charter. That is to say, when the city council by resolution decided to proceed under the state law pursuant to the procedures there provided and made its determination that there was need for a housing authority in the city of Eureka, it was exercising a legislative function. All steps taken thereafter pursuant to the statute as indicated in the Kleiber decision, are administrative and the electors of the city have no referendary power under the city charter to interfere with the performance of those powers and duties. It would follow that the action of the city council here involved is not subject to the referendary provisions of the city charter.

The majority appear to accept Kleiber v. City and County of San Francisco, supra, 18 Cal.2d 718, 117 P.2d 657, and Hopping v. Council of City of Richmond, 170 Cal. 605, 150 P. 977, as settling in all cases that the power of referendum may be exercised only as to legislative acts. The Kleiber case did not involve the reserved power by the electorate. The Hopping case involved the referendary provision of the Richmond city charter and the decision was confined to the express language of that organic instrument. It was recognized, however, 170 Cal. at page 611, 150 P. 977, that if the reserved powers in the charter exceeded those reserved in the constitution, the effect of the charter would be to give to the electors of the city the additional reserved powers. The court should not now foreclose the question which was thereby left open when it is not necessary to do so. I therefore do not agree with the statement of the majority that the "power of referendum applies only to acts that are legislative in character; executive or administrative acts are not within the scope of that remedy." The people of the state might constitutionally provide for a referendum on administrative measures, however impractical that might prove to be. Also a city through a freeholders' charter—its fundamental law—could expressly provide for a referendum on administrative measures that are of local concern.

Nor do I agree with the majority declaration that the words in the charter used in the disjunctive, namely, "ordinance or measure", mean one and the same thing. Quite often powers of a city, even those legislative in character, may be exercised by resolution. Under the language of the charter of the City of Eureka, a resolution would be a "measure" as distinguished from an "ordinance."

It is unnecessary in this proceeding to determine the extent of the reserved powers of the city under its charter for the reason that in acting in the matter now sought to be subjected to the referendum the city is merely performing an administrative act pursuant to a statute which provides the implements to carry out a project which, once duly initiated, is a matter of more than local concern.

CARTER, Justice.

I concur in the conclusion reached, and agree with the view expressed by Mr. Justice Edmonds to the effect that the resolution involved an administrative matter and was therefore not subject to referendum. However, I see no necessity for going further and holding that, because the housing authority law is of statewide concern, it is not subject to referendum. That may well be one factor in determining whether an act is administrative or legislative. If the law is of a statewide nature, then even a charter city has no word in policy questions which are involved in legislation of this character.

I agree with Mr. Justice Shenk that "measure" and "ordinance" are not synonymous where both are used coupled by the disjunctive "or".

Rehearing denied; SHENK, J., dissenting.

98 Cal.App.2d 106

DUVALL et ux. v. T. W. A., et al.

No. 14236.

District Court of Appeal, First District,
Division 1, California.

June 15, 1950.

Rehearing Denied July 15, 1950.

Action by Whitney Duvall and Alberta Duvall against T. W. A., Texaco Company, and others for Eugene Flaucher, injuries allegedly sustained in a collision between automobile driven by plaintiff Whitney Duvall in which plaintiff Alberta Duvall was a passenger, with a gasoline truck owned by defendant Texaco Company. The Superior Court of the city and county of San Francisco, Frank T. Deasy, J., rendered judgment for plaintiffs but by order limited liability of defendant Texaco Company under Vehicle Code, § 402(b), to $10,000, and defendants appealed and plaintiffs appealed from the order. The District Court of Appeal, Schottky, J., pro tem, held that evidence supported implied finding that crossing collision was proximately caused by negligence of defendant Eugene Flaucher, the driver of the gasoline truck and that plaintiff Whitney Duvall was not contributorily negligent, where defendant Eugene Flaucher turned into intersecting highway on which automobile was driven wrongfully to left, instead of right, of dividing line and of triangular island and plaintiff Whitney Duvall was entitled to presumption that he took ordinary care for his own concern in that he sustained a brain injury causing loss of memory, and award to first plaintiff Whitney Duvall of $35,000 and award to plaintiff Alberta Duvall of $85,000 for injuries sustained was not excessive.

Judgments and order affirmed.

1. Negligence 🔑122(1)

The burden of proving contributory negligence is upon defendant.

2. Negligence 🔑135(1)

Contributory negligence may be found by the trier of fact from plaintiff's own evidence.

3. Negligence 🔑136(9, 26)

Contributory negligence is not established as matter of law unless the only reasonable hypothesis is that such negligence exists and reasonable men could have drawn that conclusion and none other, and where there are different inferences that may be drawn, one for and one against, the one against will be followed, and before it can be held as a matter of law that contributory negligence exists evidence must point unerringly to that conclusion.

4. Appeal and error 🔑909(6)

Where there is no evidence to the contrary, District Court of Appeal may presume that Division of Motor Vehicles properly performed its duty in granting motorists an operator's license.

5. Automobiles 🔑242(8)

Where plaintiff by reason of injuries resulting from automobile accident is unable to testify as to the circumstances surrounding the accident due to loss of memory from brain injury he is entitled to a presumption that he exercised due care.

6. Evidence 🔑53
Trial 🔑139(1)

A presumption is in itself a species of evidence and it is for the jury to say whether it has been overcome by evidence to the contrary.

7. Evidence 🔑589, 594

Fact is proved as against party when it is established by uncontradicted testimony of party himself or of his witnesses, under circumstances which afford no indication that testimony is product of mistake or inadvertence and when fact so proved is wholly irreconcilable with presumption sought to be invoked, latter is dispelled and disappears from case.

8. Automobiles 🔑244(36, 43)

In action for injuries sustained by motorist, when driving approximately 35 miles an hour during daytime in southerly direction on inner lane of four lane highway, in an intersectional collision with gasoline truck, coming from west and attempting to turn north at approximately 20 miles an hour, but entering intersection wrongfully to left, instead of right, of dividing line and of triangular island, evidence supported implied finding of jury that proximate cause of accident was negligence of truck driver and that motorist was not contributorily negligent where motorist was entitled to presumption that he exercised due care because of brain injury sustained in accident causing loss of memory.

9. Damages 🔑208(1)
New trial 🔑162(1)

Determination of amount of damages to be awarded to a plaintiff is primarily a question for the jury, under proper instructions from the court, and trial judge who in passing upon motion for new trial is in effect the 13th juror, may reduce amount of judgment if he deems it to be excessive, by granting a new trial unless plaintiff agrees to such reduction.

10. Appeal and error 🔑1004(3)

When a jury has fixed amount of damages and trial judge has impliedly approved award by denying a motion for a new trial, Appellate Court may interfere only if it appears from record, as a matter of law, that verdict was result of passion or prejudice.

11. Appeal and error 🔑1004(1)

The test to be applied by Appellate Court in determining whether damages awarded are excessive is a comparison of amount of verdict with evidence before trial court.

12. Evidence 🔑18

It is a matter of common knowledge and of which judicial notice may be taken, that purchasing power of the dollar is decreased to approximately one-half what it was prior to present inflationary spiral.

13. Damages 🔑132(7)

Award of $85,000 to woman 28 years old at time of accident, which caused brain concussion, three fractured ribs, multiple fractures of pelvic area, a comminuted fracture of right leg, rupture of bladder and many ligaments, tendons and nerves pulled out of place and broken, and woman was in serious danger of her life for most of the eight months she was in hospital and as a result of the injuries, her right leg was one inch and a half shorter than the other and there was a permanent distortion of the pelvic area and a steel wire was permanently in her leg and she could walk by taking only few steps at a time, was not excessive.

14. Damages 🔑132(7)

Award of $35,000 to 35 year old man for broken hip, a break in back of pelvis and at the sacroiliac joint, broken ribs and an occipital skull fracture, where as a result of the injuries he had a tremor and sustained a permanent distortion of the pelvic area and permanent impairment of the right sacroiliac area and was unable to smell anything so that he could no longer carry on his trade of baker, was not excessive.

15. Automobiles 🔑244(27), 249

In motorist's action for personal injuries sustained in a collision with gasoline truck, owned by gas company, evidence supported finding that driver was not an agent of gas company at time of accident hence liability of gas company was properly limited under statute to $10,000. Vehicle Code, § 402(a, b); Civ.Code, § 2300.

◆

Hadsell, Sweet, Ingalls & Murman, San Francisco, for appellants.

Melvin M. Belli, San Francisco, for respondents.

SCHOTTKY, Justice pro tem.

Defendants Transcontinental and Western Air, Inc., (hereinafter referred to as T. W. A.), The Texas Company (referred to in plaintiffs' complaint as Texaco Co.), and Eugene Flaucher, have appealed from judgments entered on verdict of the jury in favor of plaintiffs Whitney Duvall and Alberta Duvall, husband and wife, in an action to recover for personal injuries received in a truck and automobile collision at the intersection of Millbrae Road with the old Bayshore Highway in San Mateo County. The verdict was against all defendants, and the amount awarded Whitney Duvall was $35,000 and $85,000 was awarded Alberta Duvall. The trial court denied the motion of defendants for a new trial, but made an order limiting defendant Texas Company's liability to $10,000. Plaintiffs have appealed from the order so limiting the liability of defendant Texas Company.

Defendants' Appeal.

Defendants urge two grounds for a reversal of the judgments: (1) There was contributory negligence on the part of plaintiffs as a matter of law which precludes their recovery of damages; (2) The amounts of damages awarded were so grossly excessive as to indicate passion or prejudice.

The following is a fair summary of the facts relating to the accident, as shown by the record.

On February 15, 1948, at about 1:25 p. m., plaintiff Whitney Duvall was driving his 1933 De Soto sedan in a southerly direction along the old Bayshore Highway in San Mateo County. He and his wife, plaintiff Alberta Duvall, who was riding with him in the front seat, were returning to Burlingame from the San Francisco Airport where they had seen Mr. Duvall's mother off on a plane to Los Angeles. Bayshore is a four-lane highway, two northbound and two southbound, divided by a double white line. As they approached the intersection with the road which curves out from Millbrae they were driving approximately 35 miles an hour and were in the inner of the two southbound lanes. The weather was clear, and the roadways were dry and level. Millbrae Road runs into Bayshore Highway at an angle of about 90 degrees, but before reaching Bayshore it curves for several hundred feet. It is divided by a white line and a traffic island at the junction with Bayshore, and traffic on Millbrae Road is required to go to the right of the dividing line and the island to enter upon Bayshore. The left lane of Millbrae is for traffic turning right from Bayshore onto Millbrae.

Defendant Flaucher, an employee of defendant T. W. A., was driving a 28-ton, 16-wheel truck and semi-trailer loaded with 4000 gallons of gasoline, and owned by the defendant Texas Company, in an easterly direction on Millbrae Road. He was picking up speed as he rounded the "Millbrae curve" and as he approached the intersection of Millbrae Road with old Bayshore, he was, according to his testimony, traveling 20 miles an hour and may have been traveling 24 miles an hour at the time of the impact. In order to turn left onto Bayshore and go north, he entered the intersection to the *left,* instead of right, of the dividing line and of the triangular island designed to separate incoming and outgoing traffic, and crashed into the right side of the Duvall car. Flaucher testified that he did not see the Duvall car until just before he struck it and had not applied his brakes until then. Skid marks were found from the intersection line. There was evidence that his truck left tire burn marks on the curve before any brakes were applied, indicating that he may have been going at a greater rate of speed than he indicated in his testimony.

At the time of the trial, one year after the accident, both plaintiffs were suffering from retrograde amnesia and were unable to remember anything that had happened that day after they had left the airport. A witness for plaintiffs, Frank Ramsey, had gone to the airport in his own car to see Mr. Duvall's mother off on the plane and at the time of the accident was following about 100 feet behind plaintiffs on the Bayshore Highway. He testified that both cars were going approximately 35 miles an hour and traveling in the inner of the southbound lanes. He could not say whether or not Mr. Duvall turned his head to look for traffic from the Millbrae Road, but did see Duvall's car swerve slightly to the left over the double line about a second before the impact. Ramsey testified that he himself had seen the red tank truck of defendants when he was about 200 yards north of the intersection.

[1-3] Defendant's first major contention is that plaintiffs were guilty of contributory negligence as a matter of law which precludes their recovery of damages. Before discussing this contention, we quote the language of our Supreme Court in the recent case of Anthony v. Hobbie, 25 Cal. 2d 814, at page 818, 155 P.2d 826, at page 829: "Turning to the question of contributory negligence on the part of the decedent, certain rules must be remembered. The burden of proving contributory negligence is upon the defendant. 19 Cal.Jur. 697–699. True, contributory negligence may be found by the trier of fact from the plaintiffs' own evidence. But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be

drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion."

[4] Defendants point out that Mr. Duvall had never owned an automobile until a few weeks before the accident, and that he then bought a 1933 De Soto sedan, which defendants seem to delight in referring to with great frequency as a "jalopy." However, the record shows that this automobile was in good mechanical condition and that its brakes had been relined a few months before. Defendants then assert that Duvall got his first operator's license a few days after he bought the car and that up to the time of the accident he had apparently taken no driving lessons nor had he in any way acquired any skill in the operation of the old De Soto by driving it on the highway. However, the record shows Duvall testified: "I purchased the car before I got this driver's license. I had a driver's license before that." Furthermore, there is nothing in the record to show that plaintiff Duvall needed any driving lessons or lacked skill in driving. Even though he had never owned a car before, he may like countless others, have operated the automobiles of others. Also, we are justified in presuming, where there is no evidence to the contrary, that the Division of Motor Vehicles properly performed its duty in granting him an operator's license. It is hardly likely that he would have attempted to drive his mother from Burlingame to the San Francisco Airport if he had a broken-down jalopy and did not know how to operate it.

Defendants then admit that defendant Flaucher entered the old Bayshore Highway at 20 miles an hour and to the left of the traffic island, but claim that it would not have made any difference if he had gone to the right as "Mr. Duvall just wasn't looking out for anything and apparently was not even aware of the red Texaco truck which Mr. Ramsey [who was following about 100 feet behind the Duvalls] had been observing for some time." Defendants admit the negligence of defendant Flaucher, and then assume that plaintiff Duvall was paying no attention. Defendant Flaucher was coming into the old Bayshore Highway on the Millbrae Road and plaintiff Duvall would certainly have a right to assume that the driver of the truck would not violate the law and cut into the highway on the left side of the traffic island. In view of the evidence here presented and the rule as to contributory negligence, it is difficult to understand how defendants seriously can contend that such evidence shows contributory negligence on the part of plaintiff Whitney Duvall as a matter of law.

[5-8] Even though there were no presumption that plaintiff Duvall took ordinary care for his own concern, we believe that the record amply supports the implied finding of the jury that the proximate cause of the accident was the negligence of defendant Flaucher and that there was no contributory negligence on the part of plaintiff Duvall. But the instant case is one in which a plaintiff by reason of injuries resulting from the accident is unable to testify as to the circumstances surrounding the accident due to loss of memory from brain injury, and in such a case he is entitled to a presumption that he exercised due care. This presumption is in itself a species of evidence and it is for the jury to say whether or not it has been overcome by evidence to the contrary. In Scott v. Sheedy, 39 Cal.App.2d 96, this court said, at page 101, 102 P.2d 575, at page 578: "Under the circumstances, in view of the reason for the rule as stated in the Westberg case [Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590], we feel it can make no difference whether the injured party dies or is incapacitated by loss of all memory of the circumstances of the accident, the result of brain injury from the collision. In other words, notwithstanding the evidence from other witnesses, 'all possible facts both in favor of and against the alleged negligence of the plaintiff' (Westberg v. Willde, supra) were not before the court. In this case no witness could have testified that plaintiff saw the danger. A witness might place him in a position from which an inference might be drawn that he could see or realize dan-

ger, but that would not be sufficient if a reasonable inference otherwise could be drawn. If the acts and conduct of an incapacitated party must be testified to by other witnesses, we conclude that the test given in the Westberg case and in Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 210 P. 269, is proper. In the Mar Shee case, the court, 190 Cal. at page 9, 210 P. at page 273, said: '* * * we deduce that a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case.'"

We conclude, therefore, that there is no merit in defendants' contention that there was contributory negligence on the part of plaintiffs which precludes their recovery of damages.

Defendants' next contention is that the sums of $35,000 and $85,000 awarded to Mr. and Mrs. Duvall, respectively, were so grossly excessive as to indicate passion or prejudice on the part of the jury and thus to require a reversal of the judgments.

[9-12] The determination of the amount of damages to be awarded to a plaintiff is primarily a question for the jury, under proper instructions from the court. The trial judge, who in passing upon a motion for a new trial is in effect the thirteenth juror, may reduce the amount of the judgment if he deems it to be excessive by granting a new trial unless the plaintiff agrees to such reduction. But when a jury has fixed the amount of damages, and where, as here, the trial judge has impliedly approved the award by denying a motion for a new trial, an appellate court may interfere only if it appears from the record, as a matter of law, that the verdict was the result of passion or prejudice. As this court said in Gluckstein v. Lipsett, 93 Cal.App.2d 391, at page 400, 209 P.2d 98, at page 104: "The test to be applied in cases where it is contended that the damages awarded are excessive was stated by us in Buswell v. City and County of San Francisco, 89 Cal.App.2d 123 [page 127], 200 P.2d 115, 117, to be 'a comparison of the amount of the verdict with the evidence before the trial court.' Taking into consideration the disfigurement, the humiliation, the pain and the malignancy, we cannot say that the award of $115,000, large as it is, is so far out of line as to show passion and prejudice on the part of the jury. It is not a question of what we would award, Nason v. Leth-Nissen, 82 Cal. App.2d 70, 185 P.2d 880, but whether we can hold that it indicates that type of action by the jury. 'Generally speaking, * * * if there is substantial evidence in the record supporting the damages awarded by the jury and it is inferentially approved by the trial judge by his denial of a motion for new trial without reducing the damages, we are powerless to reduce them or to hold the award excessive.' Holmes v. Southern California Edison Co., 78 Cal.App.2d 43, 52, 177 P.2d 32, 37. In considering the amount of the verdict, we must bear in mind the present day situation as expressed in Kircher v. Atchison, T. & S. F. Ry. Co., 32 Cal.2d 176, 187, 195 P.2d 427, 434: 'It is a matter of common knowledge, and of which judicial notice may be taken, that the purchasing power of the dollar has decreased to approximately one half what it was prior to the present inflationary spiral [citing cases]. * * *'"

[13] Mrs. Duvall was 28 years of age when the accident occurred, and was apparently in good physical condition. Her injuries consisted of a brain concussion; three fractured ribs, one with a piece split off; multiple fractures of the pelvic area; a comminuted fracture (bone splintered and broken into many pieces) of the right leg; rupture of the bladder, and many ligaments, tendons and nerves pulled out of place and broken. She was delirious for several days after being admitted to the hospital, a number of drainage tubes were placed in her bladder, and opiates were continually administered for pain. During treatment she developed jaundice from the many blood transfusions, and a pulmonary embolus (blood clot on lungs) formed, as

well as thrombo phlebitis (clot in leg). Traction was placed on her leg. She was in serious danger of her life for most of the eight months she was in the hospital. At the time of trial, the right leg was smaller and an inch and a half shorter than the other, there was a permanent distortion of the pelvic area, a steel wire was permanently in her leg and she could walk by taking only a few steps at a time. She had pain in her back, was very uncomfortable when sitting, did not have full use of her right leg as the knee would not bend, and had little feeling in the lower part of her right foot. She had more painful headaches than previously, considerable heart palpitation at times, and some bladder trouble remained. It was testified to by Dr. E. W. Cleary, specialist in orthopedics, who attended Mrs. Duvall, that having a child would be a great threat to her life, and that further improvement in her condition was problematical. Dr. Cleary testified: "I think the chances are she will have pain, intermittently at least, the rest of her life. I don't think she will ever attain a degree of physical confidence so that she will have any considerable freedom of action. She may get well enough to get out of the wheelchair and discard her crutches and walk about her own home to a limited degree, but she will always be, in my opinion, under the hazards of acute complications of some sort or other, associated with the extensive damages she suffered."

Plaintiffs in their brief itemize the special damage to Mrs. Duvall at $46,016.13. There was some conflict as to whether she should be allowed a sum as compensation for loss of future earnings. She formerly worked as a beauty specialist in Chicago and more recently in California had been a clerk at Montgomery Ward & Company, though prior to the time of the accident she had left that job to care for a member of her family who was ill.

[14] Mr. Duvall, 35 years old and in good health prior to the accident, suffered a broken hip, a break in the back of the pelvis and at the sacroiliac joint, broken ribs and an occipital skull fracture. At the time of the trial he had frequent severe headaches, dizziness, backache, and fatigued quickly. He used a cane continuously because of back and hip pain when walking; "he walked with hesitation and a limp," his right leg would cramp, and he had a tremor due to a general nervousness. He had a permanent distortion of the pelvic area and permanent impairment of the right sacroiliac area. He also had been unable to smell anything since the accident. Dr. Cleary testified with respect to Mr. Duvall: "* * * it is reasonably probable that he will not be able to undertake any strenuous regular activity from now on. * * * In order to get this bone injury, he has to have had, at the time of the impact of the accident, violence enough so that he must have had a lot of tearing of ligaments and muscles in that area. There is the scar left there in that sort of tearing, from the spilling of blood into the tissue, which shrinks and turns into scar to a certain extent. I don't know how much those scars are going to affect him. Those scars do have a tendency to increase the pain, and to produce chronic pain, at age particularly." The loss of physical strength and loss of his sense of smell seemed to assure plaintiff of the fact that he could no longer carry on his trade of baker, the only one he knew and had ever followed. His special damages are itemized in plaintiffs' brief and total $103,364.60.

Many cases in which verdicts of juries have been reduced by appellate courts have been cited by defendants, but it would serve no useful purpose to discuss these cases as each case must be determined upon its own facts. Considering the extent of injuries suffered by plaintiffs as hereinbefore detailed, and applying the rules laid down by this court in Gluckstein v. Lipsett, supra, and in the still more recent case of Sullivan v. City and County of San Francisco, 95 Cal.App.2d 745, 214 P.2d 82, we are convinced that we may not say that, as a matter of law, the verdicts are excessive.

Plaintiffs' Appeal.

Plaintiffs have appealed from the order of the trial court limiting the liability of defendant Texas Company to the sum of $10,000. Plaintiffs contend that defendant Flaucher, the driver of the truck, was the agent, actual, ostensible or sub-agent of the defendant Texas Company, and thus coming within the exception of section 402(b) of the Vehicle Code its liability under section 402(a) was not limited.

Said section 402 provides: "(a) [In general.] Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages. (b) [Limitation of liability.] The liability of an owner for imputed negligence imposed by this section and not arising through the relationship of principal and agent or master and servant * * * is limited to the amount of ten thousand dollars ($10,000) with respect to the death of or injury to more than one person in any one accident * * *."

In the instant case the question of whether defendant Flaucher was an agent of the defendant Texas Company was not submitted to the jury, and no instructions upon that issue were requested or given. Counsel on both sides evidently preferred to have that matter determined by the court after the verdict, and it was so agreed in chambers. Thereafter the motion to limit the liability was made and in its order denying defendants' motion for a new trial the court included an order limiting the judgment to $10,000 as to defendant Texas Company.

[15] It was admitted that the truck was owned by the defendant Texas Company but denied that defendant Flaucher was an employee or agent of said defendant. The evidence showed that the truck was loaned to defendant T. W. A. by The Texas Company to be used in hauling products of The Texas Company. Gasoline was delivered to the T. W. A. bulk storage plant in San Mateo by defendant Texas Company and from there defendant T. W. A. transported its own gasoline to the airport in The Texas Company's truck. It was on one of these trips from the bulk storage plant to the airport that the accident occurred. Defendant Flaucher was at no time employed by The Texas Company and it had no control over him or over the truck which was garaged and fueled by T. W. A. Defendant Flaucher was actually an employee of T. W. A. and drove for its benefit exclusively. He was hired by T. W. A. to haul gasoline from one T. W. A. location to another.

Plaintiffs contend that defendant Flaucher was the obstensible agent of defendant Texas Company, and it was therefore liable for his torts under Civil Code section 2300, which provides: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him."

Plaintiffs point out that the truck was painted the typical bright red of The Texas Company truck, had its insignia upon the door and also that the license plates had been applied for by The Texas Company. Plaintiffs argue that by allowing Flaucher to drive the truck which so obviously belonged to The Texas Company it created in the minds of third persons the belief that Flaucher was its employee. There are of course instances in which an ostensible agency may be created by permitting a person to drive a truck under such conditions, but it cannot reasonably be contended that a motorist would be more likely to wish to collide with a truck bearing the insignia of The Texas Company than with one bearing any other insignia.

The question of whether defendant Flaucher was an agent of defendant Texas Company was a matter for the trial court to determine upon the evidence in the case. We believe that the record not only amply supports the conclusion of the trial court that defendant Flaucher was not an agent of defendant Texas Company but it is difficult to understand how it could have arrived at any other conclusion.

In view of the foregoing, the judgments appealed from are affirmed, and the order limiting the liability of defendant Texas Company to the sum of $10,000 is affirmed; plaintiffs to recover their costs on the appeal.

PETERS, P. J., and BRAY, J., concur.

---

98 Cal.App.2d 264

WARREN v. ALLEN et al.

Civ. 17686.

District Court of Appeal, Second District,
Division 2, California.

June 27, 1950.

Rehearing Denied July 12, 1950.

Hearing Denied Aug. 24, 1950.

Mayme Warren, also known as Mrs. Jack Raymond, brought action against D. Curry Allen and Jean Curry Allen to recover damages for injuries sustained by the plaintiff through defendants' negligence. The Superior Court, Los Angeles County, Harold B. Jeffery, J., gave judgment for the plaintiff and the defendants appealed. The District Court of Appeal, Moore, P. J., held that the evidence supported the implied findings of the jury.

Judgment affirmed.

1. Landlord and tenant 🔑169(6)

In action for damages by tenant for injuries sustained in descending stairway, evidence sustained finding that owner was negligent in failing to keep his premises free from hazards.

2. Appeal and error 🔑1001(1)

Where record showed substantial evidence which supported jury's verdict which trial court approved, judgment based thereon would not be disturbed on appeal.

3. Landlord and tenant 🔑169(11)

In action for damages by tenant for injuries sustained in descending stairway on owner's premises, where evidence was contradictory, question of contributory negligence was for jury.

A. G. Reily, Los Angeles, for appellants.

Joseph D. Taylor and Walter W. Heil, Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff recovered $4,000 as damages resulting from injuries suffered when descending a stairway while a tenant or invitee on the premises of defendants. Four grounds are assigned for reversal, none of which is established.

[1-3] Negligence in failing to keep the structure free from hazards was proved by the testimony of witnesses that the stairs were in a bad state of disrepair, a board was cracked, and the steps were loose. A receipt for rent of her apartment in same structure for the month including the day of her fall was introduced by respondent. The testimony of her physician proved the nature and extent of her injuries. The testimony of respondent showed that the accident was not due to her carelessness; that it occurred on the stairway, and that the fall was from the second step. In this she was corroborated by Miss Mitchell. Such evidence having been adopted by the jury was sufficient to establish respondent's tenancy, that her injuries proximately resulted from appellants' negligence and that they were reasonably worth the amount awarded. No fact was proved that necessarily required a finding of respondent's contributory negligence. That there was evidence contradictory of that which established respondent's claim does not impeach the implied findings and conclusion of the jury. The judgment derived from a verdict approved by the trial court will not be disturbed by the reviewing court if the record shows any substantial evidence in support thereof. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183. Whether respondent was guilty of contributory negligence was a question of fact for the jury. Harris v. Joffe, 28 Cal.2d 418, 423, 170 P.2d 454.

Appellants refer to certain testimony of witness Eggleston "by way of contradicting much of the testimony of plaintiff." Such conflicts were disposed of by the verdict. In their extended argument upon their thesis that respondent contributed negligence to cause her injuries they have cited numerous decisions. Citti v. Bava, 204 Cal. 136, 140, 266 P. 954; Lammers v. Pacific Electric Railway Company, 186 Cal. 379, 199 P. 523; Fidelity & Casualty Co. of New York v. Paraffine Paint Co., 188 Cal. 184, 204 P. 1076; Steinberger v. California Electric Garage Co., 176 Cal. 386, 394, 168 P. 570; Fugise v. Los Angeles Railway Company, 12 Cal.App. 212, 107 P. 317; Schwind v. Floriston Pulp & Paper Co., 5 Cal.App. 197, 89 P. 1066; Wood v. Los Angeles Railway Company, 172 Cal. 15, 21, 155 P. 68; Watwood v. Fosdick, 212 Cal. 84, 297 P. 881; Grazer v. Flannagan, 35 Cal.App. 724, 170 P. 1076; Goldstein v. Healy, 187 Cal. 206, 211, 201 P. 462. While they were proper matter for comment to the trial court, they have no relevancy after the facts have been established by the fact finders upon substantial evidence. Whether the defect was so obvious as to constitute a notice of its presence was disposed of by the verdict. If it was readily observable appellants in the exercise of ordinary care should have seen it and by the same token respondent could reasonably have assumed that appellants had repaired it. Andre v. Allynn, 84 Cal.App.2d 347, 351, 190 P.2d 949; Sommerfield v. Miratti, 49 Cal.App.2d 450, 454, 121 P.2d 746; Foster v. A. P. Jacobs & Associates, 85 Cal.App.2d 746, 754, 193 P.2d 971.

The testimony of the witness Eggleston impugning the character of attorney Heil was discredited and rejected by the jury. He admitted a conviction for a forgery, was inconsistent in his narrative of events and was contradicted by the attorney who testified in detail the matters discussed in their conferences. The witness' testimony having been rejected by the jury, Mr. Heils' conduct stood unimpeached, if it was ever relevant. If appellants were "prejudiced in the minds of the jury" it cannot be ascribed to any improper act of respondent's counsel, but rather to the testimony and behavior of the witness Eggleston.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

---

98 Cal.App.2d 158

SPRUCE v. WELLMAN et al.

Civ. 17320.

District Court of Appeal, Second District, Division 2, California.

June 22, 1950.

William J. Spruce brought an action against Irene E. Wellman and others to recover damages for personal injuries sustained as the result of a collision between an automobile driven by defendant Wellman and a truck owned by defendant telephone company and driven by its employee, defendant Connelly. The Superior Court, Los Angeles County, Harold B. Jeffery, J., granted plaintiff's motion for a new trial after a verdict was rendered in favor of the defendant telephone company and its employee, and from the judgment entered granting the new trial, the defendant telephone company and its employee appealed. The District Court of Appeal, Wilson, J., held that since the liability of the telephone company rested on the negligence, if any, of its employee, defendant Connelly, and the order granting the new trial was not effective, for want of jurisdiction, against defendant Connelly because of plaintiff's failure to serve notice of its motion for new trial on him, the order was also ineffective against the telephone company.

Reversed.

1. New trial ⚷138

Under statute requiring party to serve upon "adverse party" notice of his intention to move for new trial, term "adverse party" includes every party who will be adversely affected by granting of motion. Code Civ. Proc. § 659.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Adverse Party".

2. New trial ⚷136

Statute requiring service of notice of intention to move for new trial is mandatory, and court is without jurisdiction to reexamine issue of fact that has been tried or to change its decision thereon unless all parties to issue have been properly brought before it by service of required notice. Code Civ.Proc. § 659.

3. New trial 🔑½, 136

"Motion for new trial" is statutory proceeding, collateral to original proceeding, and constitutes new action brought to set aside judgment, and jurisdiction of parties, other than moving party, is obtained by service upon them of notice of motion. Code Civ.Proc. § 659.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Motion for New Trial".

4. Master and servant 🔑304, 332(5)
Principal and agent 🔑159(1), 195

Under theory of respondeat superior, the employee's responsibility is primary because he committed negligent act, if any was committed, and employer's responsibility is secondary in that he committed no moral wrong but is held accountable for his agent's conduct, and a finding that employee has done no wrong exculpates principal.

5. New trial 🔑138

In action to recover damages for personal injuries arising out of automobile collision, defendant driver was adverse party to any proceeding in which there was attempt to hold him liable after jury had declared he was blameless, and he was not affected by order granting new trial when he was not served with notice of motion for new trial. Code Civ.Proc. § 659.

6. Indemnity 🔑13(1)

In event of judgment against employer for damages occasioned by unauthorized act of negligence by its employee, employer may recoup its loss from employee.

7. New trial 🔑139

Where notice of motion for new trial was not addressed to employee and affidavit of service by mail did not show that service was made upon him personally or by service upon his attorneys, fact that same attorneys represented both employee and employer and service was made on attorneys for employer did not vest jurisdiction in court to make order affecting employee. Code Civ. Proc. § 659.

8. New trial 🔑163(1)

In action to recover damages for personal injuries brought against employer and employee, where liability of employer rested on negligence, if any, of employee, and order granting new trial was not effective against employee because of failure to serve notice of motion on employee, order was also ineffective against employer, even though employer had been served with notice of new trial. Code Civ.Proc. § 659.

9. New trial 🔑8

In action for personal injuries against driver of automobile in which plaintiff was riding and driver of other automobile and his employer, where driver of automobile in which plaintiff was riding was granted new trial but plaintiff had not served notice of motion for new trial on driver of other automobile, plaintiff was not entitled to have cause tried again as to all defendants. Code Civ.Proc. § 659.

Lawler, Felix & Hall, Leslie C. Tupper, Leland B. Conant, all of Los Angeles, for appellants.

Leonard Wilson, Los Angeles, for respondent.

WILSON, Justice.

Action for personal injuries against Irene E. Wellman, The Pacific Telephone and Telegraph Company, and Francis Shade Connelly, the latter's employee. After trial by jury a verdict was rendered in favor of defendants Telephone Company and Connelly. Judgment was entered on the verdict.

Plaintiff's injuries resulted from a collision between an automobile driven by Ernest L. Wellman and a truck owned by the Telephone Company and driven by Connelly while in the course of performing his duties as an employee.

In due time plaintiff filed a "notice of motion for a new trial" which is addressed: "To the Defendant, Irene Wellman and to her attorney, Clarence B. Runkle, and to the defendant, Pacific Telephone & Telegraph Company, a corporation, and to its attorneys, Lawler, Felix & Hall, Leslie C. Tupper and Leland B. Conant." The affidavit of service by mail recites that the notice of motion for a new trial was served on Irene Wellman and Pacific Telephone and Telegraph Company by mailing it to their respective attorneys, naming them. The notice is not addressed to Connelly and the affidavit of mailing does not state that it was mailed to him or to his attorneys.

The motion for a new trial was granted on the ground of insufficiency of the evidence to sustain or justify the verdict of the jury and the judgment entered thereon.

After the granting of the motion, plaintiff served a notice of the ruling addressed to all defendants *including Connelly* and the affidavit of service by mail states that the notice of ruling was served "on the Defendants in said action" by mailing to their respective attorneys.

Defendants The Pacific Telephone and Telegraph Company and Connelly have appealed from the order granting a new trial.

Plaintiff's action against the Telephone Company is based on the theory of *respondeat superior.* If Connelly is not liable the company is not liable. Since the notice of motion for a new trial was not addressed to Connelly he was not called upon to defend against the motion and the court was without power to grant it as to him. Nevertheless, the court's order is general in form, not specifying the parties upon whom it was intended to operate.

[1-4] "The party intending to move for a new trial must, * * * file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial, * * *." Code Civ.Proc., sec. 659. The term "adverse party" means and includes every party who will be adversely affected by the granting of the motion. In the absence of service on the adverse party of notice of intention to move for a new trial the superior court is without jurisdiction to grant the motion. An "adverse party" is one whose interest in the subject matter is adverse to or will be affected by the granting of the motion, and if the notice is not addressed to or served upon a person who is an adverse party the court cannot grant a new trial upon any issue affecting his interest. Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173, 194, 152 P. 542; Marshall & Stearns Co. v. Deneen Bldg. Co., 169 Cal. 229, 231–232, 146 P. 684. Section 659 of the Code of Civil Procedure is mandatory and the superior court is without jurisdiction to re-examine an issue of fact that has been tried or to change its decision thereon unless all parties to the issue have been properly brought before it by service of the required notice. Johnston v. City of San Fernando, 35 Cal.App.2d 244, 246, 95 P.2d 147. A motion for a new trial is "a new statutory proceeding, collateral to the original proceeding" and constitutes a new action brought to set aside the judgment. Fowden v. Pacific Coast Steamship Co., 149 Cal. 151, 154, 86 P. 178, 179. The parties to such collateral proceeding are determined by the notice of motion and "jurisdiction of the parties, other than the moving party, is obtained by the service upon them of such notice." Bell v. San Francisco Savings Union, 153 Cal. 64, 69, 94 P. 225, 227. The employee's responsibility is primary because he committed the negligent act, if any was committed, and the employer's responsibility is secondary in that he committed no moral wrong but is held accountable for his agent's conduct. Hence a verdict exonerating the agent must necessarily exonerate the principal, since the jury's declaration that the agent has done no wrong amounts to a declaration that the principal cannot be responsible for a wrong which the agent did not commit. Bradley v. Rosenthal, 154 Cal. 420, 423, 97 P. 875, 129 Am.St.Rep. 171.

[5] The court granted the motion for a new trial on the ground that the evidence was insufficient to sustain the verdict. Therefore by its order the court purported to hold that the evidence was insufficient to exonerate Connelly from negligence; but Connelly was an adverse party to any proceeding in which there was an attempt to hold him liable after the jury had declared he was blameless. Therefore, since he was not made a party to the new trial proceedings he is not affected by the order

granting a new trial any more than he could be bound by a judgment without service of summons and complaint upon him.

[6] Connelly was an interested party since, in the event of a judgment against the Telephone Company for damages occasioned by his unauthorized act of negligence, the company may recoup its loss from him. Bradley v. Rosenthal, supra; Myers v. Tranquility Irr. Dist., 26 Cal.App.2d 385, 389, 79 P.2d 419; Johnston v. City of San Fernando, supra, 35 Cal.App.2d at page 246, 95 P.2d 147.

[7] Since the notice was not addressed to Connelly and the affidavit of service by mail does not show that service was made upon him personally or by service upon his attorneys, the fact that the same attorneys represented both Connelly and the Telephone Company and service was made on the attorneys for the company did not vest jurisdiction in the court to make an order affecting Connelly. Estate of Pendergast, 143 Cal. 135, 138, 76 P. 962.

[8] Since the liability of the Telephone Company rests on the negligence, if any, of Connelly, no independent act of negligence on the company's part having been alleged or proved, and since the order granting the new trial was not effective for want of jurisdiction to disturb the verdict declaring Connelly was not negligent, the Telephone Company cannot be held to have been negligent and is exculpated by the exoneration of Connelly. The judgment entered on the verdict in favor of Connelly, which for the reasons above stated has become final, is a bar to any action by plaintiff against the company. Freeman v. Churchill, 30 Cal.2d 453, 461, 183 P.2d 4; Will v. Southern Pacific Co., 18 Cal.2d 468, 472, 116 P.2d 44. The court having been without jurisdiction to set aside the verdict as to Connelly, the employee, it was likewise without jurisdiction to set it aside as to the Telephone Company, his employer. Johnston v. City of San Fernando, supra, 35 Cal.App.2d at page 246, 95 P.2d 147.

[9] Plaintiff's only answer to defendants' argument is that the jury rendered a verdict against defendant Wellman upon which a judgment was entered and the court granted her motion for a new trial upon a notice of intention addressed to plaintiff and to defendants Telephone Company and Connelly, as a result of which a new trial must be had between plaintiff and defendant Wellman. Viewing the case "from a practical aspect," says plaintiff, since the case must be retried as between him and Mrs. Wellman, he should not be precluded from having the cause again tried as to all defendants. Inasmuch as the question as to the Telephone Company and Connelly is one of jurisdiction and not of "practical aspect" the cause must be determined upon long established legal principles.

The order granting a new trial in favor of plaintiff and against defendants The Pacific Telephone and Telegraph Company and Francis Shade Connelly is reversed.

MOORE, P. J., and McCOMB, J., concur.

---

98 Cal.App.2d 104

In re RIVE'S ESTATE.

KAEPPELIN et al. v. UNITED STATES.

Civ. 13872.

District Court of Appeal, First District, Division 1, California.

June 14, 1950.

Hearing Denied Aug. 10, 1950.

Proceeding in the matter of the estate of Philip Rive, deceased, wherein Paul Kaeppelin and Marie Josephine Jeanne Haffner contested the petition for final distribution on the ground that the will was void for the reason that the United States government had no capacity to receive distribution of the estate as a legatee. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered a decree of final distribution by which it was decreed that the entire estate should be distributed to the United States, and the contestants appealed. The District Court of Appeal, Peters, P. J., held that the legacy was void and the will was ineffective.

Decree of final distribution reversed.

1. United States ⚷55

The United States Government may not lawfully be named as a legatee under a will. Probate Code, § 27; U.S.C.A.Const. art. 6, cl. 2; Amend. 14, § 1.

2. United States ⚷55
Wills ⚷866

Where testator provided that in event of his death he desired his estate to go to the United States Treasury Department to assist in war effort, legacy was void and will ineffective, and estate would be distributed to heirs at law of decedent. Probate Code, § 27; U.S.C.A.Const. art. 6, cl. 2; Amend. 14, § 1.

◆

Robert E. Hatch, San Francisco, for appellants.

Hugh K. McKevitt, Joseph F. DeMartini, San Francisco, for respondent Romberger, executor.

George T. Washington, Assistant Solicitor General, Washington D. C., Frank J. Hennessy, United States Attorney, Robert B. McMillan, Assistant United States Attorney, San Francisco, John T. Fowler, Attorney, Department of Justice, Washington, D. C., for respondent United States.

PETERS, Presiding Justice.

Philip Rive, a resident of San Francisco, died testate on July 12, 1945, leaving an estate of about $116,000. The dispositive provision of his will provides that "In event of my death I desire my estate to go to U. S. Treasury Dept. to assist in war effort." Appellants, claiming to be a nephew and niece of decedent, and, as such, his next of kin and heirs at law, contested the petition for final distribution, contending that the will was void for the reason that the United States government has no capacity, under California law, to receive distribution of an estate as a legatee. After a hearing, the probate court entered its decree of final distribution by which it was decreed that the entire estate should "be and the same is hereby distributed to The United States of America." From this decree this appeal is taken.

[1] The sole question presented on this appeal is whether the United States government may, in this state, lawfully be named as a legatee under a will. The precise question has been decided adversely to the respondent by the decisions of the Supreme Court of California in Re Estate of Burnison, 33 Cal.2d 638, 204 P.2d 330, 331, and In re Estate of Sanborn, 33 Cal.2d 647, 204 P.2d 335, 336. In the Burnison case the California Supreme Court held that a bequest to "The United States government U. S. A." was void under section 27 of the Probate Code, while in the Sanborn case a similar ruling was made as to a bequest to the "United States of America." The two cases were appealed to the United States Supreme Court, which disposed of both appeals in a single decision, United States v. Burnison, 339 U.S. 87, 70 S.Ct. 503, 94 L.Ed. 675, in which it was held that the interpretation of section 27 of the Probate Code by the Supreme Court of California to the effect that the United States government could not lawfully take by will in this state did not violate the supremacy or the equal protection, or the privileges and immunities clauses of the United States Constitution. U.S.Const. art. 6, cl. 2; Amend. 14, § 1.

[2] Although we entertain serious doubts that section 27 of the Probate Code should be interpreted so as to prevent the United States government from becoming a legatee under California law, as an intermediate court we are bound by the decisions of the Supreme Courts of the United States and of California. That being so, the legacy here involved must be declared to be void, and the will held to be ineffective. The estate, under existing law, and unless the Supreme Court of California sees fit to overrule the Burnison and Sanborn cases, should be distributed to the heirs at law of the decedent.

The decree of final distribution is reversed.

BRAY, J., and SCHOTTKY, J., pro tem., concur.

98 Cal.App.2d 116

CONRAD v. WEST.
Civ. 17421.

District Court of Appeal, Second District,
Division 2, California.
June 15, 1950.

W. E. Conrad brought an unlawful detainer action against Mabel E. West for possession of a dwelling house leased to defendant by plaintiff. From a judgment of the Superior Court of Los Angeles County, Charles A. Paulsen, J., for plaintiff, defendant appealed. The District Court of Appeal, McComb, J., held that the trial court erred in denying defendant's motions to abate the action until disposition of the tenant's pending federal court action against the landlord to recover liquidated damages for exaction of more than the maximum rent.

Judgment reversed with instructions.

1. Courts ⇨493(1)

When a state court and federal court may each take jurisdiction of action, tribunal first acquiring jurisdiction holds it to exclusion of other tribunal until first tribunal's duty is fully performed and jurisdiction is exhausted.

2. Courts ⇨493(2)

In tenant's federal court action against landlord to recover liquidated damages for exaction of more than maximum rent, landlord could have filed counterclaim to evict tenant from leased premises, in which case federal court would have acquired jurisdiction of such action in nature of unlawful detainer to exclusion of state Superior Court's jurisdiction of landlord's subsequent unlawful detainer action against tenant. Federal Rules of Civil Procedure, rule 13 (a–c), 28 U.S.C.A.

3. Abatement and revival ⇨12

The Superior Court erred in denying defendant's motions to abate landlord's unlawful detainer action against tenant pending disposition of tenant's pending federal district court action against landlord to recover liquidated damages for exaction of more than maximum rent, since federal court first acquired jurisdiction and landlord could have obtained relief, sought in state court action, by counterclaim in federal court action. Federal Rules of Civil Procedure, rule 13(a–c), 28 U.S.C.A.

◆

George W. Manierre, Paul G. Breckenridge, Los Angeles, for appellant.

Leonard Wilson, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an unlawful detainer action, defendant appeals.

Facts: Plaintiff, the owner of a dwelling house, leased it under a rent control "ceiling" of $75.00 per month. After a time plaintiff regained possession of the premises on the theory that it would be used for business property. However, without making any changes in the house he leased it to defendant for a two year term at a rental of $350.00 per month. Defendant, upon learning that the "ceiling" on the property was $75.00, on May 13, 1948, commenced an action in the United States District Court, Southern District of California, to recover from plaintiff liquidated damages for rent paid in excess of the maximum rent together with reasonable attorney's fees and costs. On June 18, 1949, plaintiff filed the instant unlawful detainer action in the superior court of Los Angeles county seeking to recover possession of the property from defendant. Defendant by her answer and motions in the trial court alleged the pendency of the action in the United States District Court and sought to have the superior court abate the present action until the suit pending in the federal court had been disposed of. Such motions were denied and the superior court proceeded to try the unlawful detainer action giving judgment in favor of plaintiff.

Question: Did the trial court commit prejudicial error in refusing to abate the present action pending the outcome of the suit in the United States District Court?

This question must be answered in the affirmative and is governed by these pertinent rules:

[1] 1. When a state court and a court of the United States may each take jurisdiction of an action, the tribunal where jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted. (Morrow v. Superior Court, 9 Cal.App.2d 16, 22, 48 P.2d 188, 50 P.2d 66; Ponzi v. Fessenden, 258 U.S. 254, 256, 42 S.Ct. 309, 66 L.Ed. 607, 22 A.L.R. 879; In re Cohen, 198 Cal. 221, 227, 244 P. 359; Cutting v. Bryan, 206 Cal. 254, 257, 274 P. 326.)

[2] 2. Plaintiff in the superior court action could have filed a counterclaim in the federal court action seeking to evict the tenant (defendant in the superior court action) from the leased premises. In such a case the federal court would have had jurisdiction of the action in the nature of unlawful detainer. (See Subd. a, b, c, rule 13, Title 28, Federal Rules, U.S.C.A.[1]; Franzen v. Chicago, M. & St. P. Ry. Co., 7 Cir., 278 F. 370, 371; Stoltz v. United States, 9 Cir., 99 F.2d 283; McCauley v. Hazelwood, 8 Cir., 59 F. 877; Holt v. Nixon, 7 Cir., 141 F. 952; Lehnen v. Dickson, 148 U.S. 71, 13 S.Ct. 481, 37 L.Ed. 373.)

[3] Applying the foregoing rules to the facts of the present case it is evident that defendant's motion to abate the present proceedings pending the disposition of the action in the United States District Court should have been granted since under rule 1, supra, the United States District Court first obtained jurisdiction, and under rule 2, supra, plaintiff, if he had been entitled thereto, could have obtained by counterclaim in the federal court the same relief which he is seeking in the present action.

In view of our conclusion it is unnecessary to discuss other matters argued by counsel.

The judgment is reversed with instructions to the superior court to abate the present action until a decision of the action pending before the United States District Court has become final.

MOORE, P. J., and WILSON, J., concur.

98 Cal.App.2d 181

COSTA v. BANTA.

Civ. 7772.

District Court of Appeal, Third District, California.

June 23, 1950.

Hearing Denied Aug. 17, 1950.

Frank Costa brought proceedings against Bert Banta to contest election of directors of irrigation district. The Superior Court of San Joaquin County, R. M. Dunne, J., rendered a judgment in favor of the defendant, and the plaintiff appealed. The District Court of Appeal, Adams, P. J., held that jurisdiction of Superior Court could be questioned for the first time on appeal, and that Superior Court had no jurisdiction to try the contest.

Appeal dismissed.

---

[1] Rule 13, Subdivisions a, b, and c of the Federal Rules of Civil Procedure read: "Counterclaim and Cross-claim. (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

"(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

"(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party."

1. Appeal and error ⚷185(1)

Jurisdiction of Superior Court of proceeding to contest election of directors of irrigation district could be raised for the first time on appeal to District Court of Appeals from judgment of Superior Court.

2. Waters and water courses ⚷227

Elections in irrigation districts are governed by the provisions of the Water Code, and by provisions of the Election Code, and therefore as no provision is made in the Water Code for election contests in Superior Courts, Superior Court had no jurisdiction of proceedings to contest election of directors of irrigation district. Water Code, §§ 21705–21713.

◆

Alfred Nelson, Piedmont, for appellant,

Willens & Boscoe, by Maxwell M. Willens, Stockton, for respondent.

ADAMS, Presiding Justice.

On February 2, 1949, an election was held for the selection of directors of the West Side Irrigation District. Appellant Costa and respondent Banta were candidates for election in Division 3 of such district. It was concluded by the election officials that Costa and Banta had each received 39 votes. Thereafter the board of directors of the district, upon demand by Costa, recounted the votes and it concluded also that each candidate had received 39 votes. Costa then filed an election contest in the Superior Court of San Joaquin County, alleging that three ballots which had been rejected by the election officials and by the board of directors should have been counted for him, and that certain ballots counted for Banta should have been rejected. The trial court heard the contest and found that the vote was still a tie. From the judgment of that court this appeal was taken.

Respondent attacks the jurisdiction of the trial court to hear such an election contest, relying upon the decision of this court in Hunt v. Superior Court, 93 Cal. App.2d 504, 209 P.2d 411, decided September 2, 1949, after the trial of the instant case and the rendition of judgment therein on June 21, 1949.

In the Hunt case it was decided that elections in irrigation districts are governed by the provisions of the Water Code, secs. 21705–21713, and not by the provisions of the Elections Code, and that as no provision is made in the Water Code for election contests in the superior courts, the superior court had no jurisdiction to try the contest therein instituted. It follows therefrom that in the case before us the superior court was without jurisdiction to try the contest instituted by appellant Costa.

[1] Although the jurisdiction of that court was not questioned during the trial, it is well established that questions of jurisdiction are never waived and may be raised for the first time on appeal. Hallock v. Jaudin, 34 Cal. 167, 173; Emery v. Pacific Employers Ins. Co., 8 Cal.2d 663, 665-666, 67 P.2d 1046; Norager v. Mountain States Life Ins. Co., 10 Cal.App.2d 188, 192, 51 P.2d 443; Schwartz, Inc., v. Burnett Pharmacy, 112 Cal.App.Supp. 781, 784-785, 295 P. 508; Penaat v. Guasco, 84 Cal. App.2d 445, 453, 191 P.2d 564; Berryman v. Quinlan, 29 Cal.App.2d 608, 613, 85 P.2d 202.

[2] Appellant urges with great earnestness that the decision in the Hunt case was wrong, and that we should overrule it. However, our decision in that case was arrived at only after careful consideration, and we are not convinced that the conclusion reached was wrong.

It follows therefrom that in this case the superior court was without jurisdiction to try the issues presented, and, accordingly, that this court has no jurisdiction of the appeal from its judgment.

The appeal is dismissed.

PEEK, and VAN DYKE, JJ., concur.

98 Cal.App.2d 189

PEOPLE v. TORRES et al.

Cr. 815.

District Court of Appeal, Fourth District, California.

June 23, 1950.

Juan M. Torres, Mario Garcia Tapia and Alfredo Barela Estrada, were convicted by the Superior Court of Tulare County, Glenn L. Moran, J., sitting without jury, of illegal possession of marihuana, and defendants appealed. The District Court of Appeal, Griffin, J., held that evidence was sufficient to support finding of possession.

Judgment affirmed.

1. Criminal law 🔑374

In prosecution for illegal possession of marihuana, question of admissibility because of remoteness of evidence of prior confiscation by state of defendant's automobile, four months before present arrest, because it contained marihuana was largely in discretion of trial court.

2. Criminal law 🔑369(2)

Where evidence tends logically to establish any fact material for people, or to overcome any material matter sought to be proved by defense, the evidence is relevant and admissible though it may show commission by defendant of another crime similar or dissimilar to crime defendant is being tried for.

3. Criminal law 🔑369(2), 370, 371(1, 12), 372(1)

Evidence of other acts by defendant of similar nature to offense for which he was tried may be admitted, if not too remote, to prove material fact, or to show motive, scheme, plan, or guilty knowledge and intent.

4. Criminal law 🔑370, 1170½(5)

In prosecution for illegal possession of marihuana, where one defendant had specifically denied knowledge of presence of 4 marihuana cigarettes found in automobile, evidence that defendant's automobile previously had been confiscated for containing marihuana was relevant to disprove defendant's claim of lack of knowledge of presence of marihuana, and it was not prejudicial on cross-examination of defendant to seek to elicit evidence that defendant was in business of selling marihuana.

5. Criminal law 🔑374

In prosecution of three defendants for illegal possession of marihuana, evidence that one defendant's automobile had previously been confiscated for containing marihuana was not admissible against the other two defendants.

6. Criminal law 🔑260(11)

In prosecution of three defendants for illegal possession of marihuana tried to court without jury, no error could be claimed by two defendants for admission of evidence admissible as to third defendant but not as to them because trial court was presumed to know it was not binding on other defendants.

7. Poisons 🔑4

Statute prohibiting possession of marihuana does not require proof that accused had marihuana on person. Health and Safety Code, § 11160.

8. Poisons 🔑9

In prosecution of three defendants for illegal possession of marihuana, evidence that four marihuana cigarettes were present under blanket on front seat of automobile in which defendants were riding at time of arrest, that automobile had been in possession of one defendant for some days prior to arrest was sufficient to sustain conviction.

9. Criminal law 🔑260(11)

Where evidence reasonably justifies inference of guilt and trial court so finds, no question of law reviewable in appellate court is presented by fact that same evidence also justifies inference of innocence.

10. Poisons 🔑9

In prosecution of three defendants for illegal possession of marihuana, guilty knowledge may be inferred from false and contradictory statements made by defendants separately to arresting officers.

11. Witnesses 🔑379(11)

In prosecution of three defendants for illegal possession of marihuana, false and contradictory statements made by defendants separately to arresting officers may be considered by trial court in determining veracity of defendants' testimony.

J. M. Lopes, Visalia, for appellants.

Fred N. Howser, Attorney General; Howard S. Goldin, Deputy Attorney General, for respondent.

GRIFFIN, Justice.

Defendants and appellants Juan M. Torres, Mario Garcia Tapia and Alfredo Barela Estrada were charged and convicted by the court sitting without a jury, with the crime of illegal possession of marihuana. The main point involved in this appeal is the sufficiency of the evidence to support the finding of possession.

Late at night on November 25, 1949, two officers stopped a Chevrolet sedan being driven by defendant Torres. Defendant Tapia was seated in the back seat at the time. Defendant Estrada was in the front seat with Torres. The unusual weaving of the car, as it proceeded down the highway, attracted the officers' attention. Upon searching it the officers found four marihuana cigarettes, neatly rolled under a blanket which covered the front seat. The boys, when separately questioned, claimed that they had driven to Fresno to a dance or show that evening, denied having any knowledge of the cigarettes being in the car, and told somewhat conflicting stories of their activities in Fresno and as to picking up additional passengers. One defendant claimed they picked up four boys on their return to their home and that all four of those boys sat in the back seat. Another defendant stated that after coming out of the show they picked up four boys and they drove them home; that two of them sat in front and two in the back seat. When questioned by an inspector none of the defendants mentioned about picking up any "hitch-hikers". When later questioned by a deputy sheriff they said they picked up *one* hitch-hiker on the way home and that he sat in the front seat. At another interview they said they picked up three Mexican boys who rode in the back seat and the three defendants rode in the front seat and they all went to a dance.

When the car was stopped by the officers Tapia seemed to be fumbling with something. The driver was nervous when the cigarettes were found. They were discovered in the center of the front seat and were firm, round, in good condition, and not mashed. The officers showed them to the defendants, stating that they believed they were marihuana. Torres replied that they had had other passengers in their car and they must have belonged to them. Defendant Tapia claimed that he did not own the car but borrowed it from one Famio Garcia, about four or five days prior to their arrest. Torres and Estrada stated that Tapia had had the car two or three weeks prior to that time.

Tapia testified on the stand that he had had possession of the car one to three weeks prior to his arrest and that the blanket was over the front seat when he secured it and that he never had removed it; that he did not know the marihuana cigarettes were under the blanket or in the car and that they were not his. On cross-examination this defendant was asked if it were not a fact that in July, 1949, his car was confiscated by the state because it had marihuana in it. Over objection, defendant was ordered to answer the question and he stated that "In Los Angeles I was caught for that. I gave some boys a ride and they had marihuana with them * * * they didn't return the car back to me." He was then asked if it were not true that he was in the business of selling marihuana cigarettes, i. e., bringing them up here from Mexicali and peddling them around at various towns. He answered in the negative.

[1] Counsel for appellants claimed prejudicial error in the ruling of the court in the reception of this evidence. The question of the admissibility, because of remoteness, of said evidence rests largely in the discretion of the trial court. People v. Arrangoiz, 24 Cal.App.2d 116, 117, 74 P.2d 789.

[2] The general test of relevancy is whether the evidence tends logically, na-

turally, and by reasonable inference to establish any fact material for the people or to overcome any material matter sought to be proved by the defense. If it does, then the evidence is admissible whether or not it embraces the commission of another offense and whether the other crime be similar or dissimilar. People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924.

[3] Evidence of other acts of a similar nature may be admitted when not too remote, to prove a material fact, or where it tends to show motive, scheme, plan or system, or to show *guilty knowledge* and intent. People v. Henderson, 79 Cal.App. 2d 94, 119, 179 P.2d 406; People v. Hennessey, 201 Cal. 568, 582, 258 P. 49; People v. Brown, 72 Cal.App.2d 717, 720, 165 P.2d 707; People v. Bercovitz, 163 Cal. 636, 639, 126 P. 479, 43 L.R.A.,N.S., 667.

[4] In the instant case Tapia specifically denied any knowledge of the presence of the four marihuana cigarettes in the car in which they had been transported. The evidence sought to be elicited was relevant to establish this defendant's knowledge of the presence of the marihuana cigarettes in the car, and since there was testimony that he had been previously caught in Los Angeles in a car containing a packet of marihuana (the same narcotic here involved) such evidence was admissible under the above-mentioned rule and was a circumstance tending to show that he falsified in disclaiming knowledge of the presence of the marihuana, and was relevant in disproving defendant's claim of lack of knowledge.

[5, 6] Defendants next claim that this evidence was not admissible against the other two defendants. This is true. However, no objection was made at the trial as to its admissibility on this ground. Since the trial was before the court, sitting without a jury, no error can be claimed in this respect because the trial court is presumed to know the law that it was not binding on the other defendants. People v. Seerman, 43 Cal.App.2d 506, 111 P.2d 457; People v. Guiterez, 126 Cal.App. 526, 536, 14 P.2d 838; People v. Gasser, 34 Cal.App. 541, 168 P. 157.

On cross-examination at the trial the police officer testified that he examined the car and found a mechanical defect which, in his opinion, would cause the car to weave, but not to the extent that it was weaving that night.

[7-9] In support of the claim that the facts established are insufficient to show knowledge on the part of the defendants, they cite People v. Gory, 28 Cal.2d 450, 170 P.2d 433; People v. Martin, 76 Cal. App.2d 317, 172 P.2d 910; and People v. Bledsoe, 75 Cal.App.2d 862, 171 P.2d 950. The facts of the cases cited are strikingly dissimilar and can be accordingly distinguished. In the instant action the marihuana was found on the front seat of the car in which all defendants were riding. The question whether the defendants knowingly had possession of it was a factual question for the trial court to determine. The statute, Health and Safety Code, § 11160, does not require proof that the accused had the unlawful articles on their persons. The fact that "possession" of the narcotics was immediate and exclusive and under defendants' dominion and control was sufficiently established by the evidence. Where the circumstances in evidence are such as would reasonably justify an inference of guilt, and the court so found, the fact that an inference of innocence might also just as reasonably have been predicated on such circumstances does not present a question of law reviewable by an appellate court. People v. Bassett, 68 Cal.App.2d 241, 156 P.2d 457. See, also, People v. Randolph, 133 Cal.App. 192, 23 P.2d 777; and People v. Sweeney, 66 Cal. App.2d 855, 859, 153 P.2d 371.

[10, 11] It is the people's contention that guilty knowledge may be inferred from the false, misleading and contradictory statements made by defendants to the arresting and investigating officers; that since each defendant gave a different account as to their activities on the night in question and as to the transportation of claimed passengers or "hitch-hikers", and their seating arrangements, the court had the right to consider the contradictory and false statements in determining the veracity of the defendants' testimony and

their guilty knowledge. People v. Gory, supra, supports this contention.

We conclude that the evidence sufficiently supports the finding of the trial court.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

98 Cal.App.2d 142

BROWN v. BROWN.

Civ. 17272.

District Court of Appeal, Second District, Division 1, California.

June 21, 1950.

Rosa Lee Brown brought an action against James Brown for partition of a parcel of real property and to quiet title to household effects and equipment, and judgment was entered quieting title to both the real and the personal property in the plaintiff, whereupon defendant moved for new trial. The Superior Court, Los Angeles County, Clarence M. Hanson, J., granted defendant's motion and the plaintiff appealed. The District Court of Appeal, Drapeau, J., held that since both parties alleged ownership in joint tenancy by their pleadings no issue was raised on that question and the trial court erred in finding that defendant had no interest in the property.

Affirmed

1. Pleading 🔑**129(4)**

Where defendant averred in cross-complaint that he and plaintiff owned realty as joint tenants and plaintiff did not deny in her answer to cross-complaint that such realty was owned by her and defendant as joint tenants, joint tenancy was admitted as fact.

2. Joint tenancy 🔑**10**

Where both parties by their pleading alleged ownership in joint tenancy, and neither claimed sole ownership, there was no issue raised on that question, and trial court erred in entering judgment quieting title to such property in the plaintiff. Code Civ. Proc. § 759.

◆

Walter L. Gordon, Jr., Los Angeles, for appellant.

Crispus A. Wright, Los Angeles, for respondent.

DRAPEAU, Justice.

This is an action for partition of a parcel of real property and to quiet title to household effects and equipment. The complaint alleges that the parties are husband and wife; that a decree of annulment of the marriage has been granted in favor of plaintiff wife; that the real property which is the subject of the partition is held by the parties as joint tenants; that it is free of encumbrance except for a judgment in favor of plaintiff in the amount of $600. The various amounts paid by each of the parties upon the purchase price of said realty are set forth in detail.

Defendant's answer denies "each and all the material allegations contained" in the complaint. His amended cross-complaint avers that he and plaintiff are the owners of the described realty as joint tenants; admits the decree of annulment and the judgment for $600; and alleges a schedule of payments on the purchase price of the real property controverting those set up by plaintiff in her complaint.

[1] Both parties claimed to own the personal property.

Plaintiff answered the cross-complaint and by her failure to deny that she and defendant owned the realty as joint tenants admitted that fact. 21 Cal.Jur. 156, sec. 106.

Thereafter an interlocutory decree in partition and quieting title was entered adjudging that each party was the owner of an undivided interest in the realty and ordering that it be partitioned between them "according to their respective rights and interests, as ascertained, declared and established by this Decree and particularly described in Paragraph 7 of the complaint." Said decree also appointed a referee in partition who was directed, among other things, to discharge any liens or encumbrances of record and to report his proceedings to the court. The personal property was adjudged to belong to plaintiff and that defendant had no right, title or interest in or to the same.

The trial court made its minute order "Denying Partition but Quieting Title," and entered judgment adjudging that title to both the real and personal property be quieted in plaintiff, as her sole and separate property, and that defendant be forever barred from asserting any right, title or interest therein; also ordered defendant to execute a quitclaim deed of the realty which should effectuate an extinguishment of the $600 lien on the real estate.

[2] Thereafter, according to a settled statement on appeal, defendant's motion for a new trial was heard and granted by the Honorable Clarence M. Hanson by reason of the absence from the county of the Honorable D. Oliver Germino, who tried the case and entered judgment therein. The motion was made upon the grounds: (1) insufficiency of the evidence to justify the decision and (2) error in law occurring at the trial, and was granted on both grounds. In ruling orally on the motion, Judge Hanson pointed out to counsel "that the plaintiff, by her complaint, alleged that she and the defendant, James Brown, were owners of the real property involved as joint tenants thereof, and accordingly, as there did not appear to be any amendment to the complaint alleging any fact to the contrary or alleging that the plaintiff was the sole and exclusive owner as against the defendant, James Brown, the judgment * * * was not sustained and was as a matter of law erroneous."

Plaintiff appeals from the order granting the new trial contending that "although the complaint alleged that the real property was held in joint tenancy, the Court had a right to determine the Defendant's interest in the property and that since it found that defendant had no interest in the property it was reversible error for the Court to grant a new trial on account of an error of law."

As heretofore stated, both parties by their pleadings alleged ownership in joint tenancy. Neither claimed sole ownership, hence no issue was raised on that question.

In support of her position, appellant cites the case of DeUprey v. DeUprey, 27 Cal. 329, 335, 87 Am.Dec. 81, which holds that "Any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land may be put in issue, tried and determined in such action."

In the cited case, Elizabeth DeUprey commenced her action for partition against Samuel DeUprey, alone, alleging that he was a cotenant and owned an undivided half of the premises. After demurrer to the complaint was overruled, plaintiff was permitted to bring in the wife of defendant by a supplemental complaint. By her answer to such supplemental complaint, Mary Ann DeUprey "not only claimed a homestead right to the premises, but claimed that the entire legal estate was in her, and the Court found that the legal title to an undivided half was in her." In other words, the rights of the several parties, plaintiff as well as defendant, were put in issue by the pleadings. Therefore, the trial court had jurisdiction in the partition action to determine such respective rights. See section 759, Code of Civil Procedure.

Apropos is the case of Livermore v. Webb, 56 Cal. 489. That was an action in partition, the complaint therein alleging that plaintiffs and defendants were owners of land as tenants in common. The court adjudged that defendant Webb was the sole owner in fee of all the lands described in the complaint and that neither the plaintiffs nor any of the other defendants had any estate, right, title or interest in the land. The other defendants appealed from the judgment on the ground that the court's finding was against the record because defendant Webb admitted that he was a tenant in common with the plaintiffs and the defendant Livermore.

In affirming the judgment the court commented that the record disclosed an amended answer had been filed in the case alleging the exclusive ownership of Webb.

In the cause under review, the pleadings are insufficient to raise the issue of sole ownership; hence the finding to that effect was erroneous.

The order granting motion for new trial is affirmed.

WHITE, P. J., and DORAN, J., concur.

98 Cal.App.2d 177

AVALON PRODUCTS, Inc. v. LENTINI.

Civ. 17709.

District Court of Appeal, Second District, Division 2, California.

June 23, 1950.

Hearing Denied Aug. 17, 1950.

Action by the Avalon Products, Inc., a California corporation, against Jimmie Lentini for damages for breach of contract. The Superior Court of Los Angeles County, Philip H. Richards, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Wilson, J., held that where contract for purchase of personalty left to future negotiations and agreement the method of payment, and defendant repudiated contract, prior to delivery of goods, and before parties had agreed to method of payment, plaintiff could not recover damages for breach of contract.

Reversed.

1. Contracts 🔑9(1), 147(1)

The law leans against destruction of contracts because of uncertainty and favors an interpretation which will carry into effect reasonable intention of parties if it can be ascertained.

2. Contracts 🔑9(1)

The description of subject matter of an agreement may be indefinite but if it is capable of being identified and rendered definite and certain by other evidence, contract is enforceable. Civ.Code, § 3538.

3. Sales 🔑54, 82(3)

Where one buys personal property at an agreed price by implication of law he agrees to pay the price and if no time of payment is agreed upon the law fixes time of delivery as time of payment. Civ.Code, § 1729.

4. Contracts 🔑39

Where there has been no agreement upon an essential element of a contract, and contract provides no means for determination thereof, but leaves it to future negotiation and agreement of parties, contract is void.

5. Sales 🔑1(3), 78

Generally, if no price is fixed in a contract, the law, upon delivery and acceptance of commodity sold, implies an understanding between parties that a reasonable price is to be paid, but where price of commodity called for, but not delivered, is to be subsequently ascertained by agreement of parties, contract of sale is incomplete and unenforceable until price is fixed or agreed upon.

6. Contracts 🔑39

An agreement to be enforceable must comprise all the terms which parties intend to introduce into it.

7. Contracts 🔑9(1), 39

Generally, a provision in a contract which leaves open the terms of payment for future negotiation renders contract incomplete and uncertain in one of its material features and for that reason unenforceable in equity.

8. Sales 🔑1(3)

Where contract for purchase of personalty left to future negotiation and agreement of parties the method of payment, and buyer repudiated contract, prior to delivery of goods, and before parties agreed to method of payment, sellers could not recover damages for breach of contract.

◆

Sanner, Fleming & Irwin, John Amos Fleming, Los Angeles, for appellant.

Walter R. Powers, Los Angeles, for respondent.

WILSON, Justice.

From a judgment in favor of plaintiff in an action for damages for breach of contract, defendant appeals.

As ground for reversal appellant contends the contract is invalid and unenforceable.

Respondent is a distributor of commercial ice cream freezers under a license agreement from the manufacturers. Prior to July 26, 1948, there were negotiations between appellant and one of respondent's salesmen with respect to the purchase by appellant of certain ice cream freezer equipment. On that date appellant called at respondent's office and executed a purcase order for specified equipment. At the time he executed the order, appellant gave respondent's sales manager his check for $435 on account. The purchase order, which is the contract sued upon herein, contains a description of the goods ordered, the delivery date, the purchase price less the amount of the down payment and under special instructions is written the following: "Method of payment to be agreed upon before delivery."

At the time of the execution of the purchase order respondent's sales manager drew an order directed to the manufacturer and appellant approved the electrical specifications by signing his name on a copy thereof. Either the same day or within a day or two after the execution of the order appellant stopped payment on the check he had given as a down payment and thereafter notified respondent in writing that he would not accept or pay for the equipment. Respondent cancelled its order with the factory and the machinery was never shipped.

Appellant concedes that if the order were silent as to the terms of payment it would, upon proper acceptance by respondent, have constituted a valid contract. He contends, however, that the words "Method of payment to be agreed upon before delivery" in the putative contract indicate that the minds of the parties had not met upon one of the essential terms and that the contract was therefore incomplete.

[1-3] The law leans against the destruction of contracts because of uncertainty and favors an interpretation which will carry into effect the reasonable intention of the parties if it can be ascertained. McIllmoil v. Frawley Motor Co., 190 Cal. 546, 549, 213 P. 971; Sutliff v. Seidenberg, Stiefel & Co., 132 Cal. 63, 65, 64 P. 131, 469; Roy v. Salisbury, 21 Cal.2d 176, 184, 130 P.2d 706; Meyers v. Nolan, 18 Cal.App.2d 319, 322, 63 P.2d 1216. The description of the subject matter of an agreement may be indefinite but if it is capable of being identified and rendered definite and certain by evidence *aliunde,* the contract is enforceable. McIllmoil v. Frawley Motor Co., supra; Mebius & Drescher Co. v. Mills, 150 Cal. 229, 236, 88 P. 917; Pease v. Lindsey, 129 Cal.App. 408, 410, 18 P.2d 717. That is certain which can be made certain. Civ.Code, sec. 3538. Where one buys personal property at an agreed price by implication of law he agrees to pay the price and if no time of payment is agreed upon the law fixes the time of delivery as the time of payment. Civ.Code, sec. 1729; Gilfallan v. Gilfallan, 168 Cal. 23, 29, 141 P. 623, Ann.Cas.1915D, 784.

[4-7] Where, however, there has been no agreement upon an essential element and the contract provides no means for the determination thereof but leaves it to the future negotiation and agreement of the parties, the contract is void. McIllmoil v. Frawley Motor Co., supra. Thus it is true generally that if no price is fixed in the contract the law, upon delivery and acceptance of the commodity sold, implies an understanding between the parties that a reasonable price is to be paid; but where the price of the commodity called for but not delivered is to be subsequently ascertained by the agreement of the parties, the contract of sale is incomplete and unenforceable until the price is fixed or agreed upon. Jules Levy & Bro. v. A. Mautz & Co., 16 Cal.App. 666, 669, 117 P. 936; Stone Drill Corp. v. Stoody Co., 4 Cal.App.2d 367, 369, 40 P.2d 945. The agreement to be enforceable must comprise all the terms which the parties intend to introduce into it. "An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement until the terms of that agreement are settled." Mecham on Sales, Vol. I, sec. 234; Monahan v. Allen, 47 Mont. 75, 80, 130 P. 768. Although a greater degree of certainty is required in a contract which is

sought to be specifically enforced, the general rule is that a provision in a contract which leaves open the terms of payment for future negotiation renders the contract incomplete and uncertain in one of its material features and for that reason unenforceable in equity. Morris v. Ballard, 56 App. D.C. 383, 16 F.2d 175, 49 A.L.R. 1464 and cases cited. In California the rule is the same and no action will lie to enforce the performance of a contract or to recover damages for its breach unless it is complete and certain. Talmadge v. Arrowhead Reservoir Co., 101 Cal. 367, 371, 35 P. 1000; Dillingham v. Dahlgren, 52 Cal.App. 322, 329–330, 198 P. 832.

[8] The purchase order involved herein specifically provides that the method of payment is to be agreed upon before delivery. An essential element of the contract is thus left to future negotiation and agreement of the parties. If prior to delivery either party should insist upon terms of payment which the other is unwilling to meet neither party could enforce the contract. Since appellant repudiated the contract before there was complete agreement respondent cannot recover damages for its breach.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.

---

97 Cal.App.2d 901

WALKER et al. v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 14163.

District Court of Appeal, First District, Division 2, California.

June 9, 1950.

Hearing Denied Aug. 3, 1950.

Charlotte E. Walker and two minors, by first named plaintiff as their guardian ad litem, sued the City and County of San Francisco and others for the death of John W. Walker, named defendant's employee. From a judgment of the Superior Court in and for the City and County of San Francisco, Milto D. Sapiro, J., for named defendant on the pleadings, plaintiffs appealed. The District Court of Appeal, Goodell, J., held that decedent's fatal injury arose directly out of his employment within the Workmen's Compensation Act and that plaintiffs' exclusive remedy was under such act, so as to bar their recovery of damages from named defendant.

Judgment affirmed.

1. Workmen's compensation 🔑610

For workman's injury to "arise out of employment" within Workmen's Compensation Act, hazard to which he is exposed need only be inherent in nature of his work and conditions under which it is to be done, rather than external or foreign to it. Labor Code, § 3600(b).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Arise Out of Employment".

2. Workmen's compensation 🔑647

Fatal injury to city fireman as result of collision between fire truck, on which he was responding to alarm, and street car owned by city, because of motorman's failure to stop car on fire truck's approach, as required by statute, arose directly out of fireman's employment within Workmen's Compensation Act, as risk of collision was inherent in fireman's occupation. Labor Code, § 3600(b); Vehicle Code, § 554.

3. Workmen's compensation 🔑2162

A deceased city fireman's widow and minor daughters could not recover damages from city for his death as result of collision between fire truck, on which he was responding to alarm, and city's street car, on theory that decedent was employee of corporate entity functioning governmentally while street car operators were employees of another such entity functioning in proprietary capacity, but exclusive remedy was under Workmen's Compensation Act. Labor Code, §§ 3600(a–c), 3601, 3852; Vehicle Code, § 554.

4. Pleading 🔑9, 350(3)

In action against city for city fireman's death as result of collision between fire truck and city's street car, allegations of amended complaint that city functioned as two separate proprietary and governmental entities and was not decedent's employer in its proprietary capacity as operator of street railway, were not allegations of facts, which must be taken as true on defendant's motion for judgment on pleadings, but mere conclusions of law, controlled by particular alleged facts from which conclusions were drawn, so that granting of motion was not improper.

5. Pleading ⚷350(3)

On defendant's motion for judgment on pleadings, complaint must be read as if it contains statement of all matters subject to judicial notice, including manner in which defendant city and county, filing such motion, functions, though complaint expressly alleges contrary. Code Civ.Proc. § 1875.

6. Workmen's compensation ⚷2084

A proceeding under Workmen's Compensation Act constitutes exclusive remedy for injuries falling within scope of such act. Labor Code, §§ 3600, 3601.

◆

William P. Golden, Jesse H. Miller, San Francisco, for appellants.

Dion R. Holm, City Attorney of the City and County of San Francisco, George E. Baglin, Deputy City Attorney of the City and County of San Francisco, San Francisco, for respondent.

GOODELL, Justice.

This action was brought by the widow and two minor daughters of John W. Walker to recover $75,000 damages for alleged negligence resulting in his death.

Respondent filed a general demurrer which was overruled, and after answering, it moved for judgment on the pleadings. The motion was granted, judgment entered, and this appeal taken.

On July 24, 1944 the decedent, a member of the San Francisco Fire Department, was on his fire truck responding to an alarm when, at the intersection of Duncan and Church streets, a street car of the municipal railway ran into the truck. From injuries then received he died the same day.

The face of the complaint shows that decedent was an employee of the City and County, which owns and operates the municipal railway. Appellants contend that because the railway is operated by respondent in its proprietary capacity, while fire protection is a governmental function, the problem should be treated legally as if decedent had been an employee of one corporate entity, functioning governmentally, and the motorman and conductor (whose negligence is admitted for the purpose of the motion) employees of another, functioning in a proprietary capacity. Respondent stands simply on the fact that the complaint shows that decedent was fatally injured within the course of his employment, hence that his dependents are limited, as far as his employer is concerned, to the award of compensation declared by §§ 3600–1, Labor Code to be the exclusive remedy.

Labor Code, § 3600 prescribes the essential conditions of compensation in part as follows: "(a) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division. (b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment. (c) Where the injury is proximately caused by the employment, either with or without negligence. * *"

[1, 2] Appellants contend that decedent's fatal injury did not *arise out of* his employment, hence with one of the conditions absent the case is not within the act. They argue that the injury arose out of the violation by the railway and its employees of Vehicle Code, § 554, which provides that upon the approach of an emergency vehicle "* * * The motorman of every street car shall immediately stop such car clear of any intersection and keep it in such position until the authorized emergency vehicle has passed * * *" They claim that the purpose of § 554 is "to safeguard the lives of the fire fighting personnel and prevent the disabling or destruction" of such vehicles. That of course is true, but the argument answers itself since manifestly the risk of collision in going at top speed to a fire is one of many risks inherent in a fireman's

occupation and not at all common to all persons alike. "All that is required is that the hazard to which the workman has been exposed be recognized as inherent in the nature of the work and the conditions under which it is to be done, rather than external or foreign to it." Prosser on Torts, Hornbook Series, p. 534. See Freire v. Matson Navigation Co., 19 Cal.2d 8, 13, 118 P.2d 809; Pacific Employers Ins. Co. v. Industrial Accident Commission, 26 Cal.2d 286, 289, 158 P.2d 9, 159 A.L.R. 313; Globe Indemnity Co. v. Industrial Accident Commission, 36 Cal.App. 280, 171 P. 1088, and Industrial Indemnity Co. v. Industrial Accident Commission, 95 Cal.App.2d 804, 214 P.2d 41. We are satisfied that decedent's fatal injury arose directly out of his employment, hence there existed a concurrence of the conditions of § 3600.

In pressing their argument respecting separate entities appellants cite Hanley v. Marsh & McLennan, J. B. F. Davis & Son, 46 Cal.App.2d 787, 117 P.2d 69, which follows Esberg v. Badaracco, 202 Cal. 110, 259 P. 730 in holding that the San Francisco School District is an entity distinct from the City and County. There is no parallel between that case and this, since school districts are recognized as separate legal entities from the counties or municipalities wherein they function. Butler v. Compton etc. District, 77 Cal.App.2d 719, 728, 176 P.2d 417, and its citations.

Appellants also suggest an analogy between the present situation and the case of a large, parent corporation which owns a smaller corporation "lock, stock and barrel", and argue that an employee of the larger one, injured by a vehicle of the smaller one, would still have his common-law remedy for damages against the latter, and could not be relegated to workmen's compensation simply because the smaller corporation was owned by the larger. Of course not. But that is as clear as example of two corporate entities as the one supplied by a school district and a municipality.

In Park v. Union Mfg. Co., 45 Cal.App.2d 401, 114 P.2d 373, the plaintiff, who was injured in the course of her employment while working for two partners, brought suit for damages against Union Manufacturing Company, a copartnership, composed of the two partners by whom she was employed, on the theory that the copartnership (doing business under the fictitious name) was a legal entity separate and distinct from her two employers. A judgment for plaintiff was reversed on the ground that there were not two entities and that her remedy under the workmen's compensation act was exclusive.

In City of Pasadena v. Railroad Commission, 183 Cal. 526, 530, 192 P. 25, 27, 10 A.L.R. 1425, it was claimed that a city operating a public utility should be treated as a private corporation engaged in the same business, notwithstanding the fact that the city carried on such business as a municipal corporation. The court held that "It is not true that a city is a private corporation when carrying on a municipally owned public utility." That case was followed in Irilarry v. City of San Diego, 186 Cal. 535, 538, 199 P. 1041, and in Irish v. Hahn, 208 Cal. 339, 344, 281 P. 385, 387, 66 A.L.R. 1382, where the court said: "The distinction between the governmental and proprietary functions was never made for the purpose of adding to or detracting from either as a public function, but for the purpose of determining the liability of the municipality in tort."

With respect to the tort liability of a public corporation operating a utility in its proprietary capacity see People v. Superior Court, 29 Cal.2d 754, 761-762, 178 P.2d 1.

Appellants have not cited any case in this state or elsewhere, decided since the advent of workmen's compensation, which supports their contention.

On the other hand there are numerous authorities which have followed the plain language of § 3601, Labor Code, and its parent section, which provides that "Where the conditions of compensation exist, the right to recover such compensation * * * is * * * the exclusive remedy against the employer for the injury or death."

In Alaska Packers Ass'n v. Industrial Accident Commission, 200 Cal. 579, 583, 253 P. 926, 928 the court said: "The California Workmen's Compensation Act provides the only means by which an injured employee can recover compensation from his employer for injuries received in the course of and arising out of his employment, and it abrogates the common-law liability of the master for such injuries in the cases to which it is applicable. (Citation.) The obvious intent of the act was to substitute its procedure for the former method of settling disputes arising bewteen those occupying the strict relationship of master and servant, or employer and employee, by means of actions for damages. (Citation.) It substitutes a new system of rights and obligations for the common-law rules governing the liability of employers for injuries to their employees. (Citation.) When the specified conditions exist, the remedy provided by the act is exclusive of all other statutory or common-law remedies. (Citation.)"

Later cases are Freire v. Matson Navigation Co., 19 Cal.2d 8, 10, 118 P.2d 809, supra; Baugh v. Rogers, 24 Cal.2d 200, 207, 148 P.2d 633, 152 A.L.R. 1043; Burton v. Union Oil Co., 129 Cal.App. 438, 19 P.2d 9; Buttner v. America Bell Tel. Co., 41 Cal.App.2d 581, 107 P.2d 439 and Jiminez v. Liberty Farms Co., 78 Cal.App.2d 458, 459, 177 P.2d 785.

Appellants cite Turner v. City of Indianapolis, 1884, 96 Ind. 51, where a fireman was injured when the chief's buggy which he was driving to a fire was overturned by an obstruction in the street. He was held entitled to damages against the city, his employer, for its negligence. This was before Indiana had workmen's compensation. After its adoption the same court held (1942) that a fireman was within the act. City of Huntington v. Fisher, 220 Ind. 83, 40 N.E.2d 699.

Appellants rely also on Coots v. City of Detroit, 1889, 75 Mich. 628, 43 N.W. 17, 5 L.R.A. 315, where the plaintiff was driving an engine to a fire when it ran into a hole in the street, causing serious injuries. A judgment in his favor against his employer, the city, was affirmed. This, also, was before Michigan had workmen's compensation.

[3] Respondent cites Bross v. City of Detroit, 1933, 262 Mich. 447, 247 N.W. 714, 715, a case on all fours with the present one, where the plaintiff fireman was injured in a collision between the hook and ladder on which he was riding and a municipally owned street car. The same court which had held in the Coots case that a fireman could sue the city held, because of the Workmen's Compensation Law, that he could not do so. In affirming a judgment based on a directed verdict the court said: "It is contended by the plaintiff that, as the city of Detroit owned and operated its street railway system, the agency that caused his injury, which was a function distinct from that in which he was employed, the city was 'some person other than the employer' within the meaning of the above-quoted provision of the statute. No authorities are cited by the plaintiff to support this contention. It is too plainly untenable to require argument. Nor is there any merit to the claim that, because the city was operating a street railway system as a private enterprise, the Workmen's Compensation Law has no application."

The Bross case is cited in De Guiseppe v. City of New York, 188 Misc. 897, 66 N.Y.S.2d 866, 867, affirmed, De Giuseppe v. City of New York, 273 App.Div. 1010, 79 N.Y.S.2d 163. There damages were sought for the death of an employee of the city's department of sanitation who, while performing duties within the scope of his employment, was struck by a municipally owned trolley car negligently operated by an employee of the city's board of transportation. The plaintiff contended (as these appellants do) that since the two agencies of the city were separate and distinct, the sanitation department not being a business for pecuniary gain while the board of transportation was, the decedent was not killed by the negligence of another in the same employ, hence the right to compensation was not the exclusive remedy. The court said: "The statute, of course, saves to an employee the right to proceed against a third party in a common-law action, but it is obvious that a defendant cannot simultaneously be two distinct entities, i. e., an employer and also a third party; for a third party is one who has no connection whatever with the relationship of employer and employee—a stranger to that relationship.

But here, the employer of the trolley car operator was the City of New York and the employer of plaintiff's intestate was likewise the City of New York. No amount of argument on plaintiff's part, however forceful or fanciful, can provide an escape from this salient fact and destroy the applicability of Section 11. Bogartz v. Astor, 293 N.Y. 563, 566, 59 N.E.2d 246." The Court noted that "there seems to be a paucity of direct judicial authority" in New York upon the subject but stated that there were decisions which "analagously would seem to justify the conclusions which the Court has reached herein," citing Winter v. Peter Doelger Brewing Co., Inc., 175 App. Div. 796, 162 N.Y.S. 469, affirmed 226 N.Y. 581, 123 N.E. 895 and Williams v. Hartshorn, 296 N.Y. 49, 69 N.E.2d 557, 558, as well as Bross v. City of Detroit, supra. In Williams v. Hartshorn, supra, the Court of Appeals said: "Regardless of his status as owner of the premises where the injury occurred, an employer remains an employer in his relations with his employees as to all matters arising from and connected with their employment. He may not be treated as a dual legal personality, 'a sort of Dr. Jekyl and Mr. Hyde.'" The court there drew on California for authority, citing Park v. Union Mfg. Co., 45 Cal.App.2d 401, 114 P.2d 373, supra.

The Michigan Bross case and New York De Guiseppe case are directly in point. Those cases answer appellants' argument based on § 3852, Labor Code. That section makes it clear that notwithstanding an employee is awarded workmen's compensation he may still sue a third person for negligence. Here, as held in the Michigan and New York cases, there is no third person excepting defendant Hirschbrunner, the motorman of the municipal car, whose liability, if any, is not affected by this motion.

[4, 5] Appellants contend that the motion was improperly granted since the allegations of the complaint as amended had to be taken as true, as on demurrer. Williams v. San Francisco, 24 Cal.App.2d 630, 76 P.2d 182; Gross v. Bank of America, 4 Cal.App.2d 353, 355, 41 P.2d 178; 21 Cal. Jur. p. 240. That is true with respect to well pleaded allegations of *fact*. But the allegations that the City and County functioned as two separate entities, proprietary and governmental, and that in its proprietary capacity *it was not decedent's employer,* were mere conclusions and not allegations of fact and "the conclusions of the pleader will be controlled by the particular facts alleged from which the conclusions are drawn". Deming v. Smith, 19 Cal.App. 2d 683, 66 P.2d 454, 458. The manner in which the City and County functions is within the judicial knowledge of the court, § 1875, Code Civ.Proc., and on such a motion, as on demurrer, the pleading must be read as if it contained a statement of all matters subject to judicial notice, even when it contains an express allegation to the contrary. Livermore v. Beal, 18 Cal. App.2d 535, 540, 64 P.2d 987. It follows that the allegations of fact told the court nothing that it did not already know from its judicial knowledge, and that the conclusions of law were ineffective.

[6] We are not unmindful of the fact that it would be decidedly to the advantage of decedent's widow and children (as in other cases cited earlier) to be able to maintain, as against the City and County, this action for damages rather than to accept an award of workmen's compensation. Had the collision involved the car of a private utility, or "any person other than the employer", Labor Code, § 3852 such action of course could have been prosecuted. E. g., Bencich v. Market Street Ry. Co., 29 Cal.App.2d 641, 85 P.2d 556. Had decedent been injured while not "within the course of his employment" he could have maintained such an action against his employer. E. g., Sullivan v. City and County of San Francisco, 95 Cal.App.2d 745, 214 P.2d 82. Appellants, however, find themselves confronted by the rule of §§ 3600–3601 and the cases which have consistently followed it ever since California has had workmen's compensation, holding that if the injury falls within the scope of the act a proceeding thereunder constitutes the exclusive remedy. Freire v. Matson Navigation Co., supra. In the latter case the court said: "The rule is not altered because a plaintiff believes that he can establish negligence on the part of his employer and brings a civil

suit for damages." [19 Cal.2d 8, 118 P.2d 810.]

The complaint as amended alleges facts showing appellants' exclusive remedy to be within the compensation provisions of the Labor Code, hence the motion was properly granted.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

LARSON et al. v. THORESEN et al.*

Civ. 17382.

District Court of Appeal, Second District, Division 1, California.

June 26, 1950.

Rehearing Denied July 10, 1950.

Hearing Granted Aug. 24, 1950.

Erik R. Larson and another brought action against John F. Thoresen and another for partition of realty on which the parties had erected a house and garage for purpose of sale. The Superior Court of Los Angeles County, Myron Westover, J., rendered an order in favor of defendants and the plaintiffs appealed. The District Court of Appeals, Doran, J., held that Superior Court did not err in failing to charge defendants for rental during time when they occupied garage and part of the house as a residence while the house was being completed, and that defendants were entitled to an award of $1,000 for depreciation caused by delay and hinderance of a sale by the plaintiffs.

Order affirmed.

1. Partition 🔑86

Where plaintiffs and defendants agreed to construct a house and garage and sell realty and divide sales price equally after deduction of payment of bills and expenses of sale, trial court in partition action properly refused to charge defendants for rent because of their occupancy of garage and part of house as living quarters while they were working on the house.

2. Tenancy in common 🔑28(1)

One tenant cannot maintain an action against his co-tenant who is in sole possession of the property, to recover rent for the cotenant's occupancy.

3. Appeal and error 🔑1010(1)

Where the record discloses substantial evidence in support of a finding, no interference therewith is justified.

4. Partition 🔑81

Where plaintiffs and defendants agreed to construct a house and sell it and divide sales price equally after deducting payment of bills and expenses of sale, and evidence in partition action indicated that plaintiffs failed to co-operate in effecting a sale of the realty, both by way of refusal to sign broker listings and otherwise, court properly awarded defendants $1,000 for depreciation caused by the delay.

5. Partition 🔑34

Partition is a proceeding of equitable nature.

◆

Robert Wanamaker, Pasadena, for appellants.

Lee J. Myers, Harold B. Cooper, Los Angeles, for respondents.

DORAN, Justice.

On August 5, 1947, the parties hereto executed a written contract which recites that John F. Thoresen, respondent herein, "is the owner of an enforcible written contract for the purchase of a building lot known as 1069 Bryant Road, El Monte, California, for the sum of $1,800.00, no part of which has been paid, and has erected certain partially completed buildings * * * at an outlay of $1,800.00 for labor and $135.95 for materials", and that appellant Larson "is desirous of obtaining a one-half interest in said property".

It was agreed that each party "will immediately pay to the owner of the lot * * * $900.00 * * * and title shall be taken in the names of" Mr. and Mrs. Larson and Mr. and Mrs. Thoresen. Appellant Larson also agreed to pay to Thoresen $817.97, "being one-half of the labor and materials paid for to the present time"; each party agreed to pay one-half of all unpaid bills, and "materials and outside labor necessary for the completion of said property". For any labor performed by the parties in completion of the dwelling Thoresen was to receive $2.25 per hour and Larson $2.00 per hour.

---

* Subsequent opinion 226 P.2d 571.

The contract further provided "That upon the completion of said buildings, said property shall be placed on the market for sale, at a price and upon terms to be mutually agreed upon". After payment of unpaid bills, expenses of sale, etc., "the remainder of the sale price shall be divided equally between the parties hereto". The contract, which was prepared by respondents' attorney, was signed and approved by the parties and their respective wives.

It is stated in appellants' brief that "During the construction, respondents, including their daughter and a brother, lived in the garage, and appellants placed a bed in the front bedroom * * * where they sometimes slept. Respondent Elide Thoresen prepared meals for the parties while they were working on the house. Meals taken by appellants were paid for by them. * * * About two weeks before the house was completed, respondents caused a stove to be * * * set up in the kitchen * * * where Elide Thoresen prepared meals. * * * Appellant testified that he objected to the use of the house for living purposes."

Appellants' brief further avers that "the parties agreed that it should be offered for sale at $12,000.00"; at a broker's advice, however, it was priced at $11,500.00, but no offer of that amount was ever obtained. Thereafter, the friendly relations of the parties became somewhat strained, due, as appellants allege, to respondents' use of the house, differences of opinion as to settlement of accounts, and "the failure of respondents to match appellants' contribution of funds to the project by $720.64". Ultimately, appellants filed the present action for partition, rental value, damages, and attorney fees.

The "Appellants proceeded to trial upon the theory that the occupancy of the property by the respondents constituted a breach of the written agreement between them. Respondents contended that since the title to the property had been taken as tenants in common, the respondents had the right to remain in possession rent free. * * * Apparently the trial court accepted respondents' theory".

No findings of fact, conclusions of law or formal judgment, were ever filed. However, at the conclusion of trial, the judge filed an "Opinion and Order" in favor of the respondents, finding "that the principal delay (in sale of the property) has been caused by plaintiffs Larson". The trial court "ordered that the parties proceed vigorously at once to sell the property at private sale, for the best price obtainable, but not for less than $9,500.00, subject to confirmation by the court; from the proceeds of which the court will allow Larson $507.56 excess of his cash advances and labor for the enterprise, over those of Thoresen, including the $25.22 for taxes paid by him, will allow for the services of Thor Thoresen the sum of $29.30, will allow incidental expenses and commission on sale, allow Thoresen $1,000.00 depreciation caused by Larson's delays, allow each side attorney's $750.00 fees, and will then divide the remaining net proceeds of the sale equally between Larson and wife, and Thoresen and wife".

The trial court's "Opinion and Order" further states: "There can be no allowance for rent between the parties. Their rights to possession were equal. But instead of rent it is ordered that Thoresen have the floor covering cleaned and paint the inside trim at his own expense. If the parties conclude to paint exteriors to aid a sale, the cost thereof may also be deducted from the proceeds of sale before division". The respondents sought the dismissal of this appeal on the ground that the order appealed from is not a final order, but such dismissal was denied.

Appellants' brief submits the argument that "The trial court's decision is contrary to the law and facts of the case in that it erroneously construes the contract between the parties as authorizing and permitting the occupancy of the house for residence purposes over objection of appellants and without the necessity of paying rent". The appellants also contend that the trial court's ruling "in denying appellants the right to present evidence of constructive eviction and ouster of appellants by respondents was erroneous".

It is also claimed that "The trial court's finding that appellants delayed and hindered a sale of the house is contrary to the evidence", and that the award of $1,000.00 damages to appellants for depreciation caused by such delay is erroneous and contrary to law. Also complained of is, that "having determined that partition was necessary, the trial court was under a duty to proceed therewith by a judicial sale or other appropriate relief, and its direction that the parties conduct a sale is a wrongful withholding of the relief to which appellants are entitled".

[1, 2] There is no merit to appellants' first contention that the trial court erred in permitting respondents to occupy the premises without payment of rent. "It is a recognized rule", as stated in McWhorter v. McWhorter, 99 Cal.App. 293, 296, 278 P. 454, 455, "that one tenant may not maintain an action against his cotenant who is in sole possession of the property to recover rent for the cotenant's occupancy". Moreover, as mentioned in respondents' brief, the record discloses evidence "that Thoresens' occupation * * * was for the sole purpose of protecting the interests of both parties". Appellants' argument that the parties should be considered as "joint adventurers" rather than as mere joint owners, and that the contract implied "that the house should be sold as a new unoccupied house", cannot be accepted as furnishing a legitimate exception to application of the rule in the instant case.

[3, 4] Appellants' argument that the trial court's finding to the effect that appellants delayed and hindered a sale of the house, and awarding respondents $1,000.00 for depreciation caused by such delay, is contrary to fact and law, is answered by the well-established formula of appellate procedure which provides that where the record discloses substantial evidence in support of a finding, no interference therewith is justified. The record herein reveals evidence, both documentary and testimonial in nature, which would indicate appellants' non-co-operation in effecting a sale of the property, both by way of refusal to sign broker listings and otherwise. That the evidence furnishes substantial support for the trial court's finding cannot well be doubted.

As pointed out in respondents' brief, the trial court "ordered the parties to carry out the terms of their contract by providing that the parties should: 'proceed vigorously at once to sell the property at private sale, for the best price obtainable, but for not less than $9,500.00' ". The trial court also provided for a division of the proceeds to be received from such a sale, an award of damages to respondents, and the payment of equal attorney fees to each party. While it would have been desirable that formal findings and judgment be filed, the so-called "Opinion and Order" entered by the trial court is definite and certain in its requirements.

[5] Partition is a proceeding of equitable nature; the trial court was obviously a better judge of the equitable merits of the present controversy than an appellate tribunal. It cannot be said that the decision rendered herein was contrary to law, inequitable, or without evidentiary support. The record reveals no reversible error.

The order appealed from is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

In re DENLINGER'S ESTATE.

DENLINGER v. LUTON.

Civ. 3994.

District Court of Appeal, Fourth District, California.

June 16, 1950.

Hearing Denied Aug. 10, 1950.

Proceeding in the matter of the estate of Carrie E. Denlinger wherein Ava Luton, executrix, filed a petition to sell real estate, and filed petition for confirmation of sale, and Roy G. Denlinger filed objections. The Superior Court of San Diego County, C. M. Monroe, J., confirmed the sale and the objector appealed. The District Court of Appeal, Griffin, J., held that the trial court had not abused its discretion in confirming the sale of the property.

Order confirmed.

1. Executors and administrators ⚿365

Sale by executrix of real estate forming part of testatrix' estate was not voided by fact that purchasers were son-in-law and daughter of executrix. Probate Code, § 583.

2. Executors and administrators ⚿323, 327

In determining whether executrix' sale of real estate was for advantage of estate, trial court could consider that there was not enough property in estate to pay administration costs and present distribution would probably necessitate later sale in order to partition property, since one of devisees was a minor, and that will gave executrix authority to manage decedent's estate until in her discretion it might be sold. Probate Code, §§ 754, 785.

3. Executors and administrators ⚿375

Confirmation of sale of real property forming part of deceased's estate is in trial court's discretion which should be exercised with view to best interests of persons interested in proceeds. Probate Code, § 785.

4. Executors and administrators ⚿375

Trial court's confirmation of sale of real estate cannot be set aside unless trial court abused discretion.

5. Executors and administrators ⚿375

Where real estate appraised at $15,000 was sold by executrix at sale, duly noticed, to son-in-law and daughter of executrix for $16,000 evidence supported finding that sale was for advantage of estate and those interested therein and justified confirmation. Probate Code, § 785.

◆

Allen G. Mitchell, El Cajon, for appellant.

C. Rupert Linley, El Cajon, for respondent.

GRIFFIN, Justice.

Objector and appellant herein, Roy G. Denlinger, is the son of decedent. Under the terms of her will he is entitled to an undivided one-third interest in the estate. After the will had been admitted to probate and during the course of administration, the executrix, Ava Luton, daughter of deceased, filed a petition to sell, at private sale, to the highest bidder, subject to confirmation by the court, the ranch property inventoried in the estate and appraised at $15,000. The sale was duly noticed. A bid in the sum of $16,000 was received for the property from Kermit G. Heise, son-in-law, and Lottie L. Heise, daughter of the executrix. A return of sale and petition for confirmation was filed on May 16, 1949. Appellant filed an objection thereto upon the grounds that the sale was conducted contrary to the provisions of sec. 583 of the Probate Code and voidable for the reason (1) of the relationship of the bidders to the executrix; (2) that the sale was not necessary for the payment of debts or costs of administration since objector offered to pay into court such costs; and (3) that there was not sufficient evidence upon which the court could find that the sale was for the advantage and interest of the estate.

Upon the hearing of the petition to confirm the sale, there being no other bidders, the court confirmed it subject to the objection filed. On hearing the objection, evidence was taken on the subject which may be summarized as follows: The property was advertised for sale over a considerable length of time. Prospective purchasers visited the property but no other bids were received. The ranch property, which was impracticable of partition, was about the only asset of the estate. The other item was personal property appraised at $480.58. Appellant is the only objector. The two remaining devisees, other than the executrix, were satisfied with the sale. The executrix had resided on the property for about 15 years prior to the death of her mother. Her daughter and son-in-law also resided there. The undisputed evidence is that the bidder and his wife negotiated a loan from one Minor for $7,000. As security, they were to execute a first trust deed on the property when the sale was confirmed. They deposited $1,600 of their own money, which accompanied the bid. They arranged for a loan from their great-aunt for the balance of the purchase price and costs, amounting to about $7,500. The executrix testified she agreed to repay the great-aunt that amount and to take a note and second trust deed on the ranch from the Heises as security for the repayment of that amount when her distributive share came to her; that she was not taking title to the property but made this loan because she wanted to put her money out at interest; that she was crippled and living with her daughter until further arrangements could be made. She testified she was not purchasing the property for herself either directly or indirectly.

After the hearing the court overruled the objection, found that the executrix practiced no fraud, was not interested in the sale either directly or indirectly, that it was necessary and for the best interests of the estate that the property be sold, and it approved the sale.

[1] In support of appellant's first claim he cites Strudthoff v. Yates, 28 Cal.2d 602, 170 P.2d 873; 11B, Cal.Jur., p. 56, sec. 670; 34 C.J.S., Executors and Administrators, § 599a, page 562; and 131 A.L.R. 990–1003. The Strudthoff case is no authority for the claim here made because the evidence here indicated that the executrix never acquired any title to the property, directly or indirectly, and the court so found. The mere relationship of the bidder here involved, alone, would not necessarily, in and of itself, force a finding that the sale should be voided.

In 34 C.J.S., Executors and Administrators, § 598, page 562, cited by appellant, it is stated that "* * * a sale to a near relative, or the husband or wife, of the personal representative usually is voidable, and under some statutes a purchase by the wife of the personal representative is void. Near relationship between the representative and the purchaser does not compel an inference of fraud, but is merely a circumstance to be carefully considered with the other circumstances in the case."

The trial court's finding precludes further discussion on the subject. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301.

As to the second and third contentions, we see no merit. There apparently was insufficient property remaining in the estate to pay costs of administration. At the conclusion of the hearing on the objection, appellant offered to advance money covering such costs to avoid a sale of the property. The court said that such offer was not then properly before the court, and denied this request. Appellant claims error and cites In re Estate of Rawitzer, 175 Cal. 585, 592, 166 P. 581, which is factually dissimilar.

Under sections 754 and 785 of the Probate Code, when a sale of property of an estate is necessary to pay debts or expenses *or* when it is for the advantage, benefit and best interests of the estate and those interested therein that any property of the estate be sold, the executor or administrator may sell the same, either at public auction or private sale, using his discretion as to which property to sell first. And if it appears to the court that good reason existed for the sale, that the sale was legally made, and fairly conducted, the court shall make an order confirming the sale and directing conveyance to be executed.

Here, the property, if distributed in kind, would go to the devisees, one of whom was a minor. The trial court rightfully concluded that it would not be practical to here order distribution and later have proceedings brought to partition the property, in which case a sale no doubt would likely be ordered. The will provided that the executrix manage decedent's estate and granted her such authority, "until such time as in her discretion it may be sold".

[2–4] The trial court had a right to consider all of these factors in determining whether the sale was for the advantage and best interests of the estate and those interested therein. Upon general principles, the court, in confirming a sale of property, should exercise a sound discretion with a view to the best interests of those who are or may become interested in the proceeds. It being a matter of discretion, the action of the trial court must stand on appeal unless an abuse of that discretion appears. In re Estate of Bazzuro, 161 Cal. 71, 76, 118 P. 434; In re Estate of George, 123 Cal. App. 733, 12 P.2d 86; In re Estate of Da Roza, 82 Cal.App.2d 550, 553, 186 P.2d 725; In re Estate of Scott, 172 Cal. 485, 157 P. 242.

[5] The court's finding on this subject is supported by the evidence and is conclusive on appeal.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

98 Cal.App.2d 165

LANE v. SUPERIOR COURT IN AND FOR SISKIYOU COUNTY.

Civ. 7853.

District Court of Appeal, Third District, California.

June 22, 1950.

Original prohibition proceeding by Sara E. Lane and Sara E. Lane, as guardian ad litem of Louis Grover, an incompetent person, against the Superior Court of the State of California, in and for the County of Siskiyou, for a writ prohibiting and restraining respondent from modifying or amending in any way heirship decree previously entered by respondent in a proceedings in the matter of estate of Mary DeBoie, deceased. The District Court of Appeal, Van Dyke, J., held that where it could not be determined whether Probate Court's proposed amendment of decree of heirship to include daughter of decedent's brother, who predeceased decedent, as an heir was intended to correct a clerical error or was an attempt, under guise of correcting such error, to in fact correct judicial error, a writ of prohibition would not lie to prohibit Probate Court from modifying or amending the heirship decree.

Alternative writ discharged, and application for peremptory writ denied.

1. Descent and distribution 🔑71(1)

A decree determining heirship is a "proceeding in rem" made in course of proceedings that are purely statutory and special in their nature. Probate Code, §§ 1080, 1200.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Proceeding in Rem".

2. Descent and distribution 🔑71(7)

Decrees determining heirship are accorded the same intendments in favor of their validity as the final judgment of any court. Probate Code, §§ 1080, 1200.

3. Courts 🔑198

Jurisdiction of probate court is established when the appropriate petition has been filed and a notice required by statute has been given.

4. Descent and distribution 🔑71(1)

Where petition to establish heirship has been filed and the notice prescribed by statute has been given, the probate court has jurisdiction to proceed with the whole matter of heirship in the decedent's estate. Probate Code, §§ 1080, 1200.

5. Descent and distribution 🔑71(1, 7)

An heirship proceeding is a specialized proceeding in rem wherein the res is the right of heirship and distribution, and as to that issue the decree is binding on the whole world. Probate Code, §§ 1080, 1200.

6. Descent and distribution 🔑71(7)

A decree in an heirship proceeding is not one in persona in favor of one party against another but is a solemn declaration of status of the res, and ipso facto renders it what the decree declares it to be. Probate Code, §§ 1080, 1200.

7. Judgment ⚷306

Aside from statute, courts have inherent power to correct clerical error by clerk or judge in judgments ex parte and without notice or time limitation, subject only to the condition that the power be used only to correct clerical errors, and not for judicial errors.

8. Judgment ⚷306

The inherent power of court to correct clerical error in order or judgment extends to cases where some provision of or omission from an order or judgment as made or rendered was due to inadvertence or mistake of court which might properly be treated as a clerical misprision rather than a judicial error.

9. Judgment ⚷297

Independently of statute, a trial court has power to correct mistakes and to annul orders and judgments inadvertently or improvidently made.

10. Judgment ⚷304

Although a court has power to set aside judgments and orders inadvertently made which are not actually the result of exercise of judgment, it has no power to set aside or amend judicial error except under appropriate statutory procedure.

11. Prohibition ⚷29

Where it could not be determined whether probate court's proposed amendment of decree of heirship to include daughter of decedent's brother, who predeceased decedent, as an heir was intended to correct a clerical error or was an attempt, under guise of correcting such error, to in fact correct judicial error, prohibition would not issue to restrain probate court from modifying or amending the heirship decree. Probate Code, §§ 1080, 1200.

Mark M. Brawman, Yreka, for petitioners.

Tebbe & Correia, Yreka, for Real Party in Interest.

VAN DYKE, Justice.

Prohibition: The estate of Mary DeBoie is in the course of probate in Siskiyou county, her surviving husband being the administrator. On October 13, 1948, two sisters of decedent filed in that proceeding their petition to determine heirship. The surviving husband appeared personally and claimed he was entitled to the whole estate as community property. Statutory notice to all persons who might be interested was given by posting as provided by section 1080 of the Probate Code. The matter was heard, Honorable Albert F. Ross, judge assigned, presiding. The only parties present were the surviving husband and the sisters. Considerable testimony was taken concerning the nature of the property as being community or separate. The testimony concerning heirship was scanty but one of the sisters did testify that the decedent left surviving her the two sisters and the surviving husband. When she was asked about other relations she said that one brother had died before the death of Mary DeBoie and had left surviving him a daughter; that the witness did not know where this daughter then was and had not heard from her "in a number of years." Nothing further appeared concerning this niece of decedent. All issues were submitted to the trial court, and thereafter Judge Ross filed with the clerk a document entitled "Memorandum of Decision." Therein he announced his intention to hold that the personal property in the estate was community and should go to the husband, decedent having died intestate; that the real property was separate property of the decedent. The memorandum then continued: "I therefore find that the two sisters are entitled to inherit one quarter each of the real property herein and the husband is entitled to one half, and direct that an order so determining heirship be prepared." Nothing was said about the niece. Approximately three weeks thereafter there was filed a decree adjudging that decedent had left surviving her as her only heirs at law, the surviving husband and the two surviving sisters. Again no mention was made of the niece referred to in the testimony. More than one year elapsed thereafter and on January 30, 1950, Ena Hallick Layton, alleging herself to be the aforesaid niece of decedent, filed her petition for an order modifying the decree determining heirship and for a declaration that she was entitled to an equal interest with the two surviving sisters. Responsive to this petition the two sisters filed objections to her petition setting up the foregoing proceedings and contending the decree was final and could not be changed. They alleged that while Sara E. Lane, one of the sisters, did testify as above set forth, she did not at that time know the whereabouts of Ena Hallick Layton nor whether she was alive or dead. They denied that the niece had been intentionally omitted from their petition to determine heirship, and alleged that Sara, the only one sworn, had truthfully answered all questions propounded.

There is no dispute between the parties but that Ena Hallick Layton is a niece of decedent, or that but for the decree aforesaid, she would be entitled to share in the estate of decedent. Her petition to amend the decree was heard before the court, Honorable James M. Allen, presiding. Judge Allen filed with the clerk a memorandum of his intended action upon the petition to amend the decree. After noting that the evidence taken at the hearing of the petition to determine heirship showed that Ena Hallick Layton was a legal heir, and that this evidence had never been contradicted, the judge declared that he had no doubt that Judge Ross had "inadvertently overlooked her when he made his decision and signed the decree." He stated there is nothing in the record to show that the niece had any actual knowledge of the death of her aunt, of the estate proceedings, or of the proceedings to determine heirship until she filed the petition to amend that decree. And he finally declared that he conceived it to be his duty to do whatever lay in his power to see that the estate was properly distributed to the actual legal heirs and that he would grant her petition to allow her to take her legal share of the estate. However, he stated in addition: "I will not sign the formal order until objectors have the opportunity to test the correctness of my decision in the upper courts if they desire to do so."

Sara E. Lane and her sister thereupon filed in this court their petition asking that a writ of prohibition issue directed to the trial court and the judge thereof prohibiting and restraining the court from modifying or amending in any way the heirship decree.

[1-6] Preliminarily it may be said that a decree determining heirship is a proceeding in rem made in the course of proceedings that are purely statutory and special in their nature; that such decrees are accorded the same intendments in favor of their validity as the final judgment of any court; that jurisdiction to take any action prescribed by statute is established when the appropriate petition has been filed and notice required by statute has been given; that when a petition to establish heirship has been filed and the notice prescribed by Probate Code section 1200 has been given, the probate court has jurisdiction to proceed with the whole matter of heirship in the decedent's estate; that an heirship proceeding is a specialized proceeding in rem wherein the res is the right of heirship and distribution, and as to that issue the decree is binding on the whole world; that the decree in such a proceeding is not one in persona in favor of one party against another but is a solemn declaration of the status of the res, and ipso facto renders it what the decree declares it to be. Estate of Wise, 34 Cal.2d 376, 210 P.2d 497, and cases cited. Therefore as a result of the proceedings taken here in the matter of determination of heirship Ena Hallick Layton was bound, and in effect lost her heirship even though it be true that she had no actual knowledge of anything that had transpired. Her right to apply for relief under section 473 of the Code of Civil Procedure had expired, and consequently her petition could only invoke the inherent power of the trial court to correct its records to make them speak the truth in so far as their failure to do so had been caused by clerical errors or misprisions, including those of the court itself if any

such had occurred. The contention of petitioners here is that the decree determining heirship was and is valid; that it is final and that upon the record before it the contemplated action of the trial court would be in excess of jurisdiction and therefore properly restrainable by writ of prohibition. In answering these contentions it will be necessary to refer somewhat generally to the power of the trial courts in correcting their judgments.

[7-10] A good discussion on the subject is found in Morgan v. State Board of Equalization, 89 Cal.App.2d 674, 677, 201 P.2d 859, 861. It is therein said: "Aside from statute, courts have an inherent power to correct judgments where there has been a clerical error by the clerk or by the judge himself. There is no time limit within which this correction need be made. The correction can often be made ex parte and even without notice. The only important limitation upon the power is that it must be used to correct 'clerical' errors, and cannot be used for 'judicial' errors."

The opinion goes on to declare that the power extends also to cases where some provision of or omission from an order or judgment as made or rendered was due to the inadvertence or mistake of the court which might properly be treated as a clerical misprision rather than a judicial error. The opinion reviews many cases upon the subject matter, only some of which need be noted here. In Bastajian v. Brown, 19 Cal.2d 209, 214, 120 P.2d 9, 11, the trial court, after a submission to it of a cause involving the quieting of title, caused a minute entry to be made that judgment was ordered for the defendants. After the expiration of a year, during which no action was taken, plaintiff presented findings of fact and conclusions of law which were in his favor on an important issue. They were signed by the judge. No motion for a new trial was made nor appeal taken but application was made to vacate the findings and judgment on the ground that they did not conform to and were not the true judgment rendered by the court. An order granting this motion was made, the court declaring that the findings had not conformed to the true judgment intended by the court and that this situation had arisen through clerical error. An appeal was taken, and the Supreme Court held as follows: "Independently of statute a trial court has power to correct mistakes and to annul orders and judgments inadvertently or improvidently made. * * * which are not actually the result of the exercise of judgment, it has no power * * * to set aside or amend judicial error except under appropriate statutory procedure."

The court further held that the error corrected in that case was not a judicial one; that the judge's solemn declaration in the order vacating the judgment was that the findings and judgment did not conform to and set forth the true judgment rendered by the court; that this declaration could not be wholly disregarded because it was a declaration of a fact that was concealed in the mind of the judge; and that no one was in a better position than he to state what had been his true intent. Said the Supreme Court: "He may have failed to read the findings and judgment before signing them. He may have supposed they were in favor of defendants. His declaration may be construed to so indicate. Under such circumstances it is obvious that the findings and judgment would not *in fact* be the decision actually intended to be rendered by him, or that he in the exercise of judicial authority arrived at. * * * The facts within the personal knowledge of the judge may be considered, and in vacating or correcting a clerical error or mistake he may give effect to his own recollection. The declaration in the order vacating the judgment has a direct bearing on the existence of such error. * * * The signing of the findings does not necessarily establish that an error in a judgment is a judicial one. * * * The trial court's finding upon conflicting evidence that a clerical error exists, and the nature thereof, is conclusive upon this court."

[11] The foregoing is sufficient authority for a determination that the writ of

prohibition will not lie under the circumstances disclosed here.

First the trial court has jurisdiction to entertain and act upon the petition to amend its own judgment. Next, if a clerical error has been committed, as a result of which the judgment attacked is not the true judgment of the court, the trial court may amend its judgment to speak the truth. In the first instance the trial court must determine whether or not the amendment sought will be the correction of clerical error or an attempt, under the guise of correcting such error, to in fact correct judicial error. In the case at bar the trial court has not so acted. It may still do so. While the record before that court, when it announced its intended action, is presented here, and while it may be conceded that it presents grave questions as to the nature of the error sought to be corrected, nevertheless we cannot say that such will be the record when the court does take the suggested action. For instance, that court might, in view of the declarations in the Bastajian case, supra, concerning the importance of declarations by the judge who made the decision, set aside the submission and direct that a further hearing be had in which that judge may have an opportunity to throw additional light upon the vital point to be determined by the trial court. Conceivably additional evidence from other sources might be received, the point being that this court is in no position at this time to declare that the trial court will, if it finally amends the decree as requested, be then acting in excess of jurisdiction. Under the circumstances here it is impossible for this court to say that under any and all conceivable situations the suggested action of the trial court, when it shall have been taken, will exceed its jurisdiction. On the contrary the proper method of presenting this issue to an appellate court is to await the action of the trial court, and when it has been taken, to present on appeal the question here sought to be presented. On appeal the actual basis of whatever ruling the trial court makes can be properly presented by the record on appeal, and then, and only then, can the legal issues involved be appropriately decided.

The alternative writ is discharged, and the application for a peremptory writ is denied.

ADAMS, P. J., and PEEK, J., concur.

HUNTER v. JUSTICE'S COURT OF CENTINELA TOWNSHIP, LOS ANGELES COUNTY et al.*

Civ. 17713.

District Court of Appeal, Second District, Division 1, California.

June 21, 1950.

Hearing Granted Aug. 17, 1950.

John C. Hunter filed a petition for a writ of prohibition to the Justice's Court of Centinela Township, County of Los Angeles, State of California, and The Honorable Bernard Lawler, Judge thereof. The District Court of Appeal, Drapeau, J., held that the Public Resources Code sections prohibiting drilling an oil well on less than an acre of land, and giving to the owner of less than an acre, surrounded by an oil lease, the status of a lessor in the oil lease, with right to share proportionally with other lessors in the royalties paid to landowners, did not provide for a forum with power to secure for owner of less than an acre of land his right, co-equal with surrounding owners and lessees, to his fair share of the oil and gas from the common source of supply, and to that extent invaded constitutional property rights of owner of less than an acre of land.

Writ issued as prayed.

1. Mines and minerals 🔑47

Until enactment of statute prohibiting drilling an oil well on less than one acre of land, every landowner irrespective of the size of his parcel of land, could drill for oil and reduce it to possession. Public Resources Code, § 3602.

---

* Subsequent opinion 223 P.2d 465.

2. Mines and minerals 🔑92.4

The California, Oil Well-Spacing Laws are for the public welfare, under the police power, to insure that drilling too many wells in a given area will not waste oil, and are not unconstitutional because drilling on less than an acre of land is prohibited. Public Resources Code, § 3602.

3. Evidence 🔑20(1)

District Court of Appeal would take judicial notice of the fact that drilling an oil well is an expensive undertaking and would not be economically feasible upon land less than an acre in extent.

4. Mines and minerals 🔑92.4

The statute giving to the owner of less than an acre of land, surrounded by an oil lease, the status of a lessor in the oil lease with right to share proportionally with other lessors in the royalties paid to landowners, is not invalid as being so oppressive and unreasonable as to amount to an improper exercise of the police power. Public Resources Code, § 3608.

5. Constitutional law 🔑280

If the state takes away part of the ownership of property for the general good of all, the state must afford means for the protection of the property owner.

6. Mines and minerals 🔑92.4

The Public Resources Code sections prohibiting drilling an oil well on less than an acre of land, and giving to an owner of less than an acre of land, surrounded by an oil lease, the status of a lessor in the oil lease, with right to share proportionally with other lessors in the royalties paid to landowners, do not provide for a forum with power to secure for him his right, coequal with surrounding owners and lessees, to recover his fair share of the oil and gas from the common source of supply and to that extent invades constitutional property rights of owner of less than an acre of land surrounded by an oil lease. Public Resources Code, §§ 3602, 3608.

Arthur C. Fisher and John C. Packard, Los Angeles, for petitioner.

Harold Judson, Hollywood, and Orris R. Hedges, Los Angeles, for amici curiæ on behalf of petitioner.

Fred N. Howser, Attorney General, John F. Hassler, Jr., Deputy Attorney General, for respondents and others.

O'Melveny & Myers, W. B. Carman, Jr., William W. Alsup and Deane F. Johnson, all of Los Angeles (Robert T. Patton and Donald S. Coye, Los Angeles, of counsel), for Shell Oil Company, Real Party in Interest.

DRAPEAU, Justice.

Since 1925 petitioner has owned two town lots, an area 140 feet long and 100 feet wide, and 39/100 of an acre. Shell Oil Company has what is called a community lease from lot owners in the vicinity. The lease includes lots adjacent to, and surrounding petitioner's lots.

Petitioner is not a party to the Shell lease. But, under Section 3608 of the Public Resources Code petitioner's lots are included within the lease—whether he likes it or not. Section 3602 forbids him to drill upon his own lots, they being less than an acre in extent.

Petitioner commenced to drill a well for himself on his own property. Whereupon the District Attorney of Los Angeles County filed a criminal complaint in the respondent Justice's Court, charging him with violation of Section 3600 of said Code. Petitioner's motion to dismiss the complaint was denied; he pleaded not guilty; and his case has been set for trial. Hence petitioner prays for the issuance of the Writ of Prohibition from this Court.

This raises the question of constitutionality of Sections 3600 and 3608 of the Public Resources Code, as applied to the facts alleged in the Petition.

The California Well-Spacing Act was first enacted in 1931. Stats.1931, Ch. 586, p. 1277. In 1939 it was embodied in Sections 3600 to 3605 of the Public Resources Code. Stats.1939, Ch. 93, p. 1067. The Legislature did not state specifically that the law was for the purpose of conservation of oil until 1947. Stats.1947, Ch. 1559, p. 3200.

The well-spacing act of 1947 was drafted in the light of the decision of our Supreme Court in Bernstein v. Bush, 29 Cal.2d 773, 177 P.2d 913. The Legislature then stated that the code sections were enacted for the conservation of natural resources and the observance of safe and orderly oil field operations.

In addition to Section 3602, which prohibits drilling on less than an acre, Section 3608 was added. Section 3608 gives to the owner of less than an acre, surrounded by an oil lease, the status of one of the lessors in that lease, with the right to share proportionately with the other lessors in the royalties paid to the landowners.

The Bernstein case indicated that unless the lot owner not included in, but surrounded by community lessors, was permitted the enjoyment of the co-equal right to recover petroleum beneath his property, California's well-spacing legislation would be held unconstitutional. The case, however, went off on the proposition that it was not one requiring issuance of the Writ of Mandate by the Supreme Court. And three of the Justices indicated they would seriously question whether the Supreme Court should declare the statute unconstitutional, in the circumstances in that case.

[1] Until the enactment of Section 3602 every landowner, irrespective of the size of his parcel of land, had the right to drill for oil and reduce it to possession. Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237; La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 114 P.2d 351, 135 A.L.R. 546. This has been sometimes called the rule of capture.

The problem here presented, then, is whether Section 3608 secures to the petitioner a co-equal right with other landowners to recover his proportion of the oil underlying his property, the State having taken away from him the right to drill his own well.

Petitioner says it does not, for the following reasons:

1. The owner of a lot or lots the size of petitioner's cannot under any set of circumstances drill upon his own property.

2. Under the lease with Shell, petitioner is to receive his proportionate part of one-sixth royalty to be paid to the landowners. This denies petitioner any share in the remaining five-sixths of the oil recovered. Petitioner should be permitted to pay his proportionate part of the cost of drilling under the lease, and thus be entitled to share accordingly in all of the oil recovered.

As stated in the brief of amici curiæ: "In California the lot owner is relegated by Section 3608 to the enforced role of a lessor receiving only one-eighth,* even though he may be financially able, technically equipped, and otherwise desirous of drilling a well upon his own property, or sharing with others the cost of drilling upon the spacing unit of which his lot forms a part.

"* The lease in the present case gives somewhat more than the law requires—one-sixth * * *"

3. Petitioner's land is subjected to the obligations of a lease in the making of which he had no part. He is forced by law into a contract in which he has no say. At least there should be some tribunal established to hear and pass upon his case, and assure to him his constitutional right of due process of law.

Under the California well-spacing law, no forum is set up to determine the respective rights of the parties whose lands are affected by well spacing, either in their relations as lessors *inter se,* or in their relations as lessors with the lessee. To instance this objection, the law of Oklahoma is cited.

Oklahoma sets up a commission with power, among other things, to determine: (a) The lands embraced in the common source of supply as then defined; (b) The plan of well-spacing then being employed in said source of supply; (c) The depth of such producing wells as may already have been completed therein; (d) The thickness, porosity, and permeability of the producing sand in said source of supply; (e) The nature and character of the reservoir energy found therein; (f) The formations encountered in any wells then drilling in said source of supply; (g) Cores taken from said source of supply; (h) The history and producing characteristics of wells in other sources of supply producing from the same or similar formations; (i) Any other available geological or scientific data pertaining to said source of supply which may be of probative value to said commission in determining the proper spacing and well drilling unit therefor. All with due and reasonable allowance for the correlative rights and obligations of the producers of oil and royalty owners interested therein.

4. Under the terms of the lease, Shell is not required to drill more than one well to each twenty acres. On property adjacent to the lease many more wells have been and are being drilled, and one well to each twenty acres does not fairly offset drainage of wells upon other and adjoining property.

5. A valid spacing act must contain a provision designating the maximum community unit or drilling area. The California law does not do this. Thus, assuming petitioner's land to be over the most prolific part of the oil structure, the lease may include lands far removed from the structure, and give to the owners of such lands a part of the oil under petitioner's property which they never otherwise could get.

6. A valid spacing act must not for an undue length of time prevent owners of less than one acre from enjoying the benefits of property over a producing oil structure. The lease in question was held for more than four years before any drilling was done, and during all that time petitioner could not drill. Under the terms of the present lease the lessee could defer drilling for twenty years.

These objections will be considered separately.

First—that the owner of less than an acre is denied the right to drill upon his property:

To understand this Court's ruling upon this objection, it is necessary to sketch, generally and roughly, the consensus of opinion among oil experts and engineers as to the immediate sources of petroleum.

Oil is not present beneath the ground as a pond or lake of liquid. It is present in the interstices of sandlike rock formations. Along with the oil, is gas under pressure.

Oil is not everywhere under the ground; it is confined to what oil men call structures. Sometimes structures are of considerable size, but each has its limits. After sufficient wells are drilled into an oil structure, experts can determine generally its limits as to length and breadth and depth. And the experts can determine with considerable accuracy how deep you have to drill to hit the structure.

Of course, no two structures are ever the same, so no exact rules can be stated as to length or depth or breadth. And ofttimes an expert's prediction as to what will happen to a particular well over a proven structure is confounded by one of the sly quirks of Mother Nature.

On the top, most structures may roughly be likened to the slanting roof of an old-fashioned house. Some are quite steep in pitch, others more nearly horizontal. It is seldom that both sides of the roof are the same in pitch or extent, or indeed, the same in productivity.

The overall size of structures is variable; some are large, some are small; in some the roof pitches off so rapidly that the structure into which wells may successfully be drilled is not very wide; in others the pitch is so gradual on one flank or the other, or on both, that it is said to be an extensive structure.

Similar observations may be made as to length and depth below the tops of these natural reservoirs.

But there is one characteristic common to all petroleum structures. The pressure of the gas is what primarily brings the oil to the surface. Other pressure of oil and water is also present. But to go into the effects and results of all pressure in an oil structure, and what man's interference does to it, would unduly complicate this layman's statement, for illustrative purposes only, of exceedingly complicated natural phenomena.

Suffice it to say that if title to property over a producing structure is held by many owners, too many wells are drilled. And too many wells diminish pressure so rapidly that only a part of the oil in the structure is recovered. When the pressure falls below a certain degree, or fails entirely, large quantities of petroleum are left in the structure and are lost. So far no technical means has been perfected to recover oil thus wasted.

In Harvard Law Review (1938) Vol. 51, at page 1219, the forces which bring oil to the surface through oil wells are described, as follows:

"An oil pool is an engine; it represents an equilibrium of rock pressure, gas pressure and underlying water pressure. Pierced by a well, these forces propel oil or gas or water, or all three, to the surface. The fundamental concept of the early cases was that an oil well produced oil, as a spring might produce water, and was itself, consequently, the subject of a property right. But, from an engineering standpoint, it has been said that the well is nothing but a vertical pipe line which permits the reservoir, as an engine, to transport oil to the surface of the lease, just as a horizontal pipe line is a means permitting a pump to transport oil from the lease to the refinery. Once placed in production, an oil pool is now known to change its underground characteristics. The lessening of the pressure around the well permits the gas which is dissolved in the oil to expand, propelling that oil through the pores of the rock or sand to the well. Concurrently, the underlying water, under a hydrostatic head, pushes upward, driving oil through the rock pores ahead of it. Under ideal conditions, those natural underground forces, i. e., 'water drive', gas pressure, and so on, may be so harnessed and controlled as to lift to the surface 90 to 95 per cent of the oil contained in the reservoir, by flowing, over a long period of years. But when oil is produced without restriction, the engine figuratively races itself to pieces: the gas, which has accumulated on top of the oil, is blown off; the underlying water rushes up through the oil-bearing sand to the well, and traps off oil; and the gas dissolved in the oil is permitted to escape so rapidly that the remaining oil is left too thick and viscous to be propelled through the rock by the diminishing pressure. The well then has to be pumped, producing much smaller quantities at a much higher cost. The result, under the American system of ownership, is that in the older fields which were operated without restriction during their flush periods, from 75 to 90 per cent of the oil has been left underground and capable of production only at a slow rate through pumping, or perhaps ultimately by mining methods. Certain fields in foreign countries, where the concessions were large enough to embrace the entire pool as a single operating unit (in contrast with the American unit of the single lease), have been so drilled and produced as to yield, by flowing, almost the full theoretical recovery."

[2] So, here is the public interest which is the basis for regulation by law of oil drilling, and in the present case, for well-spacing legislation. Concededly, such legislation is a departure from the rule of capture. The enactment is for the public welfare, under the police power, to insure that drilling too many wells in a given area will not waste oil. The people have the undoubted right to insure maximum recovery of this natural resource. People v. Associated Oil Co., 211 Cal. 93, 294 P. 717. Otherwise, we would lose for all of us that much of a commodity vital to our needs, to our welfare, and in wartime, to our existence.

Other reasons of public welfare, justifying regulation of oil drilling, under the police power, are well recognized, as forbidding the location of wells too close to highways or railways, and determining the number of wells, if any, in thickly settled districts; but the impelling reason for regulating the number of wells in an oil field is the need for conservation of this essential and useful product of nature.

Therefore, California's oil well spacing laws are well within the police power of the state, and are not unconstitutional for the single reason that drilling on less than an acre is prohibited.

The second objection—that petitioner should be permitted to contribute his part of the cost of drilling, and to receive his proportion of all of the oil recovered:

In most, if not all of the oil well spacing laws in other states, this privilege is given to owners of less than an acre. However, what other states may or may not do is not necessarily decisive of what the state of California may do. The test is whether the law applied to petitioner's property is so oppressive and unreasonable as to amount to an improper exercise of the police power. Willett & Crane v. City of Palos Verdes Estates, 96 Cal.App.2d 757, 216 P.2d 85.

[3, 4] This Court will take judicial notice of the fact that drilling an oil well is an expensive undertaking, and would not be economically feasible upon land less than an acre in extent. People v. Associated Oil Co., supra. Therefore, the principle involved in Section 3608 affords to petitioner a fair adjustment of the problem of doing justice to individuals and at the same time protecting the public interest in conservation of oil.

The third objection (in which may be included the fourth, fifth, and sixth):

Petitioner, without his consent, is included in a lease with which he had nothing to do. As pointed out in the objections above stated, the owner of less than an acre of land is delivered hand and foot to the lessee and the lessors who own more than an acre. All he gets is a one-eighth share in oil produced under the community lease, in the proportion that his short acre bears to all the land leased.

The other parties determined the area to be leased, and the lessors who will share in the production; they determine the term of the lease, the time when the first well shall be drilled to hold it, the manner of performance thereunder, the number of wells to be drilled to hold the lease, provisions for offset drilling, the lessors' share of oil recovered (which under the Section may not be less than one-eighth); they determine all of the things essential for the protection of the lessor of oil property.

[5, 6] If the state takes away part of the ownership of property for the general good of all, it must afford means for the protection of the owner. Petitioner is entitled to have his lessor's rights determined in some forum set up by the state—a forum with power to secure for him his right, coequal with surrounding owners and lessees, to recover his fair share of the oil and gas from the common source of supply. Bernstein v. Bush, supra. The Public Resources Code sections under consideration in their present form do not do this for owners of parcels of land of less than an acre; and to that extent unlawfully invade petitioner's constitutional property rights.

Let a Writ of Prohibition issue as prayed.

WHITE, P. J., concurs.

DORAN, J., concurs in the judgment.

---

98 Cal.App.2d 151

PACIFIC TELEPHONE & TELEGRAPH CO. v. WELLMAN.

Civ. 17319.

District Court of Appeal, Second District, Division 2, California.

June 22, 1950.

Rehearing Denied July 12, 1950.

Hearing Denied Aug. 17, 1950.

The Pacific Telephone & Telegraph Company brought action against Irene E. Wellman to recover cost of repairing plaintiff's truck which was damaged in a collision with an automobile driven by the defendant's husband and owned by him and defendant. The defendant's husband lost his life as a result of the accident. The Superior Court of Los Angeles County, Harold B. Jeffery, J., entered an order granting new trial after entry of judgment on a verdict in favor of plaintiff, and the plaintiff appealed, and the defendant cross-appealed from the judgment. The District Court of Appeal, Wilson, J., held that evidence was insufficient to establish that defendant was liable for negligence of her husband in operation of automobile registered in names of both her husband and herself under statute imposing liability on automobile owner for negligent operation thereof by another with owner's permission.

Order granting new trial affirmed, and defendant's appeal from the judgment dismissed.

1. Automobiles ⟹242(6)

Burden of affirmatively proving permissive use of motor vehicle is on one seeking to recover under statute providing that every owner of a motor vehicle is liable for death of or injury to person or property resulting from negligence in operation of such motor vehicle operated with permission of owner. Vehicle Code, § 402(a).

2. Automobiles ⟹242(6)

In order to impose liability under statute providing that every owner of a motor vehicle is liable for death of or injury to person or property resulting from negligence in operation of such motor vehicle operated with permission of owner, it must be shown that motor vehicle was owned at time of accident by person sought to be held liable, and that motor vehicle was operated with permission, express or implied, of such owner. Vehicle Code, § 402(a).

3. Automobiles ⟹192(5)

If automobile involved in collision while being driven by husband was community property, wife could not be held liable for damages under statute imposing liability on automobile owner for negligent operation thereof by another with owner's permission, since husband had management and control of all community property and wife had no consent to give. Vehicle Code, §§ 66–68, 140, 152, 153, 402(a).

4. Husband and wife ⟹262(1)

The presumption that property acquired by married woman as her separate property applies only to that which is acquired by an instrument in writing, and where there is no evidence of a transfer by a writing the implication is that the property is community property. Civ.Code, § 164.

5. Husband and wife ⟹262(1)

Certificate of registration of automobile in name of husband and wife was not an "instrument in writing" by which persons acquired title, and, hence, did not raise presumption that wife's interest in automobile was her separate property, as regards issue whether wife could be held liable for husband's negligence in operation of the automobile under statute imposing liability on owner for negligent operation thereof by another with owner's permission. Vehicle Code, §§ 66–68, 140, 152, 153, 402(a); Civ. Code, § 164.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Instrument in Writing".

6. Automobiles ⟹244(23)

Evidence was insufficient to establish that wife was liable for husband's negligence in operation of automobile registered in names of both husband and wife under statute imposing liability on automobile owner for negligent operation thereof by another with owner's permission. Vehicle Code, §§ 66–68, 140, 152, 153, 402(a); Civ. Code, § 164.

7. Appeal and error ⟹979(2)

Evidence concerning collision between defendant's automobile and plaintiff's truck at intersection controlled by traffic signals was so conflicting that trial court's discretion in granting a new trial after verdict for plaintiff could not be disturbed.

8. Evidence ⟹243(4), 265(16)

In action arising out of collision between defendant's automobile and plaintiff's truck at intersection controlled by traffic signals, extra-judicial statement of plaintiff's driver to police officer a few minutes after accident that traffic signal must have changed to red as he went through the intersection was evidence not limited to purpose of impeachment but was an admission against interest.

9. Automobiles ⟹242(1)

In action arising out of intersectional collision between an automobile being driven by defendant's husband, and plaintiff's truck, where defendant's husband was killed in the accident, defendant was entitled to presumption that her husband exercised reasonable care, which included presumption that he obeyed the traffic laws.

10. Automobiles ⟹242(1)

The presumption that one killed in automobile accident was exercising reasonable care at time of accident was evidence and was sufficient to create a conflict with contrary testimony produced at trial.

11. Appeal and error ⚷948

An order granting a new trial on ground of insufficiency of evidence to sustain judgment will not be disturbed on appeal unless there be a clear showing that trial court abused its discretion.

12. New trial ⚷71

Even if evidence is uncontradicted trial judge may draw inferences from it contrary to those made by the jury, and it is his duty to resolve such conflicts in determining whether issues should be retried.

13. Appeal and error ⚷979(2)

If there is any substantial conflict in the evidence the order granting a new trial on ground of insufficiency of the evidence would be affirmed.

14. Appeal and error ⚷933(1)

Upon appeal from order granting a new trial all presumptions favored the order as against the verdict.

15. Appeal and error ⚷837(2)

Order granting new trial after verdict for plaintiff in action arising out of intersectional collision on ground of insufficiency of evidence to establish that accident was caused by negligence of driver of defendant's automobile would not be reversed because a judgment had been entered against present defendant in another action arising out of same accident brought by occupant of plaintiff's truck and defendant's motion for new trial therein had been denied. Code Civ.Proc. § 657.

* * *

Lawler, Felix & Hall, Leslie C. Tupper, Leland B. Conant, all of Los Angeles, for appellant and respondent Pacific Telephone & Telegraph Co.

Clarence B. Runkle, Los Angeles, for respondent and cross-appellant Irene E. Wellman.

WILSON, Justice.

Action to recover the cost of repairing plaintiff's truck which was damaged in a collision with an automobile driven by Ernest L. Wellman and owned by him and defendant Irene E. Wellman. Ernest Wellman lost his life as a result of the accident.

The action was commenced in the municipal court of Los Angeles and because the damages resulted from the same accident as that which is the subject of Spruce v. Wellman, Cal.App., 219 P.2d 472, was transferred to the superior court and the two cases were tried together.

It is alleged in the first cause of action of the complaint that defendant Irene E. Wellman and Ernest Lee Wellman were the owners of the automobile and that Ernest Wellman was operating it as the agent of Irene Wellman. Defendant denied the allegation of agency. No evidence was introduced in support of this cause of action and the same is deemed to have been abandoned.

The second cause alleges that Ernest Wellman was operating the vehicle with the consent and permission of Irene Wellman, imputing liability to her under section 402(a)[1] of the Vehicle Code. Defendant's answer admits the automobile was owned by her and Ernest Lee Wellman, denies it was driven by the latter with her consent and permission, and denies he had operated it in a negligent manner. The answer pleads unavoidable accident, also contributory negligence on the part of Connelly, the driver of plaintiff's truck.

Upon trial before a jury a verdict was rendered in favor of plaintiff for $607, the cost of repairs to the truck, and judgment was entered against the defendant for that amount. Her motion for a new trial was granted upon the ground of insufficiency of the evidence to justify the verdict and judgment. Plaintiff has appealed from the order granting a new trial. Defendant has cross-appealed from the judgment pursuant to Rule 3(a) of Rules on Appeal, 22 Cal.2d 2, which appeal, in view of the determination of plaintiff's appeal, will be dismissed.

---

[1] Section 402(a) reads: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

The order granting a new trial for insufficiency of the evidence is justified for two reasons:

[1, 2] 1. The burden of affirmatively proving permissive use is on plaintiff. Henrietta v. Evans, 10 Cal.2d 526, 528, 75 P.2d 1051; Barcus v. Campbell, 90 Cal.App.2d 768, 773, 204 P.2d 65. For the reasons presently to be stated the burden was not sustained. There are two factors or elements in section 402(a) both of which must be present and proved in order that a person other than the driver of a vehicle be held responsible for damages resulting from negligence in the operation of the vehicle: (1) It must have been owned at the time of the accident by such person, and (2) it must have been operated with the permission, express or implied, of such owner. Krum v. Malloy, 22 Cal.2d 132, 134, 137 P.2d 18. Each factor is as important as the other. The answer admits ownership in defendant and her husband but there is no evidence as to whether defendant's interest in the car was her separate property or community property of herself and her husband. The only evidence as to title is a photostatic copy of the registration certificate issued by the Department of Motor Vehicles showing registration in the names of Ernest Lee Wellman and Irene E. Wellman. There is nothing in the provisions of the Vehicle Code cited by plaintiff[2] requiring the registration certificate to indicate the character of ownership, whether separate or community property, and the certificate in this action does not so show.

[3, 4] Had the automobile been community property defendant would not have been liable for the damages, since her husband had the management and control of all community property and she had no consent to give; her actually expressed consent, if given, would not have added to his rights which were already plenary and complete. Wilcox v. Berry, 32 Cal.2d 189, 191, 195 P.2d 414; Cox v. Kaufman, 77 Cal.App.2d 449, 451, 452, 175 P.2d 260. The presumption that property acquired by a married woman is her separate property applies only to that which is acquired "by an instrument in writing." Civ.Code, sec. 164; Estate of Walsh, 66 Cal.App.2d 704, 707, 152 P.2d 750; Fennell v. Drinkhouse, 131 Cal. 447, 451, 63 P. 734, 82 Am.St.Rep. 361. But where there is no evidence of a transfer by a writing the implication is that the property is community property. Estate of Walsh, supra, 66 Cal.App.2d at page 708, 152 P.2d 750.

[5, 6] The case of Caccamo v. Swanston, 94 Cal.App.2d 957, 212 P.2d 246, does not sustain plaintiff's contention as to defendant's liability. The court first stated, 94 Cal.App.2d at page 963, 212 P.2d 246, that if the car were community property the wife's consent to her husband's using it could not be required, she could not prevent his driving it, and therefore she would not be liable for his negligence, citing Cox v. Kaufman, supra. The evidence showed that the car had been purchased by the husband, the certificate of ownership was issued to him as registered owner and a finance company as legal owner. When the indebtedness to the finance company was paid the ownership certificate was delivered to the husband; he and his wife signed it and sent it to the Department of Motor Vehicles for transfer of ownership. The new certificate issued by the department showed the husband and wife as legal owners. As pointed out, 94 Cal.App.2d at page 964, 212 P.2d at page 250, the husband brought into being "an instrument in writing" evidencing title in himself and his wife which satisfied the requirement of section 164 of the Civil Code and raised the presumption that the wife's interest was her separate property. No such proof

---

[2] Secs. 66, 67, 68, 140, 152, 153.

appears in the instant case. There is no evidence that defendant's interest in the automobile was acquired by an instrument in writing, and there is therefore no presumption that her interest was her separate property. The certificate of registration is not "an instrument in writing" by which a person acquires title.

[7] 2. The evidence concerning the accident was so conflicting that the discretion of the court in granting a new trial cannot be disturbed.

[8] The collision occurred about 6:39 in the morning at the intersection of Eighth Street and Harvard Boulevard in Los Angeles. Eighth Street extends easterly and westerly and is crossed by Harvard at right angles. The weather was clear at the time. Connelly, the driver of plaintiff's truck, was traveling westerly on Eighth Street and Wellman southerly on Harvard Boulevard. Connelly testified that the signal on Eighth Street turned from red to green when he was 150 feet east of the intersection and that his speed at the time was 25 miles an hour. It was stipulated that the green signal remained for 36 seconds. In a conversation at the scene of the accident a few minutes after its occurrence Connelly told a police officer that the signal must have changed to red as he went through the intersection, and that he probably was at fault. Plaintiff argues that Connelly was injured and was not capable of making an accurate statement at the time, but the officer testified that while Connelly appeared nervous and excited he was walking around the scene of the wreck showing the officers the direction of travel and the place where the accident happened. Connelly's extra-judicial statement to the officer was evidence not limited to the purpose of impeachment but as an admission against interest. Card v. Boms, 210 Cal. 200, 204, 291 P. 190.

A motorman who was operating a street car westerly on Eighth Street testified that plaintiff's truck was from 40 to 60 feet east of Harvard when the signal changed from red to green; that it was at least five seconds and possibly more between the time when the signal changed and the collision; that the speed of the truck was between 25 and 30 miles an hour. Computation based on Connelly's testimony or the motorman's will show that if either correctly estimated speed and time plaintiff's truck would have been past the intersection at the end of five seconds. The motorman testified at the coroner's inquest over Mr. Wellman's body that he did not see the truck until the moment of the impact; at the trial he stated he thought he had been confused at the inquest. Nevertheless, the court had a right to consider the inconsistencies in his testimony in ruling on the motion for the new trial.

The court also had before it Connelly's testimony that he arrived at his place of work on Lake Street near Fifth at 6:00 o'clock, where he took his truck and drove to the main post office north of the Union Station, returned to the Lake Street garage, then went to an office on Wilshire Boulevard near Vermont Avenue, drove to the post office on Vermont Avenue north of Sixth Street and returned to the Wilshire Boulevard address. At each point he parked his truck, went into a post office or an office, delivered mail, unlocked boxes and picked up mail. From the Wilshire Boulevard address he traveled to the point of the accident, which took place at 6:39 A.M. Deducting the time spent at each stopping place, which according to his testimony totaled about 16 minutes, he would have been actually traveling 23 minutes from the time he left the garage until the time of the collision. The court had a right to consider these facts in connection with the evidence of Connelly and the motorman concerning the speed of plaintiff's truck at the time of the accident.

[9, 10] Defendant was entitled to the presumption that her husband exercised reasonable care, which includes the presumption that he obeyed the traffic laws. Smellie v. Southern Pacific Co., 212 Cal. 540, 548, 299 P. 529; Stealey v. Chessum, 123 Cal.App. 446, 449, 11 P.2d 428; Bennett v. Kings County, 124 Cal.App. 147, 153, 12 P.2d 47. This presumption is evidence and is sufficient to create a conflict with the testimony produced at the trial.

[11-14] Plaintiff has advanced an argument that is not only unique and novel but finds no support in the authorities, to wit, the evidence was "inherently probable," it was sufficient to sustain the verdict in favor of plaintiff, and therefore it was error for the trial court to grant a new trial. Contrary to plaintiff's contention in this regard, these rules are applicable in considering the appeal from the order granting the motion for a new trial: (1) An order granting a new trial on the ground of insufficiency of the evidence to sustain the judgment will not be disturbed upon appeal unless there be a clear showing that the trial court abused its discretion; (2) even if the evidence is uncontradicted the trial judge may draw inferences from it contrary to those made by the jury, and it is his duty to resolve such conflicts in determining whether the issues should be retried, Williams v. Field Transportation Co., 28 Cal.2d 696, 698, 171 P.2d 722; Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 359, 170 P.2d 465; (3) if there is any substantial conflict in the evidence the order granting a new trial on the ground of insufficiency of the evidence will be affirmed, Ballard v. Pacific Greyhound Lines, supra; (4) upon appeal from an order granting a new trial all presumptions favor the order as against the verdict. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338.

Applying the foregoing rules to the evidence we find no reason for interfering with the order.

[15] One William Webster Bentley was riding in the Telephone Company's truck and was injured in the accident. He filed an action for damages against Irene Wellman to recover for his injuries. His action, the case of Spruce v. Wellman decided concurrently herewith, and the instant case were consolidated and tried together. A verdict and judgment were rendered in favor of Bentley against Mrs. Wellman. She made a motion for a new trial on all statutory grounds, Code Civ.Proc. sec. 657, which was denied.

Defendant has filed in this court a certified copy of her notice of intention to move for a new trial and of the minute order denying the motion and requests that we take judicial notice thereof. The evidence applied to all three cases. The Telephone Company contends that since, by denying Mrs. Wellman's motion for a new trial in the Bentley case, the court in effect held that the accident was caused by Mr. Wellman's negligence in entering the intersection against the red signal and recognized that the evidence was sufficient to show that the accident was the result of his negligent driving, the same ruling should have been made in the case now before us. No appeal was taken from the judgment in the Bentley case and we have no means of ascertaining what motivated the court in denying the motion for a new trial in his case and at the same time granting the motion in the instant case.

Our ruling on this appeal must be on the record before us and is not affected by any question with reference to the possible inconsistency of the rulings of the court on the respective motions for new trial in the instant case and in the Bentley case. Whatever may have been the court's reasons for the two orders, they are concealed from us by the absence of the record in the latter action.

The order granting a new trial is affirmed. Defendant's appeal from the judgment is dismissed.

MOORE, P. J., and McCOMB, J., concur.

Rehearing denied; McCOMB, J., dissenting.

98 Cal.App.2d 145

CALIFORNIA AUTO COURT ASS'N, Inc., v. COHN et al.

Civ. 17432.

District Court of Appeal, Second District, Division 1, California.

June 22, 1950.

The Califorina Auto Court Association, Inc., sued Max Cohn, Jack Ostrow, whose true name is Jack Ostroff, Jack Marks and others for damages arising from defendants' alleged conspiracy to deprive plaintiff of a real estate broker's commission. From

a judgment of the Superior Court of Los Angeles County, William B. McKesson, J., for defendants Ostroff and Marks, plaintiff appealed. The District Court of Appeal, White, P. J., held that the complaint stated a cause of action and was not demurrable as ambiguous, uncertain or unintelligible.

Judgment reversed with directions.

1. Pleading ⚷214(1)

A demurrer to complaint admits verity of vital allegations thereof.

2. Conspiracy ⚷18

In action for damages from alleged conspiracy to deprive plaintiff of broker's commission on sale of motel, the complaint stated cause of action on ground of defendants' interference with plaintiff's pursuit of lawful occupation as real estate broker.

3. Conspiracy ⚷8

While broker's procurement of ready, willing and able purchaser of principal's realty is condition precedent to principal's duty to pay broker's commission, persons whose wrongful acts prevent happening of such condition cannot rely on such acts as basis for their immunity from liability to broker for damages from their conspiracy to deprive broker of commission.

4. Conspiracy ⚷1

The elements of action for civil conspiracy are formation and operation of conspiracy and damage resulting to plaintiff from acts done in furtherance of common design.

5. Conspiracy ⚷13

Each participant in wrongful act done in furtherance of conspirators' common design is responsible as joint tort feasor for all ensuing damages, regardless of whether he was a direct actor and of degree of his activity.

6. Conspiracy ⚷18

In action for damages from defendants' alleged conspiracy to deprive plaintiff of broker's commission on sale of motel, complaint was not insufficient as containing bare allegation of conspiracy, in view of detailed allegations of defendants' wrongful acts in furtherance of their common design.

7. Injunction ⚷63
Torts ⚷12

Unjustifiable interference with contractual relations is remediable in monetary damages as well as by injunction.

8. Conspiracy ⚷6

In action for conspiracy among owner and purchasers of motel to deprive plaintiff of broker's commission on sale thereof, complaint was not demurrable as showing no damages because plaintiff still had pending action against owner for commission; plaintiff not being confined to action ex contractu against party with whom he contracted to sell motel.

9. Conspiracy ⚷18
Pleading ⚷18, 19

In action for conspiracy to deprive plaintiff of broker's commission on sale of one defendant's motel to co-defendants, complaint was sufficient to state cause of action and not demurrable as ambiguous, uncertain or unintelligible.

◆

Reynolds, Painter & Cherniss, Los Angeles, for appellant.

George S. Gordon, Los Angeles, for respondents.

WHITE, Presiding Justice.

This appeal is from a judgment rendered by the trial court pursuant to an order sustaining a general and special demurrer of defendants Ostroff and Marks to plaintiff's amended complaint without leave to amend. The complaint is for damages arising out of an alleged conspiracy of defendants to deprive plaintiff corporation of a real estate broker's commission.

The complaint charged that plaintiff is a real estate broker and that in January, 1948, at the request of defendant Jack Marks, plaintiff showed said Jack Marks a number of motels that plaintiff had listed for sale. On November 26, 1948, defendant Max Cohn employed plaintiff by written agreement whereby the latter was to sell the Mohawk Motel, of which defendant Max Cohn was then the owner, for $78,000, plaintiff to receive a five per cent commission, or $3,900. Plaintiff immediately commenced advertising the motel for sale. December 4, 1948, plaintiff introduced defendant Marks to defendants Max Cohn and Mary Cohn, husband and wife, who, together with plaintiff's agents, showed defendant Marks the Mohawk Motel. Defendant Marks stated that he was interested in the motel but before purchasing it, he wished to consult with his relatives and that he would contact plaintiff immediately if he and his relatives decided to buy it. The complaint further alleged that defendant Marks then consulted defendant Naomi Marks, his wife, and defendants Ostroff, his father-in-law and mother-in-law, and that all of the defendants, knowing that plaintiff was entitled to a commission and in order "to unlawfully cheat, wrong and defraud plaintiff out of a commission of $3900.00," entered into a conspiracy, and without the knowledge or consent of plaintiff, negotiated together and directly with each other to place the title of the Mohawk Motel in the names of defendants Ostroff at a price of $74,100 ($78,000 less the commission of $3900 due plaintiff). That the defendants opened an escrow on December 8, 1948, wherein defendant Cohn sold the Mohawk Motel to defendants Marks and Ostroff, title being vested on December 16, 1948, in the names of defendants Ostroff in order to make it appear that they were the bona fide purchasers thereof, but that in reality defendants Ostroff hold it in trust for defendants Marks who are the true purchasers. That plaintiff continued to advertise the motel and to show it to prospective purchasers with the consent of the Cohns until the 16th of December, when plaintiff learned through sources other than the defendants of the alleged fraudulent transaction between them. That on December 16th defendants Marks commenced operating and managing the motel and referred to it as their own. That by reason of their acts, defendants unjustifiably interfered with plaintiff's right to pursue its lawful business, effected a breach of the contract between plaintiff and defendant Max Cohn, and deprived plaintiff of its commission of $3,900.

Defendants Ostroff and Marks demurred generally to the complaint on the ground that it failed to state a cause of action, and specially, on the grounds of ambiguity, uncertainty and unintelligibility, which demurrer was sustained without leave to amend and judgment entered pursuant thereto. The action against defendants Cohn is still pending in the trial court. Plaintiff has appealed from the judgment in favor of defendants Ostroff and Marks.

Appellant contends that a cause of action for loss of commissions exists against third persons in favor of a real estate broker, who is deprived of such commissions as a result of a conspiracy between such persons and the broker's employer, and in support of such contention appellant points out:

(1) That the right to pursue a lawful occupation is a fundamental right which courts protect;

(2) That the right to perform a contract and to obtain the benefits and profits therefrom is a property right protected by law; and

(3) Unjustifiable interference by a third party with contractual obligations is actionable.

[1, 2] Respondents admit that point (1) is a general maxim of law but simply state that "nothing cited and nothing in the complaint indicates any interference with the plaintiff's right to pursue its occupation of real estate broker." Assuming the facts alleged in the complaint to be true (and the demurrer admits the verity of the vital allegations of the complaint, Krigbaum v. Sbarbaro, 23 Cal.App. 427, 138 P. 364, it is too apparent to merit further discussion that respondents did interfere with plaintiff's pursuit of its occupation as a real estate broker.

As to point (2), respondents contend that their conduct was privileged as a legitimate exercise of their own right to purchase property directly from the owner, citing Sweeley v. Gordon, 47 Cal.App.2d 385, 118 P.2d 16, 842. The case of Sweeley v. Gordon involved an oral contract of employment and the defense of the statute of frauds and is not pertinent to the issue here involved.

[3] Respondents argue that point (3) is applicable only if there was a definite and settled contract and the means of interference was by an unlawful action. Respondents then state there was no definite and settled contract inasmuch as plaintiff was not entitled to commissions until it had produced a buyer. While it is true the procurement of a ready, willing, and able purchaser is a condition precedent to the duty of an owner to pay a real estate broker's commission, the alleged acts of the respondents prevented that condition from happening, and they cannot rely on their own wrongful acts as a basis for immunity from liability. Furthermore, it is clear from the complaint that the only other step necessary to the procurement of a ready, willing, and able purchaser was in concluding the negotiations, which defendants prevented. Krigbaum v. Sbarbaro, supra.

[4-7] As to the necessity of interference by unlawful action, respondents contend the complaint contains a bare allegation of conspiracy and is therefore insufficient. The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design. The cause of action is the damage suffered. Each participant in the wrongful act is responsible as a joint tort-feasor for all damages ensuing from the wrong, regardless of whether or not he was a direct actor and of the degree of his activity. Mox Incorporated v. Woods, 202 Cal. 675, 262 P. 302. Furthermore, because of the inherent difficulty in proving a conspiracy, it has been held that a conspiracy may sometimes be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances. Anderson v. Thacher, 76 Cal.App.2d 50, 72, 172 P.2d 533. The complaint contained allegations of acts of the respondents in detail and was not confined to a "bare" allegation of conspiracy. Respondents seek to devaluate certain of the cases cited by appellant by pointing out that the actions therein were for injunctive relief rather than for damages. Unjustifiable interference with contractual relations is not remediable solely by injunctive relief but also in monetary damages. Remillard-Dandini Co. v. Dandini, 46 Cal.App.2d 678, 116 P.2d 641. Respondents further contend that in those instances where damages were awarded, the means by which the breach was obtained were false and wrongful in themselves. In Imperial Ice Company v. Rossier, 18 Cal.2d 33, 112 P.2d 631, 633, it is stated: "In California the case of Boyson v. Thorn, supra, (98 Cal. 578, 33 P. 492, 21 L.R.A. 233) has been considered by many as establishing the proposition that no action will lie in this state for inducing breach of contract by means which are not otherwise unlawful. * * * The statements to the effect that no interference with contractual relations is actionable if the means employed are otherwise lawful were not necessary to the decision and should be disregarded."

[8] Eliminating those cases cited by respondents wherein there was no valid and enforceable contract between the owner and the broker, the respondents' position rests on their argument that the complaint shows no damages inasmuch as appellant still has its pending action against the owner for its commission. In 30 Am. Jur., Interference, Sec. 20, p. 73, we find the following language:

"* * * It has been suggested, however, that a distinction should be made between interference with the performance of executory contracts and interference with the performance of those which have been executed so that nothing remains to be done but to make payment, which the other party is induced to withhold. This view is based upon the theory that the acts complained of do not damage the plaintiff, since he may proceed to collect from the party who has failed to make the payment, *but it has been disapproved.*" Citing Hornstein v. Podwitz, 254 N.Y. 443, 173 N.E. 674, 84 A.L.R. 1. (Emphasis added.) (See also Annotations, 97 A.L.R. 1273 and 146 A.L.R. 1417 as to real estate broker's commissions.) In the various California cases wherein damages have been awarded or injunctive relief granted for unjustifiable interference with contractual relations, it is apparent that the plaintiff is not confined to an action ex contractu against the party with whom he contracted.

[9] An examination of the complaint, the demurrer filed thereto, and the authorities cited in support thereof impresses us that the complaint states a cause of action and is not vulnerable to the charge of ambiguity, uncertainty, or unintelligibility.

For the foregoing reasons the judgment is reversed with directions to the Court below to overrule the demurrer and allow respondents herein a reasonable time within which to answer should they be so advised.

DORAN and DRAPEAU, JJ., concur.

PEOPLE v. STECCONE et al.

Cr. 2643.

District Court of Appeal, First District, Division 1, California.

June 26, 1950.

Rehearing Denied July 11, 1950.*

John P. Steccone and Peter Makris were convicted in the Superior Court, Alameda County, Charles Wade Snook, J., of conspiring to violate a statute prohibiting the keeping of premises for the purpose of recording and registering bets on race horses, and they appealed. The District Court of Appeal, Schottky, J., held that the evidence was insufficient to sustain the conviction.

Purported appeals from the judgments dismissed and orders denying appellants' motions for new trial reversed.

1. Criminal law ⊂⇒1023(10)

Where defendants were convicted of conspiring to violate statute prohibiting the keeping of premises for the purpose of recording and registering bets on race horses, orders granting them probation suspended the judgments, and purported appeals therefrom would be dismissed. Pen.Code, § 182, subd. 1, § 337a, subd. 2.

2. Criminal law ⊂⇒306

In a criminal case an inference cannot be based on surmise, conjecture, or suspicion but the inference mut be one which reasonably can be drawn from the evidence.

3. Criminal law ⊂⇒427(5)

Evidence was insufficient to show a prima facie case of conspiracy to violate statute prohibiting the keeping of premises for the purpose of recording and registering bets on race horses, against defendants or either of them, and therefore, admission of evidence of acts and declarations of each alleged co-conspirator against the other, was error. Penal Code, § 182, subd. 1, § 337a, subd. 2.

4. Criminal law ⊂⇒317

The section of the Constitution permitting prosecution to comment on failure of defendant to take the stand cannot be used to supply a failure of proof by the prosecution. Const. art. 1, § 13.

5. Conspiracy ⊂⇒47

Evidence was insufficient to sustain conviction of conspiracy to violate statute prohibiting the keeping of premises for the purpose of recording and registering bets on race horses. Penal Code § 182, subd. 1, § 337a, subd. 2.

◆

J. Emmet Chapman, Frederick C. Dewar, San Francisco, for defendant and appellant Steccone.

Golden & Fratis, Oakland, Julius M. Keller, San Francisco, of counsel, for defendant and appellant Makris.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Dep. Atty.Gen., for respondent.

SCHOTTKY, Justice pro tem.

John P. Steccone and Peter Makris were charged under subdivision 1 of section 182 of the Penal Code with conspiring to violate subdivision 2 of section 337a in that they conspired to keep and maintain rooms and places at 1313 Park Street and 136 Santa Clara Avenue, in the City of Alameda, with books, papers, device and paraphernalia, for the purpose of recording and registering bets upon horse races. Six overt acts were set forth in the information. They were tried and the jury returned a verdict finding each defendant guilty as charged. Each made a motion for a new trial, but said motions were denied. Probation was applied for and each defendant was granted probation, among the conditions being that Steccone should serve six months in the county jail, and Makris three months.

---

* Subsequent opinion 223 P.2d 17.

[1] Each defendant has appealed from the judgment and from the order denying his motion for a new trial. No judgment having been rendered because of the suspension of the judgments by the orders granting probation, the purported appeals from the judgments must be dismissed. People v. Labarbera, 89 Cal.App.2d 639, 201 P.2d 584. We may, however, consider the points raised by appellants on their appeals from the order denying their motions for a new trial.

Appellants were represented by separate counsel at the trial and are represented by separate counsel upon this appeal, each appellant submitting separate briefs. Each argues the insufficiency of the evidence to support the verdict and that evidence against him was improperly admitted. Appellant Steccone in addition alleges error in the refusal of the court to give certain instructions offered by him.

Before discussing the specific contentions of appellants we shall briefly summarize the evidence as shown by the record.

Police Officer White on July 15, 1947, went to the Step Inn Club, 1313 Park Street, Alameda, owned and operated by the defendant Peter Makris. While there he saw an unidentified man place a bet with Makris; he saw Makris then make a telephone call at the telephone behind the counter and call off a lengthy list of numbers and amounts of money, among other phrases using the words "To win, to place, to show." White then placed a bet with Makris, giving him $2.00. He went back again the next day, July 16, and saw a woman place a bet with Makris, after which Makris made a telephone call similar to the one he had made the day before, but called the party on the other end of the line "John." The same unidentified man of the day before placed a bet and Makris put the money received in his pocket. White then indicated to Makris that he had won the bet he had placed the day before; Makris "checked the list," and paid White $4.70. White placed a second bet and left. He returned again on July 18 and placed a third bet. At none of these times was Makris arrested.

Police Inspector Johnson testified that on February 3, 1949, or nearly 18 months after the visit of Officer White, he went with three other police officers in plain clothes (White not among them) to the Step Inn Club, asked the patrons inside to leave and then searched the place. In a drawer in back of the bar they found approximately 45 sheets of paper, ruled with horizontal and vertical lines, mimeographed, and with no writing thereon. The defendant Steccone at that time was observed walking across Park Street, and he entered the club. Inspector Tulloh searched Steccone and found on his person a "Daily Bulletin and Sports Review" of February 3, 1949, some other papers and a sheet of paper with writing on it, having columns of figures and the name "Pete" at the top. Tulloh placed them on a shuffleboard table, and Steccone grabbed the latter sheet and tore it into pieces. Inspector Johnson picked up the pieces and stated to Steccone that it was "a very foolish thing to do" and Steccone said, "yes, he guessed it was."

The officers then went to Steccone's home, at 136 Santa Clara Avenue, Alameda, where Mrs. Steccone let them in. In the rumpus room they found an adding machine with a tape in it, with the same figures on it as found on the sheet torn up by Steccone. They also found in a closet in an open cardboard box one ruled sheet of paper similar (but not identical) to those found in the Step Inn Club and also without any writing thereon. Police Officer Eck, an expert witness on methods of keeping records used by bookmakers in the vicinity, said that the various items found in the two places were paraphernalia commonly used by bookmakers.

Officer Johnson and Verona Hayden, the police department secretary, testified as to a conversation held between Makris and Johnson, witnessed by Inspector Tulloh, in the office of the Inspector of Police in Alameda on February 3, 1949, after Makris' arrest. Makris stated that the "run down" sheets found in his club had been given him by "Johnnie Steccone" for registering his own (Makris') bets. This statement was admitted in evidence as to Makris only.

It must be borne in mind that appellants were charged with the crime of conspiracy and that before evidence of the acts and declarations of an alleged co-conspirator is admissible against the other the fact of the conspiracy must be proved. Code Civ.Proc. § 1870, subd. 6. As was said in People v. Talbott, 65 Cal.App.2d 654, at page 663, 151 P.2d 317, at page 322, "Thus the fact of the conspiracy must be proved before the evidence of said acts or declarations may be considered. The issue, however, need be proved only to the extent of establishing prima facie evidence of the fact. It need not be established by a preponderance of the evidence in a civil action nor beyond a reasonable doubt in a criminal action; the latter doctrine applies only to the issue of guilt." See, also, People v. Marvin, 48 Cal. App.2d 180, 119 P.2d 413.

The attorney general contends that there is sufficient evidence to show prima facie a conspiracy between appellants to maintain the two places as charged. As to appellant Makris' association with Steccone's operations at the latter's home he lists the following evidence: (1) The telephone call to "John" for the purpose of laying off bets; (2) the presence of Steccone in Makris' bar with a register of bets in the name of "Pete," a contraction of Makris' given name, Peter; (3) the adding machine tape at 136 Santa Clara Avenue, containing evidence of the bets shown on the paper taken from Steccone's possession in Makris' bar at the time of the raid; (4) the presence in Makris' bar of blank forms for the registering of bets similar to those found in Steccone's home, and (5) the statement of Makris after his arrest.

As to appellant Steccone's association with the bookmaking activities in appellant Makris' bar, the attorney general recites the following items of evidence: (1) Steccone's presence in Makris' bar at the time of the raid; (2) Steccone's possession in Peter Makris' bar of a register of bets under the heading "Pete"; (3) consciousness of guilt on the part of Steccone evidenced by his efforts to destroy the register of bets taken from him in Makris' bar; (4) the adding machine tape in Steccone's home, 136 Santa Clara Avenue, containing figures similar to those on the register of bets taken from Steccone in Makris' bar, and (5) the presence in Steccone's home of blank forms for the registering of bets similar to those found in Makris' bar.

The foregoing evidence would seem to indicate that appellant Makris was operating as a bookmaker at 1313 Park Street and the finding of the register of bets with the that appellant Steccone was operating as a bookmaker at his home at 136 Santa Clara Avenue. But in the instant case appellants are not charged with bookmaking, but are charged only with the crime of conspiracy.

We have read the record carefully and we are unable to agree with the attorney general that a prima facie case of conspiracy between the appellants was proved.

There is nothing in the record from which we would be justified in inferring that the "John" to whom appellant Makris telephoned in July, 1947, was the appellant John Steccone. The name "John" is a rather common name, and there is no evidence of any communication or contact between Makris and Steccone which would support an inference that the "John" to whom Makris telephoned in July, 1947, was the John Steccone who walked into the Step Inn Club on February 3, 1949, nearly 18 months later. Nor do we believe that the finding of the register of bets with the name "Pete" written at the top on the person of appellant Steccone when he walked into the Step Inn Bar, standing alone without other connecting circumstances, is sufficient to justify the inference that said "Pete" was the appellant Makris, and that he was engaged in a conspiracy with Steccone. The finding of the adding machine tape in Steccone's home with the same figures on it as were on the paper taken from Steccone was evidence of the bookmaking activities of Steccone but it shows no connection between Makris and Steccone. Similarly, the finding in appellant Makris' bar of blank forms for the registering of bets similar to those found in Steccone's home is evidence of bookmaking activity on the part of Makris, but it does not show any connection between them.

[2] As to the evidence relied upon by the attorney general to prove a prima facie case of conspiracy against appellant Steccone, we do not believe that the presence of Steccone in Makris' bar, having in his possession a register of bets with the name "Pete" at the top, together with the evidence that Steccone attempted to destroy the register of bets taken from him, and the evidence that in Steccone's home there was adding machine tape bearing figures similar to those on the said register of bets and also a blank form for the registering of bets similar to those found in appellant Makris' bar, are sufficient to make out a prima facie case of conspiracy against appellants. In a criminal case an inference cannot be based on surmise, conjecture, or suspicion; the inference must be one which reasonably can be drawn from the evidence. Here the evidence would justify an inference that Steccone was engaged in bookmaking activities but it falls far short of showing a conspiracy between Steccone and Makris. It fails to show any connection between Makris and Steccone, as the fact that their given names were "Pete" and "John" is barely sufficient to support a suspicion of guilt. As was said in People v. Long, 7 Cal.App. 27, at page 33, 93 P. 387, at page 390: "Conspiracies cannot be established by suspicions. There must be some evidence."

[3] We conclude, therefore, that the People failed to prove a prima facie case of conspiracy against appellants or either of them. This being so, the trial court erred in admitting evidence of the acts and declarations of each alleged co-conspirator against the other.

Appellants contend further that, even assuming that all of the evidence admitted by the court was properly admitted, the evidence taken as a whole was insufficient to prove the alleged conspiracy, and that appellants' motions for a new trial should have been granted.

The evidence presented in the instant case was very meager, and we are unable to find sufficient evidence in the record to support a finding that either appellant Makris or appellant Steccone was guilty of conspiracy. There is sufficient evidence from which the jury could infer that they were each guilty of bookmaking, but there is no admissible evidence from which a reasonable inference could be drawn that Makris and Steccone conspired together for that purpose. While the evidence may raise a suspicion, it does not prove the participation of appellants in any conspiracy. As was said in People v. Rodriguez, 37 Cal.App.2d 290, at page 294, 99 P.2d 363, at page 365: "It appears timely that some consideration be given to the popular but erroneous belief that less convincing evidence is required to support a judgment of guilty where the offense of conspiracy is charged. Such a belief is wholly unwarranted. Moreover, to charge conspiracy produces no advantage for the plaintiff, nor does such a charge create burdens for the defendant, any different with regard to each than might be expected in connection with the trial for other offenses. The crime of conspiracy is no more heinous, nor is it fraught with graver consequences, than other offenses. Fancied handicaps incident to the prosecution of other offenses cannot be overcome in the trial of a criminal action by merely charging conspiracy."

[4] The attorney general calls attention to the fact that neither of the appellants testified in his own defense, and asserts that the trial court and the jury had a right to draw unfavorable inferences from such failure, citing article I, section 13, of the Constitution of California. But, as said by this court in People v. Zoffel, 35 Cal.App.2d 215, at page 221, 95 P.2d 160, at

page 163: "The burden rests on the prosecution and not the defense. Section 13 of article I of the state Constitution, permitting the prosecution to comment on the failure of the defendant to take the stand, cannot be used to supply a failure of proof by the prosecution."

[5] We have set forth a fair summary of the evidence introduced in the case, and for the reasons hereinbefore given we are convinced that as a matter of law the evidence falls far short of being sufficient to support a conviction of the crime of conspiracy. Under such circumstances the trial court should have granted appellants' motions for new trial.

Appellant Steccone makes the further contention that the court erred in giving certain instructions and also erred in refusing certain instructions offered by said appellant. We have reviewed the instructions and believe that, assuming the evidence was sufficient to submit the case to the jury, the court fully and fairly instructed the jury on the law applicable to conspiracy.

In view of the foregoing, the purported appeals from the judgments must be dismissed, and the orders denying appellants' motions for new trial should be, and each of them is, hereby reversed.

PETERS, P. J., and BRAY, J., concur.

---

98 Cal.App.2d 1

PEOPLE v. GRIFFIN et al.

Cr. 2144.

District Court of Appeal, Third District, California.

June 10, 1950.

As Modified on Denial of Rehearing June 24, 1950.

Hearing Denied July 10, 1950.

William Griffin, Wiley H. Caddel and James Mulligan were convicted in the Superior Court, Mendocino County, Lilburn Gibson, J., for conspiracy to give and offer bribes to executive officers of the state and to ask for and receive bribes as executive officers and employees of the state, and for conspiracy to operate slot machines, and for giving bribes to sheriff and deputy sheriff, and orders were entered denying their motions for new trials, and they appealed. The District Court of Appeal, Per Curiam, held that the evidence was sufficient to sustain the convictions.

Judgments and orders affirmed.

1. Criminal law 🔑1141(1)

On appeal from judgment of conviction, District Court of Appeal must state the facts in the light most favorable to the prosecution.

2. Criminal law 🔑507(4)

One who under direction of officer of law feigns complicity in commission of crime merely for purpose of detecting or prosecuting perpetrator is not accomplice whose testimony must be corroborated. Pen.Code, § 1111.

3. Criminal law 🔑37

Those who originate and propose a criminal design may not escape conviction merely by reason of the fact that a trap was laid for them or that they were facilitated in execution of their unlawful enterprise by officer of law acting for purpose of detecting them.

4. Criminal law 🔑741(5)

A disputed question of fact as to whether witness was accomplice whose testimony must be corroborated is for jury. Pen.Code, § 1111.

5. Criminal law 🔑741(5)

Jury must determine whether witness was actual or feigned accomplice where evidence is conflicting. Pen.Code, § 1111.

6. Criminal law 🔑741(5)

In prosecution for giving bribes and for conspiracies to operate slot machines and to commit acts of bribery, conflicting evidence whether sheriff and slot machine operator feigned complicity in order to detect and prosecute the perpetrators so that sheriff and operator were not accomplices whose testimony must be corroborated was for jury. Pen.Code, § 1111.

7. Criminal law 🔑763(18)

Where jury was instructed that it was for them to determine from the evidence whether witnesses were accomplices whose testimony must be corroborated, instruction defining feigned accomplices was not error as taking from jury the question whether witnesses were accomplices. Pen.Code, § 1111.

8. Criminal law 🔑1159(5)

When question whether witnesses were accomplices whose testimony must be corroborated was properly left to jury, jury's finding on conflicting evidence that witnesses were not accomplices was conclusive on appeal. Pen.Code, § 1111.

9. Criminal law 🔑511(1, 7)

Sufficient corroboration of accomplices' testimony may be furnished by defendant's own testimony or by admissions or confessions made by him or by silence in the face of an accusatory statement. Pen.Code, § 1111.

10. Criminal law 🔑511(1)

The entire conduct of parties, their relationship, acts, and conduct during and after crime may be taken into consideration by jury in determining sufficiency of corroboration of testimony of accomplices. Pen. Code, § 1111.

11. Criminal law 🔑511(1)

If corroboration of testimony of accomplices is inculpatory, it is not essential that it extends to all elements of offense nor to every fact and detail included in testimony of accomplice, but the corroborating evidence is sufficient if it tends in some slight degree to implicate defendant. Pen. Code, § 1111.

12. Criminal law 🔑511(3)

The testimony of an accomplice need not be corroborated by direct evidence but may be corroborated by circumstantial evidence, and defendant's connection with alleged crime may be reasonably inferred from circumstantial and slight corroborative evidence. Pen.Code, § 1111.

13. Criminal law 🔑511(2)

Evidence corroborative of accomplice's testimony need not prove independently either that defendant is guilty of offense or that he is guilty beyond a reasonable doubt, but it is sufficient if the corroborative evidence connects defendant with commission of crime in such a way as reasonably to satisfy the fact finding body that the accomplice is telling the truth. Pen.Code, § 1111.

14. Criminal law 🔑511(1)

As respects "corroboration" of accomplice's testimony, the word "corroboration" denotes a strengthening or confirming and is essentially a relative term and refers to some antecedent which it is said to strengthen or fortify. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Corroboration".

15. Criminal law 🔑511(1)

The jury in determining question of corroboration of testimony of accomplice must compare residue of the other evidence with the accomplice's testimony in order to ascertain the truthfulness of the latter, and in this regard corroborative evidence must do more than merely raise a suspicion of guilt but must reasonably satisfy the jury that the accomplice is telling the truth. Pen.Code, § 1111.

16. Criminal law 🔑741(5)

The rule that trier of facts must decide on credibility of witness and weight and effect of his testimony is equally true when an accomplice is offered as a witness, with the restriction that the jury's discretion is not arbitrary and that jury cannot accept testimony of accomplice unless it be corroborated by such other evidence as tends to connect defendant with commission of offense. Pen.Code, § 1111.

17. Criminal law 🔑512

Where there is other evidence tending to connect defendant with the crime charged, testimony of accomplice is to be considered by jurors as any other testimony and given such weight as they may conclude that it is entitled to. Pen.Code, § 1111.

18. Criminal law 🔑1159(1)

Before a verdict of a jury can be set aside on appeal on ground of insufficiency of evidence to support it, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence sufficient to support conclusion of trial court.

**19. Bribery ⚷11
Conspiracy ⚷47
Criminal law ⚷511(1)**

In prosecution of resort employee and retired police officer and undercover operator in Attorney General's office for giving bribes and for conspiracies to operate slot machines and to commit acts of bribery, evidence was sufficient to corroborate testimony of accomplices and to sustain convictions. Pen.Code, §§ 67, 68, 330a, 1111.

20. Criminal law ⚷423(5)

Where evidence is amply sufficient to establish a conspiracy, all statements, acts and declarations by any of the parties, pending the commission of it and looking toward its consummation, are competent evidence against each and every conspirator.

21. Conspiracy ⚷47

Mere association with perpetrator of crime is insufficient to prove a criminal conspiracy.

22. Conspiracy ⚷47

The existence of a conspiracy may be established either by direct testimony of the facts or by circumstantial evidence or by a combination of both, and it need not be shown that the parties actually came together and agreed to enter into and pursue a common design but it is sufficient if they, in any manner or through any contrivance, positively or tacitly came to a mutual understanding to accomplish a common and unlawful design.

23. Conspiracy ⚷47

The existence of assent of minds which is involved in a conspiracy may be, and from secrecy of crime usually must be inferred by jury from proof of facts and circumstances which, taken together, apparently indicate that they are mere parts of the same complete whole.

24. Conspiracy ⚷23, 25

A conspiracy may result from the actions of defendants in carrying out a common purpose to achieve an unlawful end, and the law fixes no time in which the conspiracy must have been entered into and does not provide that the conspiracy have any particular duration.

**25. Conspiracy ⚷40
Criminal law ⚷423(8)**

A defendant accused of conspiracy is not required to have been a member of the conspiracy from its inception, and one who joins a conspiracy after it is formed and actively participates therein thereby adopts the previous acts and declarations of his fellow conspirators, and under such circumstances the previous acts and declarations of his fellow conspirators, although done or made before he joined the conspiracy, are admissible against him.

26. Conspiracy ⚷41

When a conspiracy is shown to exist, every act done by any one of the conspirators in furtherance of the object of conspiracy is deemed to be the act of all the conspirators.

27. Criminal law ⚷1158(1)

The jury must draw proper inferences, and if the inference so drawn does not do violence to reason, the District Court of Appeal will not interfere.

**28. Conspiracy ⚷47
Criminal law ⚷511(4)**

In prosecution for conspiracy to operate slot machines, evidence relating to transportation of slot machines was inculpatory, notwithstanding that mere possession or control of slot machines was not penalized by statute, where record contained abundant evidence that slot machines were placed on location and operated illegally, and evidence of transportation could have been considered by jury as corroborative of accomplice's testimony of steps taken in furtherance of a conspiracy. Pen.Code, § 330a.

29. Criminal law ⚷511(1, 2)

There is a distinction between declarations of accomplice made during course of conspiracy and testimony of conspirator given at trial and while under oath and subject to cross-examination, and standing alone such testimony is ordinarily sufficient to prove corpus delicti of offense, leaving to corroboration by other evidence the proof of the criminal agency, or such evidence as tends to connect the defendant with commission of the offense.

30. Criminal law ⚷511(1, 2)

In a conspiracy, proof of existence of underlying agreement and connection of defendant therewith may be of such a single and inseparable nature as to require corroboration of both elements.

31. Conspiracy ⚷47
Criminal law ⚷409, 535(2)

The existence of conspiracy and participation therein by defendant may be proved by circumstantial evidence and proof of corpus delicti may be established by circumstantial evidence, and it is not necessary that corpus delicti, prior to introduction of admissions or confessions of defendant, be established by evidence of a clear or convincing character, or by such as would be required to support a conviction, and it may be sufficient even though shown by slight or prima facie proof.

32. Criminal law ⚷680(1), 1153(3)

The order of proof is a matter within discretion of trial court whose rulings will not be disturbed on appeal except on clear proof of abuse of such discretion.

33. Conspiracy ⚷47

In prosecution of resort employee and retired police officer for conspiracies to operate slot machines and to commit acts of bribery, evidence was sufficient to establish corpus delicti. Pen.Code, § 330a.

34. Criminal law ⚷1166(1)

The defendant was not prejudiced in respect to selection of jury by dismissal of case against co-defendants, where jury sworn to try case was accepted by defendant at a time when defendant still had peremptory challenges remaining which he could have exercised had he seen fit to do so.

35. Criminal law ⚷178, 303

The District Attorney's exercise of his statutory right to request for dismissal of prosecution as to a defendant jointly indicted with another for purpose of using defendant as witness is not misconduct and District Attorney can make such a motion at any time prior to closing of People's case, and when the motion is granted by the court immunity is extended by law to the erstwhile defendant. Pen.Code, § 1099.

36. Criminal law ⚷1141(1)

Actions of district attorney with respect to dismissal of case against co-defendants would not be assumed on appeal to have been done in bad faith.

37. Criminal law ⚷1169(1)

Where evidence was admissible against defendant and was expressly limited to such defendant and jury were so instructed, admission of such evidence was not prejudicial as to co-defendant.

38. Criminal law ⚷1171(1)

In prosecution of resort employee and retired police officer and undercover operator in Attorney General's office for giving bribes and for conspiracies to operate slot machines and to commit acts of bribery, use of term "bag man" by District Attorney in his argument to jury in describing retired police officer was not prejudicial.

39. Criminal law ⚷1169(5)

Evidence of witness' conversation with defendant that co-defendant and another man were the same was not prejudicial to co-defendant, where evidence was properly admissible as against defendant and was so limited by instruction and evidence was thereafter struck and defendant thereafter testified that co-defendant and the man were not the same.

40. Criminal law ⚷672

The practice of receiving evidence subject to its subsequently being connected with the case is not commended as a general rule of procedure but is not error unless there is a clear abuse of discretion by the trial court.

41. Criminal law ⚷427(3)

The general rule requiring that proof of conspiracy to commit crime must be shown as foundation for admission of declarations of co-conspirator is not inflexible, and where the facts are intimately blended the trial court is given considerable discretion in determining the order of proof.

42. Conspiracy ⚿43(6)

An indictment can allege a conspiracy in which an executive officer or employee of the state is charged with being a member of a combine which has for its purpose the offering or giving of bribes to another executive officer and can also allege as a part of the conspiracy a further purpose to ask for and receive bribes. Pen.Code, §§ 67, 68.

43. Indictment and Information ⚿59

The accusatory pleading is sufficient if it charges in any words sufficient to give the accused notice of the offense of which he is accused, and the details and particular circumstances thereof may be obtained from the transcript of the testimony given at the preliminary examination or upon which the indictment was founded. Pen.Code, § 952.

44. Criminal law ⚿1186(3)

A judgment will not be reversed because of error in form of indictment unless error complained of has resulted in a miscarriage of justice. Const. art. 6, § 4½.

45. Conspiracy ⚿48

In prosecution for conspiracy to give and to offer bribes and for conspiracy to ask for and to receive bribes, instruction permitting defendants to be found guilty of conspiracy to either give and offer bribes or to ask for and to receive bribes was proper, as against contention that defendants could only be found guilty of both conspiracies. Pen.Code, §§ 67, 68.

◆

Robert Miller Green, Los Angeles, Joseph Ball, Long Beach, Robert P. Dockeray, Burbank, Gerry Giesler, Los Angeles, Leroy Lounibos, Petaluma, for appellants.

Fred N. Howser, Attorney General, Doris H. Maier, Deputy Attorney General, for respondent.

PER CURIAM.

Appellants William Griffin, Wiley H. Caddel, and James Mulligan, together with defendants Fred Grange, Paul McCarty and Robert Gray, were jointly indicted in Mendocino County on five counts of felony. The first count charged conspiracy to violate sections 67 and 68 of the Penal Code, in that from about November 1, 1947, to and including June 13, 1948, all six defendants conspired to give and offer bribes to executive officers of this State, with intent to influence said officers in respect to their action and decision as such officers, and also charged that they conspired to ask for and agreed to receive bribes as executive officers and employees of the State upon the understanding that their action in matters then pending before the said executive officers and employees on matters which might be brought before them in their official capacities would be influenced thereby. Three alleged overt acts were pleaded as having been committed pursuant to this conspiracy. The second count charged all six defendants with conspiring to violate section 330a of the Penal Code, in that during the same period they conspired to have under their control, either as owners, agents, employees, or otherwise, slot machines upon the result of the action of which money was then and thereafter to be hazarded. Ten overt acts were alleged to have been committed pursuant to this conspiracy.

The defendants were then charged by the indictment with having violated section 67 of the Penal Code, as follows: Count Three charged all six defendants with having given a bribe to Sheriff B. G. Broaddus on April 30, 1948; Count Four charged all six defendants with having given a bribe to Sheriff Broaddus on June 3, 1948; and Count Five charged all six defendants with having given a bribe to Sheriff Broaddus' deputy, William White, on June 3, 1948.

Before the trial began, defendant Grange entered a plea of guilty to the first count of the indictment, and on motion of the district attorney Counts Two, Three, Four and Five were dismissed as against him.

The trial of the case commenced on November 8, 1948. During its course, and before the People had rested their case, the court granted motions of the district attorney to discharge defendants Gray and McCarty in order that each might be made a witness for the People, pursuant to the provisions of section 1099 of the Penal Code.

On December 3, 1948, the jury returned its verdict finding each of the appellants guilty on each of the five counts of the indictment.

After denial of probation, judgment was rendered as follows: Each of the three appellants was sentenced to prison for the term prescribed by law on each of the five counts of the indictment; in the case of appellant Griffin, the term of imprisonment on each of the said five counts was ordered to run concurrently; appellant Mulligan's sentence provided that the terms of imprisonment imposed as to Counts One, Three, Four and Five should run concurrently, and that the imprisonment under Count Two should run consecutively to that imposed under the other four counts; appellant Caddel's sentence provided that the terms of imprisonment imposed under Counts One and Five should run concurrently, that the terms imposed under Counts Three and Four should also run concurrently, but should commence at the termination of the term of imprisonment imposed under Counts One and Five, and that the term imposed under Count Two should commence upon the termination of the term imposed under Counts Three and Four.

The three defendants moved for new trials, which motions were denied, and they have now separately appealed from the judgments of conviction, and from the orders denying their motions for new trials.

Prior to the trial appellant Caddel filed in this court a petition for a writ of prohibition to prevent the Mendocino County Superior Court from trying the cause. Said petition was denied.

The appellants contend in this appeal that the evidence was insufficient as a matter of law to justify the convictions; that testimony of accomplices was not corroborated as required by law; that the court committed error in denying motions for mistrial, for advisory verdicts and to strike evidence, and also in instructing the jury; that the court committed error in overruling demurrer to Count One of the indictment; and that the district attorney was guilty of prejudicial misconduct.

The record on appeal is voluminous, the Reporter's Transcript alone containing 4,127 pages. Fifty-three witnesses were called and examined, and over 100 exhibits admitted into evidence.

[1] Stating the facts in the light most favorable to respondent, as we are required to do, People v. Newland, 15 Cal.2d 678, 104 P.2d 778; People v. Hannon, 44 Cal.App.2d 484, 112 P.2d 719, they showed that defendant Fred Grange, who had been associated over a period of years in gambling enterprises, was, in the latter part of 1947 and in 1948, a part owner of Lane's Flat, a resort in Mendocino County. Appellant Griffin was an employee at Lane's Flat. Defendant Robert Gray was an owner and operator of slot machines and had lately been in partnership in the machines with one Gobels. This partnership having been split up, Gray, being in financial difficulty, contacted Fred Grange for assistance. After some conversations an agreement was reached whereby Grange would become a partner in the ownership and operation of the slot machines. Grange, in turn, agreed to co-sign a contract for Gray evidencing certain indebtedness on the machines to the Morris Plan, and to underwrite the monthly payments under said contract of $546.64, until such time as the revenue from the machines was sufficient to take care of the installments. Appellant Griffin took part in these discussions, and it was agreed that he would participate in the new arrangement, and in particular that he would act as mechanic for the slot machines.

Pursuant to this agreement, and on the 5th day of January, 1948, the contract with the Morris Plan was signed by Grange on behalf of Gray. Shortly afterward Gray's slot machines, which had been stored at Andy's Place in Willits, were moved in a truck by Griffin and Gray to Lane's Flat. The machines being in poor condition, it was necessary to have them repaired, and they were taken to San Francisco to the M. S. Wolf Distributing Co. Appellant Griffin went along so that he might become familiar with the mechanism of the machines.

A system of bookkeeping was then set up in which the expenditures of the new business were entered, and, later on, the revenue. When the machines had been repaired they were returned to Mendocino County where the owners of various resorts were contacted and the machines placed on location and in operation.

In the preceding late summer, Grange had become acquainted with appellant Mulligan, a retired police officer of Los Angeles. In November of that year Mulligan had come to Lane's Flat and was there at a time when Grange, Griffin and Gray were also present. After that occasion in November Grange had seen Mulligan either at Lane's Flat or in San Francisco and they had talked about slot machine operations. Mulligan claimed to have a connection with the attorney general's office through appellant Caddel, who was employed by that office as an undercover operative. Mulligan and Caddel were friends of many years' standing, and Mulligan informed Grange that Caddel and he were partners. He also informed Grange that unless "arrangements" were made in Mendocino County slot machines would not be allowed to operate. He instructed Grange to get a list of the slot machine operators and their locations, and to find out what kind of fellows the sheriff and district attorney were, and who knew them.

Both Grange and Griffin undertook to do this. On two occasions Grange contacted different deputy sheriffs in Mendocino County and sought information as to what the "deal" was on slot machines. Both of these officers assured Grange there was none. In these conversations the policy of the attorney general's office on slot machines was mentioned, and Grange declared, "Well, I have that fixed." In his talk with Deputy Sheriff William White, Grange elaborated on the subject further by describing a method whereby the local officers might know that "everything was all right" with the attorney general's office. This consisted of the giving of a certain confirmatory sign or signal whereby a representative of the attorney general's office, at a prearranged time, would call on the sheriff for no ostensible reason, and then having merely passed the time of day would depart. Information as to the use of this signal had been given to Grange by Mulligan.

Griffin's efforts to obtain the desired information were along a different line. He introduced himself to Paul McCarty, originally indicted as one of the conspirators, and who was reputed to be the largest operator of slot machines in Mendocino County. He informed McCarty that he (Griffin) was going to be a mechanic for Bob Gray's machines, and that Grange had acquired an interest in them. Griffin then asked McCarty "what the score was in the county," how they ran slot machines there, and asked "who the person was to talk to." McCarty replied that his brother, Pete, handled the matter.

Grange followed this up by also interviewing McCarty. He told McCarty of the partnership which he (Grange) now had with Gray, and since he was interested in the slot machine business he wanted to know what the deal was in Mendocino County. McCarty replied that there was no deal, but that he imposed upon the sheriff and the district attorney on the basis of long acquaintance with them, and that it was a friendship proposition.

Not being successful in these efforts to obtain the desired information, and meanwhile having been introduced to Sheriff Broaddus, Grange decided to go to headquarters and talk directly to the sheriff. This he did about the middle of February, 1948. In this conversation the operation of slot machines in Mendocino County was discussed. Grange touched upon the importance of such operations to the resorts, and that if they were permitted by the sheriff to operate machines there would be reciprocity in the form of substantial donations to the sheriff's campaign funds, or in any way he wanted to handle it. Grange assured the sheriff that the attorney general's office was "all right," and that nothing would be done by that office to embarrass the sheriff, or without previous notification. Grange then repeated to the sheriff the signal which he had previously related to White, that at an appointed time a man from the attorney general's office would call on the sheriff and say, "Good morning, I come from the attorney general's office, and how's everything, goodbye." Grange further alluded to another proof to show that he had a connection with the attorney general's office, to wit, that if the sheriff had some place which might be embarrassing to him to raid, that the attorney general's office would send the sheriff a complaint concerning the place, suggesting that the sheriff raid it, or the attorney general's office itself would raid the place. Sheriff Broaddus at first told Grange that he would not consent to any one operating slot machines or violating the law, but at the conclusion of the conversation when Grange asked him if he (Grange) should see McCarty, the sheriff said that it was all right with him if he did. Grange took this as an intimation from the sheriff that the latter might go along with the proposition.

Grange's first meeting with Caddel occurred on February 16th. On that day Mulligan had made an appointment to meet Grange at the San Francisco airport. Grange drove to San Francisco and met Mulligan as per appointment, and they went into the bar at the airport and ordered a drink. Shortly thereafter a man appeared and Mulligan said "That is Caddel." Caddel ordered a drink and then asked Mulligan, "Can I see you a moment?" The two stepped back from the bar. Later, when Mulligan left, Caddel walked up to Grange and said, "Whatever Mulligan tells you is all right with me; we are partners."

In this same month Gray became ill and was compelled to return from Lane's Flat to his home in San Francisco. A meeting was then arranged between Mulligan, Grange and Griffin to discuss the purchase of Gray's interest in the slot machines. On February 29th Grange and Griffin proceeded by plane to San Francisco, arriving there about 6:00 or 7:00 p. m., and registered at the Palace Hotel. They were assigned to a room on the eighth floor. Appellants Mulligan and Caddel, with their respective wives, had registered at the Palace on the preceding evening, and also had rooms on the eighth floor.

After arriving at the hotel, Grange and Griffin went to appellant Mulligan's room, where they saw Mulligan and his wife. On the table were four glasses, and appellant Mulligan remarked that "Buck" Caddel had just been there and gone down the hall. The three, Grange, Griffin and Mulligan, then discussed the purchase of Gray's slot machines, and Mulligan suggested they call Gray to make an appointment to see him. The hotel records show a call to Montrose 49657, the residence of Robert Gray, charged to Mulligan's room on February 29, 1948. On the following day Gray came to the Palace Hotel and met with Grange, Griffin and Mulligan. There was a variance in the testimony of Gray and Grange as to the time of the meeting, Gray fixing it in the afternoon, and Grange in the morning. In any event, a conversation was held about the sale and purchase of Gray's interest in the slot machines. It developed, however, that there was a difference of opinion about values. Gray wanted $4,000 or $5,000 for his interest, whereas it had been planned to offer him only $1,000. Gray was requested to step out of the room for a few minutes, and the remaining three discussed the matter. Grange suggested that they offer Gray $2,000. Appellant Mulligan thought for a moment and then said, "Well, I will have to go over and ask Buck." Mulligan left and was gone ten or fifteen minutes, then he came back and said it was OK for $2,000, that Buck would OK it for $2,000. Gray testified that Mulligan was gone from the room about ten minutes, and after his return they continued to talk about the sale of the machines, but that Mulligan said he wanted no part in the transaction. The conference concluded by Gray's reserving his decision on the matter to a later date.

Grange testified that when he started to leave the eighth floor of the hotel on this occasion, on going towards the elevator, he met appellant Caddel coming up another corridor, and that Caddel approached him and said, "Whatever deal Mulligan makes is OK, as we are partners." This meeting was denied by Caddel, and also it was stipulated to as a fact in the trial that Caddel checked out of the hotel at 10:30 a. m. of that day. As noted above, Gray's testimony was that the meeting occurred in the afternoon, and he was corroborated as to the time of his coming to the hotel by other witnesses.

A few days later Gray announced his decision of not selling his interest in the slot machines and of staying in the business. It was then suggested by Grange to Mulligan that the latter procure additional slot machines in order to equal the number of Gray's, and that a partnership be established which would consist of one-third interest for Gray, one-third for Mulligan, and one-third for Caddel. Mulligan said it would be a good idea, and he would tell Caddel about it. Under this arrangement Grange was to take over from Gray the two slot machines operated at Lane's Flat in consideration of three monthly payments on the Morris Plan contract, two of which had already been made by Grange. Later in March there was a further modification, whereby appellant Mulligan agreed to reimburse Grange for these payments, and to relieve Grange from responsibility under the contract, in consideration of which the two slot machines at Lane's Flat would be operated for the benefit of Mulligan and Caddel. Grange agreed to this arrangement, and informed Mulligan that $1,500 would take care of the three Morris Plan payments. Mulligan then told Grange that machines would be sent up to Lane's Flat accordingly, and that appellant Griffin would represent Mulligan and Caddel, and that they would make their own deal with Griffin.

On March 13th Griffin departed in Grange's truck for Los Angeles, having received word from Mulligan that there were some slot machines available there. In Los Angeles Griffin went to the California Games Company, a retail slot machine sales company, purchased four slot machines and ordered two more. During his stay in Los Angeles Griffin also brought to the California Games Company three or four slot machines for renovation. On one occasion appellant Mulligan was with Griffin at the slot machine company and was talking with Griffin. Delivery of the machines purchased and of those renovated was taken by Griffin in the truck, and the two additional machines which he had ordered were shipped to Robert Gray at Sutton's Place, Mendocino County. Thomas Wall, who operated the California Games Company, had known Mulligan for sixteen years and Caddel for nine.

After Griffin had arrived back at Lane's Flat with the additional slot machines, resort owners in Mendocino County were further solicited for locations, and a number of them accepted the machines. Some who were approached by Griffin and Gray did not. Meanwhile Grange had been to see McCarty again and had given him $100 for Sheriff Broaddus.

The system of deducting a certain amount from the weekly receipts of each slot machine for "protection" began around the 1st of April. The amount so deducted each week was $10 per machine, $4 of which was to be for the state, and the other $6 to take care of the local authorities. These deductions were to be called "Repairs and Insurance" and Griffin was delegated to explain this to the location owners. This was done, and the practice of taking $10 off the top from each slot machine was begun. Collections from the machines were made by Griffin or Gray and were entered upon a printed form entitled "Collection Report" which showed the amount of money taken from the machine, and the division of it.

On April 5th appellant Mulligan came to Ukiah and registered at the Palace Hotel under the name of "Miller". After arriving there he conferred with Grange about the April pay-off. Grange then went in search of McCarty, and locating him, said, "The man is here for the money," and "wants a list of your locations." In this interview between Grange and McCarty a question came up as to whether or not there should be a payment required on machines operating merely as "free play" or solely on the automatic pay-off machines. McCarty objected to paying on the former, and inasmuch as Grange didn't know the answer, Grange went back to the hotel to consult Mulligan. Mulligan instructed Grange that no payment was required for the free play machines, and so to inform

McCarty. However, Mulligan added that McCarty would only get protection on the machines he paid for and that "if something happens to some of the machines he isn't paying for then not to come crying round about it." Grange conveyed this message to McCarty. A computation was then made of McCarty's machines, to wit: 16 machines at $8 for a two-week period beginning April 1st, or a total of $128. Grange remarked it was a small amount for a man coming clear from Los Angeles to Mendocino County. After some discussion the amount was increased to $150. McCarty gave this sum to Grange in cash, together with a list of his machines. McCarty testified that the money he had given Grange was actually paid out of his own pocket, that he had not made any collection from any slot machine operators in the county, nor had he solicited any money from them. His purpose in giving Grange the money was to bait a trap for Grange on behalf of the sheriff. He said he wanted Grange to give him some proof of a connection with the attorney general's office, and that he wanted to get a look at the fellows Grange was supposed to be with.

The money obtained from McCarty, together with the list, was delivered by Grange to Mulligan in Mulligan's room at the Palace Hotel at Ukiah. Appellant Griffin was present at the time and made a copy of McCarty's list on the stationery of the Palace Hotel. It had two columns, showing both the places having free play and those having automatic pay-off machines. When Grange gave the envelope and list to Mulligan, Mulligan said, "I have to call Buck and tell him that everything is all right, because he is very interested to know." Mulligan then made a long distance call and Grange heard him speak to the party on the other end of the line and say, "Everything has gone here as planned. Everything is all right."

Mulligan's next trip to Mendocino County was on April 29th. He proceeded to Lane's Flat and met Grange about 2:00 o'clock that afternoon. He told Grange that he (Mulligan) and Caddel had driven from San Francisco in separate cars, and that Caddel was stopping off to see the sheriff. Mulligan then suggested that Grange go back and see the sheriff, and ask him if he had a visitor, and if everything was all right. Grange replied that it was a bit late, and they agreed that Grange would see the sheriff the next morning.

On the same day, about 11:15 in the morning, appellant Caddel appeared in the sheriff's office in Mendocino County, introduced himself to Sheriff Broaddus and showed his credentials, stating that he wanted to be sure that the sheriff knew who he was. He inquired if the sheriff had any "beef" with the attorney general's office. The sheriff replied he had none and that Caddel was the first man from that office to call on him. A short conversation was had between the two, lasting about five minutes, and appellant Caddel then left.

On the following morning Grange and Mulligan proceeded from Lane's Flat to Ukiah in Mulligan's car and drove up in front of the Palace Hotel. Mulligan gave Grange $200 in currency, which was placed in a white envelope. About 9:15 of that morning Grange called at Sheriff Broaddus' home and asked the sheriff if he had had a visitor on the day before. The sheriff replied in the affirmative. Grange then explained that he did not know that Caddel was going to call on the sheriff until early in the preceding afternoon, and consequently did not have a chance to notify the sheriff in advance of Caddel's visit. Near the end of this conversation Grange left a sealed envelope on the chesterfield in the sheriff's house, saying, "Here's something that will take care of you." The envelope was not picked up by Sheriff Broaddus until after Grange left, at which time the sheriff found that it contained $250 in currency. The sheriff later showed this money to Deputy Sheriff Bartolomie, and it, together with the original envelope, was introduced in evidence as People's Exhibit 3. After leaving the money with the sheriff, Grange returned to the Palace Hotel in Ukiah and picked up Mulligan.

Mulligan's visit to Lane's Flat continued from April 29th to May 4th. Meanwhile, Griffin had been looking for McCarty, and Mulligan remarked that McCarty was "a hell of a guy to do business with, you can never find him when you need him or want him." He added, "Well, you ought to forget about Mr. McCarty."

However, Grange located McCarty and informed him that he (Grange) had now produced proof to the sheriff of his connection with the attorney general's office, by Caddel's visit. Grange also told McCarty that he (Grange) had given some money to the sheriff. Grange complained because McCarty had not made his payment, to which McCarty replied that he did not have the money, but that he would bring it to Lane's Flat the next day and see the fellow from the attorney general's office.

On the next day McCarty started for Lane's Flat with the money. On the road there he was intercepted by appellant Griffin in a pick-up truck. The two stopped and stepped off the road, and Griffin handed McCarty an envelope from Grange in which was a list and a $100 bill. This $100 bill was intended for Sheriff Broaddus and was to be given to him by McCarty. The latter refused to accept the $100. He told Griffin, however, that he (McCarty) had some money and a list for payment. Appellant Griffin told him that if he had anything for Grange to put it in an envelope and he would give it to him. In doing so McCarty dropped the money and the wind blew it around. The two picked up the currency and it, together with the $100 bill, was placed in the envelope and taken by Griffin.

When Griffin came back to Lane's Flat he handed Mulligan the envelope in the presence of Grange, and related what had transpired in the interview with McCarty. Mulligan's visit at Lane's Flat was concluded on May 4th and he departed on that day for San Francisco.

In the accounts kept by Gray of slot machine business for the month of April, a statement dated April 30th showed total receipts for the month of $1,064.50. In the list of expenditures was an entry of April 30th entitled "Podok" in the sum of $250. "Podok" was a word used to indicate payoff to the state and county, according to Gray.

In the latter part of April Grange received the $1,500 which Mulligan had agreed to pay him for Grange's interest in Gray's slot machines. It was paid in the form of a cashier's check drawn on the Security First National Bank of Los Angeles. Thomas Wall, the operator of the California Games Company, testified that in April of 1948, appellant Griffin requested Wall's secretary, Melba Wasson, to go across the street to the bank and purchase the check. Griffin gave her the money, and the check was made payable to and endorsed by Grange.

Two more slot machines were purchased in May and shipped C.O.D. to Willits, California. Appellant Griffin gave Gray the money for them, a cashier's check in the sum of $500, which Gray endorsed and took delivery of the machines, as evidenced by the tag of the Railroad Express Agency. The $500 check was purchased by the same M. Wesson of the California Games Company, from the Security First National Bank of Los Angeles, and was made payable to W. A. Griffin. At one time Griffin had told Gray that Wall was the partner in Los Angeles. However, in referring to the $500 check in a discussion with Gray, Griffin said, "Well, if this thing wasn't safe then Mr. Mulligan wouldn't have sent a check up for $500.00." Wall testified he had retained no interest in the slot machines sold to Griffin, that he had never received any revenue from them or from Griffin, and never was told anything about their operations.

On May 20th Sheriff Broaddus accidentally encountered Grange, and the latter invited the sheriff to Lane's Flat for a talk. The sheriff agreed to come in a few days. On May 22nd there was a long distance call from Mulligan's number in Los Angeles to Lane's Flat. On the following day, May 23rd, Sheriff Broadddus and his deputy, William White, went to Lane's Flat, where the sheriff met Grange and had a private talk with him in one of the cottages. Grange asked if the sheriff had any "beef" about slot machines and inquired about the operators along the coast. Then Grange told Sheriff Broaddus that a letter would be received inviting the sheriff to a meeting to be called by the attorney general in Los Angeles right after the first of June. Grange then gave the sheriff a list of operators of slot machines, and suggested a "token" raid prior to the meeting in Los Angeles so that the sheriff could report the same there. The sheriff informed Grange he was taking a prisoner east, and that meanwhile Grange should take care of Deputy White, who was suspicious. This Grange agreed to do, and at the conclusion of the conference, which lasted some thirty-five minutes, Grange, when they had returned from the cabin, shook hands with White and said, "I will see you later."

On the 3rd of June, Mulligan appeared on the scene again and registered at the Palace Hotel in Ukiah, room 237, under the fictitious name of Wilson. Grange met him there, and Mulligan coached the former on what Sheriff Broaddus was to report at the Los Angeles meeting, namely, that the sheriff was not to say that there were no machines in Mendocino County, but that there were a few and he was making raids, and that he had been pretty busy, and that there would always be a few machines. On that same day Grange contacted McCarty for the June pay-off, but with negative results. McCarty reported that he had not been able to get the operators to pay him. Grange then asked McCarty to arrange a meeting for him with the sheriff right away. On this occasion McCarty returned the $100 which Grange had previously given him for the sheriff, with the comment that if Grange wanted to pay the sheriff to do it himself. The meeting so arranged by McCarty took place on the river road. Both the sheriff and Grange drove there, left their cars and then stood talking. In this conversation Grange reported to the sheriff, among other things, that there were about 158 slot machines in the county. He handed the sheriff a paper containing two lists prepared by Griffin, one of "our" machines and the other of Les Gobel's. This list was admitted in evidence as People's Exhibit 5. Grange also told the sheriff it would be a good idea to make a token raid before the meeting in Los Angeles on June 7th. Grange suggested that the sheriff pick up one of "our" machines at Sutton's which was breaking down and causing trouble. Grange also told the sheriff there was not enough in the business for everybody, that he thought the state was going to pull out, but that the sheriff did not have to worry because he would not be interfered with by the attorney general's office. Just prior to leaving, Grange opened the left-hand door of the sheriff's car and put an envelope on the seat and said, "Here's something more for you." The envelope was sealed and contained $300 in currency. This sum included the $100 returned by McCarty. Grange told the sheriff he had given $100 to McCarty for the sheriff but that McCarty had returned it. The $300 was all in currency, $20 bills, and was offered in evidence as People's Exhibit 7.

Grange then went back to the Palace Hotel and talked to Mulligan and Griffin. He told them about the $100 which was to be paid to Deputy Sheriff White, and then got the money and went to White's home on the same day and paid the $100 to White. This money was also in an envelope and consisted of five $20 bills, introduced in evidence as People's Exhibit 8. White took the money to the sheriff's office and showed the bills to Deputy Sheriff Bartolomie. After giving this money to White, Grange returned to the Palace Hotel and reported to Mulligan what had happened.

In the financial statement of slot machine operations for the first part of June there was an entry of expenditures entitled "Podok" in the sum of $300.

On June 5th, pursuant to Grange's suggestion, a machine was seized by the sheriff's office in each of the following locations: Sutton's, Tanoak, Jeff's Rancho, and Booneville. Gray testified that they had replaced the machine at Sutton's with an old, worn-out one in anticipation of the proposed raid. This was also verified by John Sutton, the operator and by Deputy Sheriff Bartolomie, who seized an old battered machine at Sutton's. A week later a new machine, to wit, a big console job, was moved into Sutton's in place of the old one that had been seized.

On June 7th Gray purchased a cashier's check in the sum of $150 which he either sent to appellant Mulligan or gave to appellant Griffin to mail. This money was also taken out of the business by Gray at the direction of Griffin and corresponded with an item of "Podok" in the records of the business.

On June 7th Sheriff Broaddus attended the meeting in Los Angeles and made a short report on slot machines in his county, in accordance with Grange's instructions. Upon returning from the attorney general's meeting, Sheriff Broaddus organized raids and seized slot machines in various parts of the county. Grange was arrested and the slot machines at Lane's Flat were seized. Appellant Griffin was also arrested, and on being questioned said, first, that he had no connection with slot machines and that he was only a mechanic. The following morning he admitted to Deputy Sheriffs White and Bartolomie that he was a partner in the slot machine business, and that he was a part owner of the machines, and that he and Gray owned the machines together.

On June 13th, at San Diego, appellant Caddel was present at a meeting of the Crime Commission. He was asked if he knew a man by the name of Mulligan, to which he replied in the affirmative. When asked in regard to what Mulligan was doing, he stated that he would prefer not to tell that before the Commission, but would be perfectly willing to tell it to Admiral Standley, President of the Commission, in private. After the meeting was adjourned Caddel informed Admiral Standley that Mr. Mulligan was employed as a "bag man," that is, a pay-off man, one who carries funds and makes the pay-off.

It is insisted with much earnestness by all the appellants that the evidence above set forth was insufficient to warrant the convictions or to support the verdicts, the principal contention being that it was based mainly upon the testimony of accomplices. It is urged by appellants that the evidence was either not corroborated at all by independent evidence, or at least was insufficiently corroborated. The heaviest attack is made upon the testimony of Grange and Gray who were accomplices as a matter of law and who, in the words of appellants, "bartered their testimony for their freedom." It is also urged that the witness, Paul McCarty, and even Sheriff Broaddus himself, were accomplices and that their testimony required corroboration.

Inasmuch as this latter point has an important bearing on the main proposition of the insufficiency of the evidence and of corroboration of accomplices, it seems proper to consider it first. As was noted above, McCarty was indicted along with the other defendants, but during the course of the trial, upon application of the district attorney, the trial court directed that McCarty be discharged in order to make him a witness for the people. In doing so, the trial judge remarked that he had grave doubts as to whether any case had been proven against McCarty and that it was his belief that if the prosecution were to rest at that time an advised verdict probably would be in order.

When McCarty was sworn as a witness he testified unequivocally that he was baiting a trap for Grange on behalf of the sheriff. There is evidence in the record that supports this declaration. When McCarty was first contacted by Grange, and the illegal scheme unfolded, McCarty refused to believe the sheriff would be a party to it. He went to see the sheriff and had a conversation with him and received certain instructions. The conversation between the sheriff and McCarty was, after the action had been dismissed as to McCarty, stricken from the record. However, in the light of subsequent events, the jury might properly have inferred that the sheriff had concurred in a course of action to be pursued by McCarty for the purpose of detection and prosecution of the perpetrators. People v. Squires, 99 Cal. 327, 33 P. 1092. This is borne out by the following facts: that McCarty and the sheriff kept in touch with each other during the course of the conspiracy, and on one occasion met in San Francisco to discuss it; that McCarty made no effort to bring any slot machine operators into the scheme as proposed by Grange nor collected any money from them for pay-off; that he refused to pay the $100 given to him by Grange to be paid to the sheriff as a bribe, stating to Grange, "If you want to pay the sheriff, pay him yourself" ; that it was his intention at the request of the sheriff to find out whether or not Grange was trying to use a pay-off to him and start some organized vice of some kind at Lane's Flat, and whether or not the attorney general was mixed up in this pay-off; that he wanted Grange to give him some proof that Grange had connections with the attorney general's office which had not been furnished, and that he was baiting a trap; that on the occasion that he paid the money to Griffin, McCarty was on his way to Lane's Flat in order that he might see the man represented to be from the attorney general's office.

[2, 3] The rule is well established that one who, under the direction of an officer of the law, feigns complicity in the commission of a crime merely for the purpose of detecting or prosecuting the perpetrator is not an accomplice and his testimony is not subject to the limitations contained in section 1111 of the Penal Code relating to corroboration. People v. Bolanger, 71 Cal. 17, 11 P. 799; People v. Keseling, 35 Cal. App. 501, 170 P. 627; People v. Heusers, 58 Cal.App. 103, 207 P. 908; People v. Lanzit, 70 Cal.App. 498, 233 P. 816; People v. Calvert, 93 Cal.App. 568, 269 P. 969; People v. Lombard, 131 Cal.App. 525, 21 P.2d 955; People v. Fitzgerald, 14 Cal. App.2d 180, 58 P.2d 718; People v. Buyle, 20 Cal.App.2d 650, 68 P.2d 268; People v. Grijalva, 48 Cal.App.2d 690, 121 P.2d 32; People v. Hicks, 62 Cal.App.2d 859, 145 P. 2d 689. This is predicated upon the theory that those who orginate and propose a criminal design may not escape conviction merely by reason of the fact that a trap was laid for them or that they were facilitated in the execution of their unlawful enterprises by an officer of the law who acted for the purpose of detecting them. People v. Caiazza, 61 Cal.App. 505, 215 P. 80; People v. Lanzit, supra.

[4, 5] It is settled law that if there is a disputed question of fact as to whether a witness was or was not an accomplice, the jury must decide. People v. Kraker, 72 Cal. 459, 14 P. 196, 1 Am.St.Rep. 65; People v. Sansome, 98 Cal. 235, 33 P. 202; People v. Demera, 64 Cal.App. 121, 220 P. 673; People v. Rous, 118 Cal.App. 534, 5 P.2d 470; People v. Featherstone, 67 Cal. App.2d 793, 155 P.2d 685. Likewise, it is for the jury to determine, when the evidence is conflicting, whether a witness was an actual or a feigned accomplice. People v. Bolanger, supra; People v. Spaulding, 81 Cal.App. 615, 254 P. 614. As pointed out in People v. Gibbs, 87 Cal.App. 177, 261 P. 1057, an accomplice usually comes upon the stand admitting his complicity in the commission of the offense. But where complicity is denied it becomes a question for the jury when the facts are disputed or susceptible of different inferences.

[6] In view of these rules it is our conclusion that the question of whether or not McCarty or Sheriff Broaddus were merely feigning complicity in the offenses charged in order to detect and prosecute the perpetrators thereof was properly left to the jury for determination.

[7, 8] The jury was given the definition of an accomplice and was instructed upon the rules in relation to the testimony of accomplices. It was further instructed as a matter of law that witnesses Gray and Grange were accomplices. On the subject of feigned complicity the trial court gave the jury the following instruction: "One who under the direction of an officer of the law or of any other person or upon his own initiative and without criminal intent feigns complicity in the commission of crime merely for the purpose of determining the perpetrator thereof with a view of prosecution for the offense is not an accomplice in law, and his testimony need not be corroborated." Appellants contend that the effect of this instruction was to take the question away from the jury and inform them that McCarty was not an accomplice. We do not so construe it. The trial court specifically instructed the jury that as to any witness in the case, other than Gray or Grange, it was for them to determine from all of the testimony and circumstances as shown by the evidence whether or not such witness was an accomplice. The determination was thus left to the jury, and

no error was committed by the trial court in giving to the jury a definition of feigned accomplices. Under the evidence of the case it was proper for the trial court so to instruct. Consequently, any inference of the complicity of McCarty and Broaddus deducible from their acts and conduct having been resolved adversely by the jury, it must be held that such a finding is conclusive on appeal, and that therefore their testimony need not have been corroborated pursuant to the provisions of section 1111 of the Penal Code. People v. Gibbs, supra; People v. Spaulding, supra.

We will now proceed to the main issue of appellants' contentions, namely, that the evidence was insufficient to support the convictions. Particular emphasis is placed by them upon a method adopted by some of the decisions in testing the sufficiency of evidence corroborative of the testimony of an accomplice. This method was first announced in People v. Morton, 139 Cal. 719, 724, 73 P. 609, 611, wherein the following language from Welden v. State, 10 Tex. App. 400, was quoted: "We suggest this mode as a proper test: Eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no *inculpatory* evidence there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him."

Appellants rely strongly upon the case of People v. Reingold, 87 Cal.App.2d 382, on page 393, 197 P.2d 175, on page 182, wherein the test above quoted was employed. In applying it to the evidence the court said: "* * * the corroboration is not sufficient if it *requires interpretation and direction* to be furnished by the accomplice's testimony to give it value; second, that the corroborative evidence to be sufficient and of the required *substantial* value *must tend directly and immediately* to connect the defendant with the offense charged against him; and, third, that the corroborative evidence is insufficient when it merely casts a grave suspicion upon the accused."

The statutory law on the subject is embraced by section 1111 of the Penal Code. This section was enacted in the year 1872 and amended only twice subsequently. In its original form it read: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof."

In 1911 the section was amended to read as follows: "A conviction can not be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." St.1911, p. 484.

By this amendment the legislature saw fit to delete from the section the words "by other evidence which in itself, and without the aid of the testimony of the accomplice."

In 1915 another paragraph was added, as follows: "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

The statutory law has thus remained relatively constant throughout a considerable period of time. In applying it to the facts of particular cases and in evaluating the degree of corroboration required, the courts have announced certain rules as follows:

It is not necessary that the corroborative evidence prove independently either that the defendant is guilty of the offense or that he is guilty beyond a reasonable doubt. People v. Ames, 39 Cal. 403; People v.

Rose, 42 Cal.App. 540, 183 P. 874; People v. Blunkall, 31 Cal.App. 778, 161 P. 997; People v. Thompson, 16 Cal.App. 748, 117 P. 1033; People v. Leavens, 12 Cal. App. 178, 106 P. 1103; People v. Melone, 71 Cal.App.2d 291, 162 P.2d 505; People v. Baskins, 72 Cal.App.2d 728, 165 P.2d 510. If this were not true and if it were required that a complete case for the prosecution be established without reference to the testimony of the accomplice, there would then be no occasion to offer the accomplice as a witness.

[9] Sufficient corroboration may be furnished by the defendant's own testimony, People v. Sullivan, 144 Cal. 471, 77 P. 1000; People v. Watson, 21 Cal.App. 692, 132 P. 836; People v. Bunkers, 2 Cal.App. 197, 84 P. 364, 370; People v. Baba, 101 Cal.App. 723, 282 P. 403; People v. King, 30 Cal.App.2d 185, 85 P.2d 928; People v. White, 48 Cal.App.2d 90, 119 P.2d 383; People v. Wilson, 25 Cal.2d 341, 153 P.2d 720, or by admissions or confessions made by him, People v. Richardson, 161 Cal. 552, 120 P. 20; People v. Davis, 135 Cal. 162, 67 P. 59; People v. Zimmerman, 65 Cal. 307, 4 P. 20; People v. Cleveland, 49 Cal. 577, or by silence in the face of an accusatory statement. People v. Collins, 4 Cal.App.2d 86, 40 P.2d 542.

[10] The entire conduct of the parties, their relationship, acts, and conduct during and after the crime, may be taken into consideration by the jury in determining the sufficiency of the corroboration. People v. King, 33 Cal.App.2d 538, 92 P.2d 510; People v. Ross, 46 Cal.App.2d 385, 116 P.2d 81; People v. Willmurth, 77 Cal.App. 2d 605, 176 P.2d 102; People v. Mazzola, 99 Cal.App. 682, 279 P. 211; People v. Wiley, 33 Cal.App.2d 424, 91 P.2d 907; People v. Rice, 29 Cal.App.2d 614, 85 P.2d 215; People v. Payton, 36 Cal.App.2d 41, 96 P.2d 991; People v. Garrison, 80 Cal. App.2d 458, 181 P.2d 738.

[11] If the corroboration is inculpatory it is not essential that it extend to all of the elements of the offense, nor to every fact and detail included in the testimony of the accomplices. People v. Black, 45 Cal. App.2d 87, 113 P.2d 746; People v. Andrew, 43 Cal.App.2d 126, 110 P.2d 459; People v. King, 30 Cal.App.2d 185, 85 P.2d 928; People v. Martinez, 19 Cal.App.2d 599, 66 P.2d 161; People v. Whittaker, 18 Cal. App.2d 396, 63 P.2d 1202; People v. Briley, 9 Cal.App.2d 84, 48 P.2d 734; People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951; People v. Baillie, 133 Cal.App. 508, 24 P.2d 528; People v. Collier, 111 Cal. App. 215, 295 P. 898; People v. Baba, 101 Cal.App. 723, 282 P. 403; People v. Negra, 208 Cal. 64, 280 P. 354; People v. Frazer, 80 Cal.App. 464, 252 P. 633; People v. Taylor, 70 Cal.App. 239, 232 P. 998; People v. Kelly, 69 Cal.App. 558, 231 P. 767; People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Wilson, 25 Cal.2d 341, 153 P.2d 720; People v. Harper, 25 Cal.2d 862, 156 P.2d 249; People v. Malone, 82 Cal.App. 2d 54, 185 P.2d 870.

Conversely, such evidence is sufficient if it tends in some slight degree, at least, to implicate the defendant. It need not be strong. People v. Kelly, supra; People v. Follette, 74 Cal.App. 178, 240 P. 502; People v. McNett, 80 Cal.App. 81, 251 P. 688; People v. Negra, supra; People v. Linde, 131 Cal.App. 12, 20 P.2d 704; People v. Tinnin, supra; People v. Andrew, supra; People v. Wilson, supra.

[12] The testimony of an accomplice need not be corroborated by direct evidence, or, stated in another way: Circumstantial evidence suffices for the purpose of corroboration. People v. McNett, supra; People v. Frazer, supra; People v. Blunkall, supra; People v. Nikolich, 93 Cal.App. 356, 269 P. 721; People v. Allen, 95 Cal. App. 60, 272 P. 349; People v. Negra, supra; People v. Entriken, 106 Cal.App. 29, 288 P. 788; People v. Knoth, 111 Cal. App. 250, 295 P. 577; People v. Bonner, 5 Cal.App.2d 314, 42 P.2d 694; People v. Ross, supra.

It is sufficient, even though circumstantial and slight, if the connection of the defendant with the alleged crime may be reasonably inferred from the corroborative

evidence. People v. Whittaker, supra; People v. Rice, supra; People v. Payton, supra; People v. Suter, 43 Cal.App.2d 444, 111 P.2d 23; People v. Wilson, supra.

[13] The corroborating evidence is sufficient if it connects the defendant with the commission of the crime in such a way as reasonably to satisfy the fact-finding body that the accomplice is telling the truth. People v. Trujillo, 32 Cal.2d 105, 194 P.2d 681; People v. Henderson, 34 Cal.2d 340, 209 P.2d 785. In the Trujillo case, supra, our Supreme Court said, 32 Cal.2d at page 110, 194 P.2d at page 684: "Such corroboration must create more than a suspicion of guilt, but is sufficient even though it 'be slight and, when standing by itself, entitled to but little consideration'. People v. Negra, 208 Cal. 64, 69, 280 P. 354, 356; People v. Wilson, 25 Cal.2d 341, 347, 153 P.2d 720; People v. Shaw, 17 Cal.2d 778, 803, 112 P.2d 241; People v. Yeager, 194 Cal. 452, 473, 229 P. 40. It is sufficient when the evidence offered as corroborative tends to connect a defendant with the commission of the crime in such a way as reasonably may satisfy a jury that the accomplice is telling the truth. It is not necessary that the accomplice be corroborated as to every fact to which he testifies. If his testimony could be completely proven by other evidence, there would be no occasion to offer him as a witness. People v. Negra, supra; People v. Yeager, supra. For the same reason, it is not necessary that the independent evidence be sufficient to establish the defendants' guilt. The prosecution is not required to single out an isolated fact which in itself, unrelated to other proven facts, is considered to be sufficient corroboration. It is the combined and cumulative weight of the evidence furnished by nonaccomplice witnesses which supplies the test."

In People v. Henderson, supra, 34 Cal.2d at page 343, 209 P.2d at page 786, the following language is used: "The evidence of inculpatory participation need not be direct nor extend to every fact and detail. It may be circumstantial and is sufficient, even though slight, if it tend to connect the defendant with the commission of the crime. People v. Negra, 208 Cal. 64, 69-70, 280 P. 354; People v. Yeager, 194 Cal. 452, 473, 229 P. 40."

In the vast majority of the decisions on the subject no indication is given that the test suggested by People v. Morton, supra, was used. And this is true of a number of the decisions on the subject, which have been decided by our district courts of appeal subsequent to the People v. Reingold case, namely, People v. Holt, 88 Cal.App.2d 42, 198 P.2d 58; People v. Mastrantuono, 88 Cal.App.2d 178, 198 P.2d 574; People v. Baker, 89 Cal.App.2d 503, 201 P.2d 42; People v. Anderson, 90 Cal.App.2d 326, 202 P.2d 1044; People v. Fountain, 91 Cal.App.2d 158, 204 P.2d 639; People v. Colton, 92 Cal.App.2d 704, 207 P.2d 890; People v. Duarte, 96 Cal.App.2d 661, 216 P.2d 81.

[14, 15] The word "corroboration" in its etymological sense denotes "a strengthening or confirming." (Webster's New International Dictionary, Second Edition.) It is essentially a relative term and refers to some antecedent which it is said to strengthen or fortify. The jury in determining the question of corroboration must obviously compare the residue of the other evidence with the accomplice's testimony, in order to ascertain the truthfulness of the latter, and in this regard the corroborative evidence must do more than merely raise a suspicion of guilt, even a grave suspicion, in the jury's mind. It must reasonably satisfy the jury that the accomplice is telling the truth. People v. Trujillo, supra; People v. Henderson, supra.

In view of these more recent decisions of the Supreme Court we conclude that the test suggested in People v. Morton, supra, and followed by People v. Reingold, supra, is not an exclusive method of analyzing the sufficiency of evidence corroborative of the testimony of an accomplice. We conclude further that such evidence may be held sufficient if it connect the defendant with the crime in such a way as reasonably to satisfy the fact-finding body that the accomplice is telling the truth.

[16, 17] Under our system of jurisprudence it is the peculiar and exclusive province of the trier of facts, either jury or judge, to decide upon the credibility of the witness, and the weight and effect of his testimony. This elementary rule is equally true when an accomplice is offered as a witness, People v. Curlee, 53 Cal. 604; People v. Gibson, 53 Cal. 601; People v. Hoosier, 24 Cal.App. 746, 142 P. 514, with the restriction, however, that the jury's discretion is not arbitrary and that it may not accept the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. However, the law does not forbid the jury to believe the accomplice, but does require that there be other evidence which measures up to the requirement tending to connect the defendant with the crime charged. If there be such evidence, then the testimony of the accomplice is to be considered by the jurors as any other testimony, and given such weight as they may conclude that it is entitled to. 8 Cal. Jur., par. 340, p. 281; People v. Flood, 41 Cal.App. 373, 182 P. 766; People v. Hoosier, supra; People v. Negra, supra; People v. Hanks, 35 Cal.App.2d 290, 95 P.2d 478.

[18] The weight to be given to the testimony of an accomplice as well as the sufficiency and weight of the corroboration is for the jury's determination. People v. Trujillo, supra; People v. Pruitt, 55 Cal.App.2d 272, 130 P.2d 767; People v. Lindley, 26 Cal.2d 780, 161 P.2d 227; People v. Newland, 15 Cal.2d 678, 104 P.2d 778. Before a verdict of a jury can be set aside upon appeal upon the ground of insufficiency of the evidence to support it, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence sufficient to support the conclusion of the trial court. People v. King, 40 Cal.App.2d 137, 104 P.2d 521; People v. Tedesco, 1 Cal.2d 211, 34 P.2d 467; People v. Ramsey, 83 Cal.App.2d 707, 189 P.2d 802; People v. Parker, 80 Cal. App.2d 128, 181 P.2d 16.

As said in People v. Henderson, 34 Cal. 2d 340, at page 346, 209 P.2d 785, at page 788: "When as in the present record it is discovered that there is testimony aside from that of the accomplice which tends to connect the defendant with the commission of the crime, the function of the appellate court is performed. Questions of the weight of the evidence and the credibility of the witnesses are for the trial court, and since the circumstances reasonably justify the finding of guilt, an opposing view that they also may be reconciled with innocence will not warrant interference with the judgment on appeal. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, and cases cited."

[19] We are satisfied, after reading the entire transcript of testimony, that, measured by the rules last above stated, there is sufficient evidence to corroborate the testimony of the accomplices. The case was tried upon the theory of conspiracy, and in support thereof the testimony of a number of witnesses who were clearly not accomplices was introduced, as well as a large number of documentary exhibits. We have already in the statement of facts summarized some of the circumstances corroborating the testimony of the accomplices. Inasmuch as the sufficiency of this other evidence is so severely challenged we will again, at the risk of repetition, allude to it.

The evidence from non-accomplice sources so far as appellant Griffin is concerned consists of, first, his own admission that he was a partner in the slot machine business, that he was a part owner of the machines, and that he and Gray owned them together. Testimony from witnesses who were not accomplices disclosed the following: that on one occasion appellant Griffin and Gray were transporting slot machines in a truck and were intercepted on the highway by two deputy sheriffs; that appellant and Gray unsuccessfully solicited

Edward E. Lane to put slot machines in the latter's resort at Riverdale; that appellant came to the resort of Austin I. Stinson three or four different times, and once approached Stinson about putting in slot machines; that one Charles Strait saw slot machines at Sutton's resort and heard them pay off, and on two occasions saw Griffin and Gray repairing slot machines there; that in 1948, some time before June, he saw both men carrying out machines which they said would not work; that one Evelyn McMahon saw Griffin come to a resort known as Peggy's Place on several occasions, and saw Griffin working on the slot machines with tools; that one Joe Whalen, an employee in the bar at Grundy's, saw Griffin repairing slot machines in that place and saw him remove the money from them.

Evidence of Griffin's trip to Los Angeles and the purchase of slot machines from the California Games Company was developed by non-accomplice testimony. As has already been stated, Griffin took delivery of the four machines purchased, and the three or four machines which had been renovated, in a truck and departed with them. Gasoline purchases on the trip were charged to a credit card belonging to Lane's Flat. Two additional slot machines purchased by Griffin were ordered to be shipped to Robert Gray in Mendocino County.

On May 5, 1948, as testified by witness McCarty, when the latter was on his way to Lane's Flat to meet the man represented to be from the attorney general's office for the May pay-off, he was stopped on the road by Griffin. Griffin handed him an envelope from Grange in which was a list and a $100 bill intended as a bribe for Sheriff Broaddus. As was related above, McCarty refused to accept this bill, but in turn stated that he had some money and a list for payment. Griffin took these and told McCarty he would give them to Grange.

Documentary evidence admitted in evidence in corroboration of testimony of the accomplices Gray and Grange was the following: a $500 cashier's check purchased by Melba Wesson of the California Games Company from the Security First National Bank of Los Angeles and payable to W. A. Griffin; this check was endorsed "W. A. Griffin" and "R. A. Gray"; Gray testified that this money was used to take delivery of slot machines which were shipped C.O.D. American Railway Express; the express tag evidencing the shipment was also admitted into evidence; a second cashier's check in the sum of $1,500, purchased by Melba Wesson of the California Games Company with money furnished by appellant Griffin, which check was made payable to Fred Grange, and bears the endorsement "Fred S. Grange"; Grange testified that he was paid this sum in reimbursement for payments made to the Morris Plan on Gray's contract for slot machines.

This evidence amply corroborates the testimony of accomplices Gray and Grange that an agreement was made and carried into execution to operate slot machines in Mendocino County and to obtain protection therefor by a system of bribery. It further directly inculpates appellant Griffin as a member and active participant in the conspiracies. It also corroborates the testimony of numerous other resort owners that Gray or Griffin or both of them together had solicited the resort owners to put in slot machines, that the machines were placed on location in their respective resorts and put in operation, and that Griffin or Gray or both collected the proceeds thereof and paid to the location owners a percentage thereof.

The evidence being corroborative of the testimony of Gray, it also corroborates certain documentary evidence which consisted generally of records kept by Gray. These exhibits comprised statements of income and disbursements, collection reports and records of the slot machine business. The "statements" show the names of various resorts in Mendocino County, and opposite these names certain items indicating money received as of a certain date. Under the head of expenses are also sundry items, with the date. For example, in People's Exhibit 60, entitled "Statement," some of the expenses listed for the month of May are as follows:

May	Expenses	Expenses	Loads
15	Tom Grundy — Load (25¢)		$40.00
17	Office — Loads — 5¢–25¢ Slots		40.00
18	Willie — Drawing	$20.00	
18	Bob — Drawing	10.00	
20	Willie — Phone call S.F.–L.A.	11.00	
21	Willie — Drawing	20.00	
21	Bob — Drawing	20.00	
23	Bob — Ent. Exp.	13.00	
23	Willie — New Truck Exp.	5.00	
25	Load for Piercy Machine		40.00
25	Bob — S.F. Trip Exp.	15.00	
25	Willie — Drawing	10.00	
25	Bob — Drawing	10.00	
26	Devoy — Load		30.00
27	Bob — Drawing	20.00	
28	Willie — Expense	5.00	
30	Willie — Mach. Rep. & Exp.	5.00	
31	Willie — Exp.	10.00	
31	Bob — Exp.	10.00	
31.	Express charges — challengers & springs	9.10	
31	Curley — Work on Machines	20.00	
31	Lane's Flat — Load		10.00
31	Morris Plan — Payment 5/8	551.64	

This same exhibit shows on the top or receipts portion of the statement the following items as "Ins.":

18	Hollow Tree	to 5/15	$40.00
20	Grundy's — Tom	to 5/15	20.00
21	Lane's	to 5/15	40.00

In this connection six of the resorts listed on this exhibit were found on June 16th by Deputy Sheriff Crawford to have had slot machines set up for automatic pay-off. Other records of the business received in evidence were certain collection reports. These consisted of regular printed forms showing, among other things, "Total Amount in Machine", "Less Expense", "Net Amount to Divide", "Merchant's Share", "Balance Due Operator". People's Exhibit 1 in evidence consists of three of these collection reports, two of which are signed by "Bob" as collector, and the other signed by "W. A. C."; this latter slip shows the "Net Amount to Divide" $50, $20 of which was to be the "Merchant's Share", and $30 "Balance Due Operator", or indicating a division of profits on a 60–40 basis.

Another exhibit admitted in evidence was the contract co-signed by Fred Grange to the Morris Plan. It discloses that the monthly payment required thereunder was $546.64. The records of the slot machine business show that payments of these installments were made and entered in said records as items of expenditure.

The record shows further that in pursuance of the conspiracies certain declarations were made. After Grange had had the visit and conversation with Sheriff Broaddus described in the statement of facts, wherein the sheriff had told Grange he might talk with McCarty, the evidence disclosed that Grange did go to McCarty again and ask what the deal was. When McCarty reiterated that there was no deal, Grange expressed his disbelief by saying, "Bla, bla, bla." Grange then told Mc-

Carty that he (Grange) had personal connections in the state or friends in the attorney general's office who could guarantee immunity from any trouble. But McCarty expressed his doubts concerning Grange's connections, and in order to verify the statement that Grange had been to the sheriff's office McCarty called on the sheriff and received from the sheriff certain instructions.

In a subsequent conversation with McCarty, Grange outlined a plan of pay-off of $10 week per machine for both the sheriff and the state. Grange said that he would guarantee that the attorney general's office would not bother them. When McCarty again expressed his doubt of the authenticity of this connection Grange said he could supply the proof in one of two ways, either by having a letter written by the attorney general's office to the sheriff, complaining about a particular place, or he (Grange) would have a man from the attorney general's office call on the sheriff at a pre-arranged time and just pass the time of day. Also, in this conversation Grange suggested a division of territory for slot machine operations in which McCarty would concede to Grange everything north of Laytonville.

[20] The evidence of these declarations of Grange was given in the testimony of McCarty. The law is well settled that where the evidence is amply sufficient to establish a conspiracy, all statements, acts and declarations by any of the parties, pending the commission of it, and looking toward its consummation, are competent evidence against each and every conspirator. People v. Ferlin, 203 Cal. 587, 265 P. 230; People v. Collier, 111 Cal.App. 215, 295 P. 898; People v. Stevens, 78 Cal.App. 395, 248 P. 696; People v. Chait, 69 Cal.App.2d 503, 159 P.2d 445.

In People v. Black, 45 Cal.App.2d 87, at page 102, 113 P.2d 746, the court held that there was no error in admitting testimony of the conversations and acts of the conspirators which occurred at a time more than three years prior to the date of the indictment. In so doing the court quoted with approval the following language from People v. Stevens, 78 Cal.App. 395, at page 407, 248 P. 696, 700, wherein a conspiracy was likened to a large tree, which, originating in a tiny tendril, requires a long time and persistent nurture to develop into a matured tree: "In our opinion there is no valid objection to evidence in conspiracy cases which tends to show, step by step, the gradual formation of a criminal concord in the minds of those charged with the illicit combination, merely because the evidence begins at a time long anterior to the wrongful meeting of minds. It is necessary only that the evidence, in all its parts, tends to prove the formation of the conspiracy. In a case in which, it is true, the only issue was as to the identity of one of the alleged parties to a conspiracy, the court said: 'From the nature of the crime itself it is difficult to prove a criminal conspiracy by direct evidence, and such conspiracies are most always proven by circumstantial and "piecemeal" evidence; and, in consideration of this fact, in such cases great latitude must of necessity be given the commonwealth in the production of its evidence.' Jenkins v. Commonwealth, 167 Ky. 544, 180 S.W. 961, 3 A.L.R. 1522."

That the above declarations of Grange were in furtherance of the conspiracy to operate slot machines, and looking toward its consummation, can hardly be questioned. The obtaining of a virtual concession for such operations free from interference by law enforcement officers would obviously be of prime importance to the owners and operators of such gambling devices.

We will next consider the evidence corroborative of accomplices' testimony that appellant Mulligan was also a member of the conspiracies. Grange testified that he saw Mulligan either at Lane's Flat or at San Francisco on an average of once or twice a month during the time of the conspiracy. There was evidence introduced from which the jury could reasonably have inferred, other than from the testimony of accomplices, that appellant Mulligan, a resident of Los Angeles, was in northern California on the following occasions: 1. November 20, 1947, at Lane's Flat; 2. January 4, 1948, San Francisco; 3. January 23, San Francisco; 4. January 29, San Francisco; 5. February 14, San

Francisco; 6. February 16, Ukiah; 7. February 17, San Francisco; 8. February 28, San Francisco; 9. March 6, San Francisco; 10. April 5, Ukiah; 11. April 6, San Francisco; 12. April 13, San Francisco; 13. April 28, San Francisco; 14. April 29, Lane's Flat; 15. June 3, Ukiah. This evidence consisted mainly of records from the Palace Hotel of San Francisco and the Palace Hotel of Ukiah, as well as the records of various airline companies. In addition, evidence was introduced showing the following long distance calls from Mulligan's home in Los Angeles to Lane's Flat, Mendocino County: February 18, 1948, February 26, February 27, March 12, March 19, April 2, April 3, April 8, April 10, and May 22. There were also the following long distance calls from Lane's Flat to Mulligan's home in Los Angeles, to wit: March 5, March 12, March 28; and on May 10th a long distance call from the pay station at Garberville to Mulligan's home in Los Angeles.

Appellant Mulligan did not take the stand to testify, and therefore offered no explanation of these telephone calls from one end of the state to the other, nor did he deny the significance of them as testified to by accomplice Grange. Circumstantially, these calls have a corroborative value which the jury could properly have inferred from them. For example, on the occasion when Grange testified that he met Mulligan and Caddel at the San Francisco airport, documentary evidence introduced indicated that, traveling by plane from different parts of the state, Caddel from Los Angeles and Mulligan from Ukiah, their itineraries were so timed that their arrivals converged at the San Francisco airport at the time Grange said he met them there. Again, when Grange and Gray testified that they had met by pre-arranged agreement at the Palace Hotel at San Francisco to discuss the purchase and sale of Gray's interest in slot machines, documentary evidence showed that Grange and Griffin had registered at the Palace Hotel on February 29th, and that Mulligan was already there, having checked in at 12:22 p. m. on February 28th; that on the two days previous to the 28th there had been long distance telephone calls from Mulligan's home in Los Angeles to Lane's Flat; that Mulligan and Grange and Griffin all occupied rooms on the eighth floor of the Palace Hotel, and that from Mulligan's room there was a telephone call shown to the residence of Gray.

On the occasion of Griffin's trip to Los Angeles, when he purchased the slot machines from the California Games Company, the evidence showed that on the day before his departure there was a long distance call at 7:55 in the morning from Mulligan's home in Los Angeles to Lane's Flat, and on the same day at 8:16 p. m. there was a call from Lane's Flat to Mulligan's home. When Griffin was at the California Games Company at Los Angeles he was seen in the company of Mulligan and the two were talking. Thomas Wall, the manager of the retail slot machine company which sold the machines to Griffin, had known Mulligan for sixteen years. The record also shows long distance calls between Mulligan's room at the Palace Hotel at San Francisco and Parkway 2125, Los Angeles, the telephone number of the California Games Company.

When Grange testified that Mulligan came to Ukiah on April 5th for the first pay-off and occupied a room at the Palace Hotel, registering under a fictitious name, and was met there by Grange and Griffin, circumstantial evidence which could have been considered by the jury in support thereof showed the following: That on April 2nd and 3rd long distance calls had been made from Mulligan's home in Los Angeles to Lane's Flat; that on April 4th a reservation for air plane passage had been made from Los Angeles to San Francisco and thence to Ukiah for a "Mulligan"; that on account of weather conditions the flight from San Francisco to Ukiah was cancelled, as was likewise the one of the 5th; that on April 5th a man registered in room 228 of the Palace Hotel at Ukiah, under the name of "Miller", from Los Angeles; that on this same day Grange looked up McCarty and declared to him, "The man is here for the money," and "wants a list of your locations." The question then arose about the free-play machines, and Grange left McCarty to consult the "man." When he returned a list was made out showing the location of the machines in two different columns. Grange testified that Griffin made a copy of this list. A copy of this list, on the stationery of the Palace Hotel in Ukiah, was admitted in evidence. The record also shows that on April 5th a telephone call was placed from Lane's Flat to the Palace Hotel in Ukiah, asking for either Grange or Griffin, and that Griffin answered the call; also that on the evening of April 5th a call was placed from room 228 occupied by "Miller" to Caddel's home in Los Angeles.

On April 29th, according to Grange's testimony, Mulligan showed up at Lane's Flat and told Grange that Caddel was stopping off to see the sheriff. Regarding this the following corroborative evidence was adduced: On the day before, Mulligan and Caddel, with their respective wives, had registered at the Palace Hotel in San Francisco within minutes of each other. On the 29th Mulligan and his wife had checked out of the hotel at the early hour of 6:39 a. m. On the same morning, at 11:15 a. m., Caddel called at the sheriff's office and had the conversation with Sheriff Broaddus which has already been related. On the following morning Grange contacted Sheriff Broaddus at the latter's home, and, after first speaking of Caddel's visit, committed the act of bribery charged in Count Three of the indictment, by leaving with the sheriff an envelope which contained currency.

Grange testified that after giving the bribe to Sheriff Broaddus, he (Grange) picked up Mulligan, and on the way back to Lane's Flat they stopped at Tanoak Park. This latter fact was corroborated by Deputy Sheriff Hollingsworth who saw Grange and Mulligan together at Tanoak Park on the occasion and who identified the automobile in which they were riding as a late model two-toned blue Oldsmobile, license No. 5-4181. Later in the same day Hollingsworth saw Mulligan and Grange together again at Piercy's.

In the records of the slot machine revenue and expenses above referred to in connection with the conspiracy, there is an entry on the 30th of April of $250 entitled "Podok." This amount exactly corresponds to the amount testified to by the sheriff as contained in the envelope given him by Grange. That testimony could have been considered by the jury as corroborative of said entry, and it reasonably could have inferred therefrom that "Podok" meant "payoff" or protection money.

Grange testified that Mulligan on this trip made another collection on the slot machine operations, namely, the money paid by McCarty to Griffin. Circumstances which the jury might reasonably consider corroborative of the same were the following: McCarty's testimony that he had informed Grange that he would bring the money to Lane's Flat and see the fellow from the attorney general's office, but on the way there was intercepted on the road by Griffin, and that he had paid Griffin the money. Deputy Sheriff Hollingsworth witnessed this scene at a distance and testified that he saw Griffin and McCarty talking together on the occasion of the transfer of this money. Later on the same day Hollingsworth saw Griffin talking to Mulligan in the Oldsmobile automobile, and on this occasion Griffin presently got out of the car and came over to talk to Hollingsworth. Griffin said the man with him was a friend from Los Angeles who was retired after thirty years on the police force. On the same occasion Hollingsworth also saw Gray standing out in front of the car talking to a woman.

On May 4th Mulligan was seen by Chief of Police Griffin in Willits, driving the Oldsmobile car, with a woman passenger. The records of the Palace Hotel in San Francisco reveal that on May 4th, at 7:13 p. m., Mulligan and his wife registered and were assigned to room 7093; that shortly thereafter a long distance telephone call was placed from Mulligan's room to Caddel's home in Los Angeles.

Grange testified that on the 3rd of June Mulligan returned to Ukiah, again registering under a fictitious name at the Palace Hotel. The evidence showed that on this date a man registered at the hotel under the name of "Wilson" and was assigned room 239. After arriving there the records show that a call from this room was placed to Mulligan's home in Los Angeles. On this same day Grange contacted McCarty for the June payoff, but with negative results. McCarty told him he could not get the operators to pay up. Grange then asked McCarty to arrange a meeting with the sheriff right away. This was done by McCarty, as related above, and Grange met with the sheriff on the river road, and this was the occasion for the second bribe, charged in Count Four of the indictment.

In the conversation with the sheriff, Grange handed to the sheriff a paper containing two lists, one of "our" machines and one of Les Gobel's. This list was admitted in evidence as People's Exhibit 5. This meeting between the sheriff and Grange was witnessed at a distance by Deputy Sheriff Crawford who took a photograph of it. The $300 in currency given by Grange to the sheriff on that occasion was admitted in evidence as People's Exhibit 7. In the financial records maintained in connection with the conspiracy to operate slot machines, there was an entry of expenditure for the first part of June entitled "Podok" in the sum of $300, corresponding to the amount received by Sheriff Broaddus.

On this same day, to wit, June 3rd, the third act of conspiracy, charged in Count Five of the indictment, was committed when Grange went to Deputy Sheriff White's home and handed him an envelope containing five $20 bills, which were also introduced in evidence.

Gray testified that on June 7th he purchased a cashier's check in the sum of $150, which was either sent to appellant Mulligan by him or given to appellant Griffin to mail. The cashier's check was introduced into evidence in this amount, payable to J. E. Mulligan and endorsed "J. Mulligan." Gray testified that this sum was taken out of slot machine money, and in support thereof there is an entry in the records of the business entitled "Podok $150.00."

The evidence above set forth clearly shows that the conspiracy illegally to operate slot machines in Mendocino County had grown into and was supplemented by a second conspiracy to commit acts of bribery.

We believe from the facts and circumstances above set forth that the jury was reasonably justified in its determination that both appellants Griffin and Mulligan were parties to the conspiracies, and that the jury could reasonably have concluded that the testimony of the accomplices was true, and that appellant Mulligan, in the general concert of action, performed the role of messenger, collector and intermediary.

Now directing our attention to evidence which the jury could have considered in connection with the testimony of accomplices that appellant Caddel was also a member of these conspiracies, it showed first a very close and intimate relationship between Caddel and appellant Mulligan. They not only visited in each other's homes, but on numerous occasions, when Caddel was in San Francisco on official missions, it so coincided that Mulligan would also be there, and the two would stay at the same hotel. On occasion they occupied the same or adjoining rooms, or, at least, rooms on the same floor. Sometimes they checked in or out of the hotel at approximately the same time. On one occasion Caddel made reservations at the Palace Hotel for Mulligan, and on another they traveled together by plane from San Francisco to Los Angeles, Caddel having made the reservation.

[21] It is of course true that mere association with the perpetrator of a crime is not sufficient to prove a criminal conspiracy. Dong Haw v. Superior Court, 81 Cal.App.2d 153, 183 P.2d 724. An entirely different situation may arise, however, when it is shown that a conspiracy is already in existence and that acts are being committed in furtherance thereof. The evidence here, revealing the conspiracy in Mendocino County and the activity of Messrs. Grange and Gray and appellants Mulligan and Griffin in connection therewith, has already been reviewed. Appellant Caddel's association with appellant Mulligan may now be considered in the light of these existing conspiracies. In January, 1948, when the conspiracy to operate slot machines was getting under way in Mendocino County the records of the Palace Hotel in San Francisco

showed that Mulligan and Caddel were there on January 4th and occupied rooms 5028 and 5030, respectively. On January 23rd Mulligan registered there again and a long distance telephone call was placed by him to Hempstead 2602, Caddel's residence in Los Angeles. On January 27th Caddel registered at the Palace Hotel, and on the following day a call was placed from Mulligan's home in Los Angeles to the Palace Hotel. Two days later Mulligan was registered in at the Palace Hotel by Caddel.

On February 16th airline records indicate that Caddell had flown from Los Angeles to San Francisco, arriving at the San Francisco airport at 11:10 a. m. Records of the Palace Hotel also show that he did not check in at the hotel until 3:11 p. m. This was the occasion when Grange testified he had met Mulligan and Caddel at the airport. Airline records also indicate that at 4:45 p. m. of the same day Mulligan departed from San Francisco for Los Angeles by plane, and that on the following day he returned to San Francisco and checked in at the Palace Hotel at 11:11 p. m. The hotel records show that on February 18th Mulligan and Caddel checked out of the hotel at approximately the same time, a reservation having been made by Caddel for two airplane tickets to Los Angeles, the names on the flight reservations being "W. H. Caddel and J. M. Mulligan."

The meeting in San Francisco on February 29th and March 1st between Mulligan, Grange, Griffin and Gray has already been referred to. On February 26th and February 27th there had been long distance telephone calls from Los Angeles, Axminster 27904, Mulligan's home, to Lane's Flat. On February 28th Mr. and Mrs. Caddel and Mr. and Mrs. Mulligan registered at the Palace Hotel at exactly the same time, and occupied rooms 8014 and 8023, respectively. Appellant Caddel admitted on the witness stand that he had made the reservations for the Mulligans. On the same day, and only a few hours after their registration, there was a telephone call from Lane's Flat, Mendoino County, to the Palace Hotel at San Francisco. When Grange and Gray arrived on the 29th they were assigned room 8059 on the same floor with Mulligan and Caddel. On the following day Caddel checked out at 10:03 a. m., and on March 2nd at 7:15 a. m. a long distance telephone call was placed from Hempstead 2602, appellant Caddel's home in Los Angeles, to Exbrook 28600, the Palace Hotel, for Jimmy Mulligan. It will be recalled that the conference on March 1st at the Palace between Mulligan, Grange, Griffin and Gray concerned the buying out of Gray's interest in the slot machines in Mendocino County.

On March 5th there was a collect call from Caddel in Madera to Mulligan in Los Angeles, and on the same day there was a telephone call from Lane's Flat to Mulligan's home in Los Angeles. On March 6th appellant Caddel registered at the Palace Hotel in San Francisco, and on that afternoon appellant Mulligan was checked in and was assigned to room 3032, the same room occupied by appellant Caddel. Mulligan had been previously registered by Caddel, according to hotel records, which also showed both appellants had checked out at 7:03 the following morning. On March 19th at 6:40 p. m. there was a long distance call from Mulligan's home in Los Angeles to Lane's Flat. At 7:04 p. m. there was a long distance call from Caddel's room at the Palace Hotel, San Francisco, to Mulligan's home in Los Angeles.

When Mulligan was in Ukiah for the first pay-off on April 5th, and registered at the Palace Hotel there under the name of Miller, he said, according to Grange, "I have to call Buck and tell him that everything is all right, because he is very interested to know." Grange heard Mulligan speak to the party on the other end of the line and say, "Everything has gone here as planned. Everything is all right." The records of the telephone company show that on April 5th at 8:01 p. m. a long distance call was completed from room 228, Palace Hotel, Ukiah, by a person named Miller, to Hempstead 2602, Caddel's home in Los Angeles. Further, the records of the Palace Hotel at Ukiah also reveal that a long distance call was made to Los Angeles from the same room and on the same day.

Grange testified that about the 10th of April Mulligan called by telephone and said that the man from the attorney general's office was busy at Santa Cruz and would be a little late. The record shows that on April 8th and 10th there were long distance calls from Mulligan's residence in Los Angeles to Lane's Flat. Two days after this last call appellant Caddel registered at the Palace Hotel in San Francisco, and on the following day Mulligan was checked in, occupying, as usual, a room on the same floor as Caddel. The records show that on this day there was a call from Lane's Flat to the Palace Hotel in San Francisco. On April 14th both Mulligan and Caddel checked out of the hotel, and notations in Caddel's daily operating report for April 14th and 15th reveal that he was in Santa Cruz on said dates, and he testified he remembered the fact of his being there.

Caddel's visit to the sheriff's office on April 29th has already been described, and the fact that on the day preceding appellants Mulligan and Caddel, with their respective wives, had registered at the Palace Hotel in San Francisco at approximately the same time. It also has been noted that on the following morning at 6:39 Mulligan and his wife had checked out of the hotel and proceeded to Lane's Flat and Mulligan informed Grange that he and Caddel had driven from San Francisco in separate cars, and that Caddel was stopping off to see the sheriff. About 11:15 of that morning Caddel appeared unannounced at the sheriff's office and had the brief conversation with the sheriff which has heretofore been related. Caddel's mission to San Francisco on April 28th, according to Walter H. Lentz, Chief Enforcement Officer, Department of Justice, was to conduct an investigation and to procure information regarding gambling, prostitution and vice in Sonoma, Humboldt, Lake and Napa Counties, and no other county; that he (Lentz) had not instructed Caddel to go to Mendocino County. Caddel, on the witness stand, admitted that his mission was as Lentz had testified, and that he had no business in Mendocino County. On his operative's report for that day there was nothing to indicate the visit to Mendocino County except the initials "Uk" which had been partially erased. Caddel was unable to say whether or not these initials were written by him, nor was he able to explain the attempted erasure. Mr. Lentz testified that "Uk" was in Caddel's handwriting. And finally, when appellant Caddel was questioned before the Crime Commission concerning Mulligan's activities, he stated in private to Admiral Standley that Mulligan was a "bag man," that is, a pay-off man.

Neither appellant Griffin nor Mulligan took the witness stand to testify, and thus did not deny any of the evidence that was admitted against them. Appellant Caddel did testify and denied any part in either the conspiracy to operate slot machines in violation of section 330a of the Penal Code, or to commit acts of bribery. Through his own testimony and that of witnesses called in his defense he sought to prove that his association with appellant Mulligan was purely of a social nature, and that a number of telephone calls referred to had been made by Mrs. Caddel. In reference to the call from Ukiah on April 5th from "Miller", appellant Caddel denied that he received this call, and introduced evidence that he was on that evening visiting his wife in the Good Samaritan Hospital at Los Angeles. Caddel also denied that he had met Grange at the San Francisco airport on February 16th or at the Palace Hotel in San Francisco on March 1st, or that he ever told Grange that he (Caddel) and Mulligan were partners.

[22] It is true that much of the evidence tending to connect appellant Caddel with the commission of the offenses here was circumstantial. However, it is the rule in this and other jurisdictions that the existence of a conspiracy may be established either by direct testimony of the fact or by circumstantial evidence or by a combination of both. People v. Gonzales, 20 Cal.2d 165, 124 P.2d 44; People v. Eldridge, 147 Cal. 782, 82 P. 442; People v. Donnolly, 143 Cal. 394, 77 P. 177; People v. Lawrence, 143 Cal. 148, 76 P. 893, 68 L.R.A. 193; People v. Moran, 144 Cal. 48, 77 P. 777; People v. Rodley, 131 Cal. 240, 63 P. 351; People v. Gregory, 120 Cal. 16, 52 P. 41; People v. Bentley, 75 Cal. 407, 17 P. 436; People v. Stokes, 5 Cal.App. 205, 89 P. 997; People v. Stevens, 78 Cal.App. 395, 248 P. 696; People v. Col-

lier, 111 Cal.App. 215, 295 P. 898; People v. Duran, 57 Cal.App.2d 363, 134 P.2d 305; People v. Black, 45 Cal.App.2d 87, 113 P.2d 746. The reason for this rule is apparent, for from the clandestine nature of conspiracy, and the often studied efforts of the participants to conceal their connections with each other, it would rarely be possible to obtain independent evidence of a formal agreement between them. It need not be shown, therefore, that the parties actually came together and agreed to enter into and pursue a common design. People v. Fitzgerald, 14 Cal.App.2d 180, 58 P.2d 718. Quoting 5 Cal.Jur., sec. 3, page 497: "It is sufficient, if they, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design."

[23] The existence of the assent of minds which is involved in a conspiracy may be, and from the secrecy of the crime usually must be inferred by the jury from the proof of facts and circumstances which, taken together, apparently indicate that they are mere parts of the same complete whole. People v. Burke, 18 Cal.App. 72, 122 P. 435; People v. Jones, 136 Cal.App. 722, 29 P.2d 902; People v. Benenato, 77 Cal.App.2d 350, 175 P.2d 296. In People v. Fitzgerald, supra, 14 Cal.App.2d at page 201, 58 P.2d at page 729, the following language is quoted with approval from Wharton's Criminal Law, vol. 2, sec. 1667: "The actual fact of conspiracy may be inferred, as has been said, from circumstances, and the concurring conduct of the defendants need not be directly proved. Any joint action on a material point, or collocation of independent but conspiring acts, by persons closely associated with each other, is held to be sufficient to enable the jury to infer concurrence of sentiment; and one competent witness will suffice to prove co-operation of an individual conspirator."

In the case of People v. Malone, 20 Cal.App.2d 1, 66 P.2d 216, it was urged that the evidence showed that the defendant had no direct contact with any of the complaining witnesses. The court said, 20 Cal.App.2d on page 6, 66 P.2d on page 218: "Such evidence is not conclusive on the question before us and we are of the opinion that there was ample indirect evidence to sustain the implied finding as to existence of the conspiracy. Indirect evidence is ordinarily all that is available to prove conspiracy and it is sufficient for that purpose. People v. Coffelt, 140 Cal.App. 444, 35 P.2d 374; People v. Ferguson, 134 Cal.App. 41, 24 P.2d 965; 5 Cal.Jur. 521."

[24] A conspiracy may result from the actions of defendants in carrying out a common purpose to achieve an unlawful end. People v. Montgomery, 47 Cal.App.2d 1, 117 P.2d 437. The law fixes no time in which it must have been entered into and it does not provide that it have any particular duration. People v. Yeager, 194 Cal. 452, 229 P. 40. It is sufficient if in any manner the conspirators tacitly come to a mutual understanding to commit a crime. People v. Yeager, supra; People v. Sisson, 31 Cal.App.2d 92, 87 P.2d 420; People v. Torres, 84 Cal.App.2d 787, 192 P.2d 45.

In the light of these rules as applied to the evidence here, we cannot say that the jury was not reasonably justified in its conclusion that evidence other than the testimony of accomplices tended to connect appellant Caddel with the commission of the offenses of which he was convicted. As said in People v. Nikolich, 93 Cal.App. 356, at page 358, 269 P. 721, at page 722: "The entire conduct of the defendant may be looked to for the corroborating circumstances, and, if from those circumstances the connection of the accused with the crime may fairly be inferred, the corroboration is sufficient. People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Martin, 102 Cal. 558, 36 P. 952; People v. Demera, 64 Cal.App. 121, 220 P. 673." See, also, People v. King, 40 Cal.App.2d 137, 104 P.2d 521.

[25] Nor is it necessary, in order to be held criminally liable, that a defendant must be shown to have been a member of a conspiracy from its inception. On the contrary, one who joins a conspiracy after it is formed, and actively participates in it, thereby adopts the previous acts and declarations of his fellow conspirators. People v. Jones, 25 Cal.App.2d 517, 77 P.2d 897; People v. Fitzgerald, 14 Cal.App.2d 180, 58

P.2d 718; People v. Schmidt, 33 Cal.App. 426, 165 P. 555. Under such circumstances the previous acts and declarations of his fellow conspirators, although done or made before he joins the conspiracy, are admissible against him. In this connection the court, in People v. Fitzgerald, supra, says, 14 Cal.App.2d at page 203, 58 P.2d at page 730: "In United States v. Logan, C.C., 45 F. 872, 889, the court, referring to a conspirator, instructed the jury that 'his connection with it (the conspiracy) at any time makes him liable for all that has been done by any of his co-conspirators in pursuance of the conspiracy.' This rule has definitely been adopted and applied in this state in the case of People v. Schmidt, 33 Cal.App. 426, 165 P. 555."

At the time appellant Caddel made his unannounced visit to Sheriff Broaddus, the jury could reasonably have concluded that both of the conspiracies charged here were not only formed but that they were at that time in active operation. The original slot machines of Gray, and those brought from Los Angeles by Griffin, were on location in the various resorts, and proceeds from them were being collected by appellant Griffin and Gray and entered in the books of the business. Income from the machines for the month of April was in excess of $1,000. Grange had given McCarty $100 for Sheriff Broaddus, and Mulligan had been to Lane's Flat and made his first collection. The conspirators had made their declarations to Sheriff Broaddus, Deputy Sheriff White, and to McCarty as to their claimed connection with the attorney general's office, and outlined the manner in which the confirmatory sign would be given. The record shows that with the stage thus set appellant Caddel appeared on the scene and performed the role as it had been predicted.

On the morning following appellant Caddel's visit to the sheriff's office the first act of bribery, charged in Count Three of the indictment, was committed. The other two acts of bribery also occurred subsequent to this visit. Appellant Mulligan was in Mendocino County on the occasion of each one of the acts of bribery.

[26] When a conspiracy is shown to exist, every act done by any one of the conspirators in furtherance of the object of the conspiracy is deemed to be the act of all the conspirators.

[27] It is one of the functions of the jury to draw proper inferences, and if the inference so drawn does not do violence to reason, this court will not interfere. People v. Latona, 2 Cal.2d 714, 43 P.2d 260.

In the case of People v. Burton, 91 Cal. App.2d 695, 708, 205 P.2d 1065, 1073; we quoted the following language from People v. Rubio, 75 Cal.App.2d 697, 171 P.2d 737 which we believe to be equally applicable here: "* * * if the circumstances relied upon by the prosecution reasonably justify an inference of guilt, but an inference of innocence might also reasonably have been drawn, it was for the jury, as between these two inferences, to choose, and unless it is obvious that the evidence does not warrant the inference of guilt adopted by the Jury. this court is powerless to interfere."

In conclusion of this phase of the appeal we are satisfied that the evidence as a whole was sufficient to justify the verdicts of the jury and the convictions of each appellant.

We will now consider the remaining points raised by the appellants' appeals.

Appeal of William Griffin

[28] It is urged by appellant Griffin that the portion of the evidence relating to the transportation of slot machines should not be considered inculpatory for the reason that the mere possession or control of slot machines is not penalized by section 330a of the Penal Code. Chapman v. Aggeler, 47 Cal.App.2d 848, 119 P.2d 204. This contention overlooks the fact, however, that the record here contains abundant evidence that the slot machines were placed on location and operated illegally, and that the evidence of moving them could have been considered by the jury as corroborative of accomplice testimony of steps taken in furtherance of a conspiracy, and as tending to show appellant Griffin's participation therein.

[29, 30] It is next contended that the evidence was insufficient to establish a corpus delicti as to appellant Griffin. The

argument in support thereof is predicated upon the rule that the corpus delicti of an offense must be established before evidence is received of the confession or admission of the defendant. There is a distinction between the declarations of an accomplice made during the course of a conspiracy and the testimony of a conspirator given at a trial and while under oath and subject to cross-examination. Standing alone, such testimony is ordinarily sufficient to prove the corpus delicti of an offense, leaving to the corroboration by other evidence the proof of the criminal agency, or such evidence as tends to connect the defendant with the commission of the offense. People v. Brown, 59 Cal. 345; People v. Zimmerman, 3 Cal.App. 84, 84 P. 446; People v. Thompson, 16 Cal.App. 748, 117 P. 1033; People v. Leavens, 12 Cal.App. 178, 106 P. 1103; People v. Mazzola, 99 Cal.App. 682, 279 P. 211; People v. Briley, 9 Cal.App.2d 84, 48 P.2d 734. In a conspiracy, however, the proof of the existence of the underlying agreement and the connection of the defendant therewith may in some cases be of such a single and inseparable nature as to require corroboration of both elements. People v. Doble, 203 Cal. 510, 265 P. 184; People v. Seitz, 209 Cal. 199, 205, 286 P. 697.

[31] We have already pointed out that the existence of a conspiracy often must be inferred by the jury from the proof of facts and circumstances, which, taken together, apparently indicate they are mere parts of the same complete whole. Consequently, the existence of a conspiracy and the participation therein by a defendant may be proven by circumstantial evidence. In like manner, the proof of the corpus delicti may be established by circumstantial evidence. It is not necessary that the corpus delicti, prior to the introduction of admissions or confessions of the defendant, be established by evidence of a clear or convincing character, or by such as would be required to support a conviction. It may be sufficient even though shown by slight or prima facie proof. People v. Fierro, 58 Cal.App.2d 215, 136 P.2d 94; People v. Alexander, 67 Cal.App.2d 107, 153 P.2d 402; People v. Day, 71 Cal.App.2d 1, 161 P.2d 803; People v. Harshaw, 71 Cal.App.2d 146, 161 P.2d 978; People v. Wade, 71 Cal.App.2d 646, 163 P.2d 59.

[32] We are mindful, also, that the order of proof in a case is a matter within the discretion of the trial court, and its rulings thereon will not be disturbed on appeal except on clear proof of an abuse of that discretion. People v. Stokes, 5 Cal.App. 205, 89 P. 997; People v. Donnolly, 143 Cal. 394, 77 P. 177. In the case of People v. Watters, 202 Cal. 154, 259 P. 442, prejudicial error was claimed because the trial court permitted the introduction in evidence of certain alleged admissions of the defendant before the corpus delicti had been sufficiently established by other proof. The Supreme Court disposed of the contention in the following language, 202 Cal. at page 157, 259 P. at page 443: "The appellant's next contention is that the trial court committed reversible error in relation to the order of proof, in that it permitted the introduction in evidence of certain alleged admissions of the defendant before the *corpus delicti* had been sufficiently established by other proof. This objection goes only, however, to the order of proof, and it has been a long established rule of criminal procedure in this state that the order of proof is a matter within the discretion of the trial court, and that its rulings thereon will not be disturbed except upon clear proof of an abuse of that discretion. People v. Jones, 31 Cal. 565, 567; People v. Daniels, 105 Cal. 262, 38 P. 720; People v. Jones, 123 Cal. 65, 55 P. 698; People v. Rodley, 131 Cal. 240, 253, 63 P. 351; People v. Donnolly, 143 Cal. [394], 398, 77 P. 177."

The order of proof in a conspiracy case is considered in People v. Ferlin, 203 Cal. 587, 265 P. 230. An objection had been made and overruled at the trial to the introduction of certain conversations, on the ground that there had been no antecedent and independent proof tending to establish a conspiracy between the defendant and the witness Hill, and that such evidence was not admissible for the purpose of establishing one. The testimony was also objected to as being hearsay. The court quoted with approval, 203 Cal. at page 599, 265 P. at page 236, the following language from People v. Matthew, 68 Cal.App. 95, 107, 228 P. 417: "'It unquestionably is the general rule that proof of the existence of the conspiracy ordinarily should precede proof of the acts or declarations of a co-conspirator made pending the conspiracy and in aid and furtherance of the common design. But the rule in this respect is not absolute and unyielding; and sometimes, for the sake of convenience, evidence of the acts and declarations of an alleged conspirator is admitted before sufficient proof of the conspiracy is given. Thus where, as here, the facts from which the conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime that it is difficult to separate them, it is not essential to the introduction of evidence of the acts and declarations of one of the conspirators that evidence should first be introduced to establish *prima facie,* in the opinion of the court, the fact of conspiracy. People v. Fehrenbach, 102 Cal. 394, 36 P. 678; People v. Mills B. Sing, 42 Cal.App. [385], 397, 183 P. 865.' * * *"

[33] Our conclusion on the matter is that the corpus delicti here was sufficiently established. As to the order of proof, we do not deem it necessary to refer again to the multitudinous facts of this case. Suffice it to say that whatever variance there was in the order of proof could reasonably be attributed to the difficulty of the subject matter, and that, in the regulation thereof, the trial court acted within the exercise of sound discretion. We do not perceive any such abuse of this discretion as would warrant a reversal.

Appeal of James Mulligan

The contentions of this appellant that the evidence was insufficient to support the judgments of conviction and that the testimony of accomplices was not corroborated have already been considered and ruled upon.

Appellant Mulligan, like appellant Griffin, also urges that the evidence was insufficient to establish the corpus delicti as to him, and closely allied to this point, he assigns as error the trial court's ruling in denying his motion to strike certain testimony. We will consider these two points together.

At the conclusion of the prosecution's case, counsel for appellant Mulligan moved to strike the testimony of certain witnesses which had previously been admitted as to Mulligan, on the ground that the testimony constituted hearsay and did not serve to link Mulligan with the alleged conspiracy. We have already considered the quantum of proof necessary to establish the corpus delicti. On this point we hold, as on the appeal of appellant Griffin, and by a parity of reasoning, that the order of proof was in the sound discretion of the trial court, and we see no such abuse of that discretion as to constitute prejudicial error. We further hold that the motion to strike was properly denied.

[34] As his next assignment of error appellant Mulligan asserts that the district attorney was guilty of misconduct in the manner in which the case was dismissed as against defendants Gray and McCarty. The precise contention urged is that appellant Mulligan was required to select a jury at a time when Gray and McCarty were still co-defendants; and that he was compelled to exercise peremptory challenges with them jointly. He also calls attention to the fact that at one time during the selection of the jury the People and all of the defendants, except McCarty, announced that they were satisfied with the jury. McCarty then exercised a separate challenge and removed the juror. This, according to appellant Mulligan, denied him a right to a jury of his choice. However, the record shows that after the exercise of this challenge by McCarty the examination of prospective jurors continued, and that appellant's counsel participated therein. One prospective juror was thereafter excused by appellant Mulligan by the exercise of the only peremptory challenge which he chose to use. Subsequently, appellant Mulligan announced that he was satisfied with the jury, and, when the jury was thereafter accepted by all of the defendants, appellant Mulligan stated that he was still satisfied with the jury. The jury sworn to try the case was accepted by appellant Mulligan at

a time when he still had peremptory challenges remaining which he could have exercised had he seen fit to do so. Under such circumstances we do not find that appellant suffered prejudice. People v. Patterson, 58 Cal.App.2d 837, 138 P.2d 341; People v. Harris, 45 Cal.App. 547, 188 P. 65.

[35] The right of a district attorney to request the court for a dismissal of prosecution as to a defendant jointly indicted with another, for the purpose of using him as a witness, is granted by statute. Penal Code, sec. 1099. It is a practice recognized in this and other jurisdictions, and the exercise of the same by the prosecuting officer is not misconduct. Such a motion may be made at any time prior to the closing of the People's case, and when granted by the court immunity is extended by law to the erstwhile defendant.

[36] In the case of People v. Walther, 27 Cal.App.2d 583, 81 P.2d 452, the court said that when immunity from prosecution has been offered to a defendant in reward for his testimony, the cause should be promptly dismissed against him. We agree with this statement, but from the record cannot find, without indulging in speculation or conjecture, that such action was not taken here. In the absence of evidence in the record to the contrary, it must be assumed on appeal that the actions of the district attorney are not in bad faith. People v. Ciulla, 44 Cal.App. 719, 187 P. 46. Under such circumstances we must hold that the action of the district attorney did not constitute prejudicial misconduct.

[37] The final contention of appellant Mulligan is that the district attorney committed prejudicial misconduct in the improper presentation of the testimony of Admiral Standley, called as a witness for the People. The record shows that this testimony was offered and expressly limited by the court to appellant Caddel. No objection was made at first to the testimony of Admiral Standley by appellant Mulligan. However, during the course of his testimony appellant Mulligan made an objection to it, on the ground, among others, that it looked like "an attempt to get in a back window when the front door and back doors are closed. It is an indirect approach on this." The court overruled the objection but in so doing specifically instructed the jury that the testimony was received only as against the defendant Caddel and not against defendant Mulligan. The evidence was admissible against Caddel, and was expressly limited to him. The jury being specifically so instructed, we can see no prejudicial misconduct in the district attorney's method of introducing it. People v. Wade, 71 Cal.App.2d 646, 163 P.2d 59; People v. Trotter, 120 Cal.App. 54, 7 P.2d 731; People v. Burdg, 95 Cal.App. 259, 268, 272 P. 816.

[38] The use of the term "bag man" by the district attorney in his argument to the jury is also assigned as prejudicial misconduct. We believe this assignment to be without merit.

Appeal of Wiley H. Caddel

The sufficiency of the evidence to support the judgment of conviction as to this appellant has already been passed upon, as well as the question of corroboration of the testimony of accomplies. The remaining assignments of error raised by this appellant will now be considered in the order in which they are presented.

It is urged first that the district attorney was guilty of prejudicial misconduct in offering in evidence certain testimony of Sheriff Broaddus relating to a conversation with McCarty. The substance of this conversation was that McCarty had advised the sheriff that on the same day that appellant Caddel had made the visit to the sheriff's office a man had also called upon McCarty. This man represented that he had been to see the sheriff, and then stated to McCarty that he (the man) wanted $4 per week per machine for the attorney general's office. When McCarty gave the sheriff this information the two then compared notes and developed a similarity in stature and dress between Caddel and the man. This testimony was admitted in evidence prior to the dismissal of the case as to McCarty and therefore while he was still a defendant. In relation to it the trial court instructed the jury as follows: "La-dies and gentlemen of the jury, in order that there may be no misunderstanding about the situation and that you may be fully advised and informed, Mr. Broaddus, who is now a witness on the stand, has among other things testified to certain conversations had between he and the defendant McCarty, and I instruct you now that the testimony concerning such conversations with McCarty are admitted only as against the defendant McCarty and are not to be considered by you as binding upon any other of the defendants."

At a subsequent time in the trial, and after the court had granted the prosecution's request for discharge as to McCarty, so that he might be made a witness for the People, the court, upon motion of the defendants, struck out of evidence the conversations between Sheriff Broaddus and McCarty, as follows: "Well, the motion will be granted and all testimony given by the witness Sheriff Broaddus relative to all conversations between he and Paul McCarty will be stricken, and the jury is instructed to disregard all the testimony that has by order of the court been stricken or which hereafter may be stricken."

When McCarty was sworn as a witness he was questioned upon direct examination, without objection, as to the identity of the man with whom he had the conversation, as reported to Sheriff Broaddus. McCarty testified definitely that "the man" was not appellant Caddel.

[39] A review of these circumstances induces the conclusion that the evidence in the first instance was properly admissible as against defendant McCarty. The court so limited it by a proper instruction to the jury, and then subsequently struck the testimony of the conversation from the record. Evidence was then adduced from the one person who would know, namely, McCarty, that "the man" was not Caddel. We cannot perceive that prejudice resulted therefrom to appellant Caddel.

The next assignment of prejudicial misconduct on the part of the district attorney is based upon a charge that immunity had been promised in advance to defendants Paul McCarty and Robert Gray, and that by delaying dismissals as to these defendants, appellant Caddel was compelled to select a jury while they were being tried as co-defendants. This same contention has been considered, supra, in the appeal of William Mulligan. For the reasons heretofore given we hold the conduct of the district attorney not to have been prejudicial. The record does not support the claim that the prosecution intended to dismiss the charges against defendants Gray and McCarty before the jury was selected. Neither does it show that appellant Caddel was forced to accept a jury unsatisfactory to him because of the presence of the other two co-defendants.

Appellant next recites as prejudicial error certain rulings of the trial judge. The first concerns trial procedure. The record shows that shortly after the taking of testimony had begun the trial court gave consideration to alternate methods of procedure and took cognizance of the problems in connection with each. After doing so, the court announced: "Well, it is difficult to look ahead and see which procedure would least encumber the record, but I am inclined to think probably that it would be less cumbersome to permit the prosecution to go ahead and pursue their remedy as they have apparently indicated that they desire to proceed. They have the laboring oar here. And then if they don't prove their conspiracy as against one or more of the defendants, then the defendants could make their motion to strike. I am rather inclined, I kind of lean toward the proposition that would be the better and less cumbersome way to proceed. And that will be the ruling and that will be the understanding, that the court will overrule your objections, gentlemen, with the proposition that if they don't connect your clients up the court will entertain a motion to strike the testimony."

In furtherance of this ruling, it was announced by the trial court that appellants might have a "continuing objection to this line of testimony and at the proper time which the court thinks would be the proper time which would be at the time the prosecution rested their case, you may have to strike the testimony."

Counsel for appellant Caddel announced that this method of preserving appellant's objections would be satisfactory.

[40, 41] Although this practice, which is sometimes followed by trial courts, namely, of receiving evidence subject to its subsequently being connected with the case, is not to be commended as a general rule of procedure, nevertheless it relates to the order of proof, and, as we have already said, will not constitute error unless there is shown to have been a clear abuse of discretion by the trial court. Such does not appear to be the case here. The general rule, of course, requires that proof of the conspiracy to commit a crime must be shown as a foundation for the admission of the declarations of a co-conspirator. This rule is not inflexible, however, and where the facts are intimately blended the trial court is given considerable discretion in determining the order of proof. The rule as given in 2 Wharton's Criminal Evidence, 11th Ed., sec. 727, pages 1221-1222, is as follows: "While the general rule is that proof of a conspiracy to commit a crime must be shown as a foundation for the admissibility of the acts and declarations of a co-conspirator, the trial court is allowed a wide discretion in determining the order in which the proof shall be introduced upon the trial. Especially where the crime has to be established by circumstantial evidence, the prosecutor must be given permission to present the proof bit by bit, as best he can, without a rigid enforcement of the rule requiring the proof of the conspiracy as a foundation for the admission of acts and declarations of co-conspirators. On authority and for reasons of practicality, if the whole of the evidence establishes a conspiracy, the order in which the acts and declarations of the co-conspirators are established loses its significance, and the question is really one of sufficiency of the proof rather than the order of its introduction. The only practical way to handle such a situation is to admit the evidence with the admonition that its competency depends upon the finding of the ultimate fact that the conspiracy existed. If it should not be found to exist, then such evidence must be disregarded, and the court should so charge and admonish the jury."

To the same effect see People v. Daniels, 105 Cal. 262, 38 P. 720; People v. Ferlin, supra; People v. Beck, 60 Cal.App. 417, 213 P. 61; People v. Henry, 86 Cal.App.2d 785, 195 P.2d 478.

The next ruling of the trial court urged by appellant as prejudicial error is the denial of appellant's motion for mistrial. This assignment of error is predicated upon the allegations of prejudicial misconduct of the district attorney, and has already been considered and passed upon. We therefore hold the denial of motion for mistrial to have been without error. Neither do we find error in the trial court's rulings in denial of motion for an advisory verdict or in denial of motion to strike evidence.

Appellant next contends that the demurrer to Count One of the indictment should have been sustained. The basis for this contention is that Count One charges appellant and the other defendants with a conspiracy to give and offer bribes and to ask for and agree to receive bribes. Appellant argues that since it is impossible to act inconsistently by both giving and receiving a bribe, it is impossible to conspire so to act. In support of this contention the appellant relies heavily upon People v. Keyes, 103 Cal. App. 624, 646, 284 P. 1096, 1105. The Keyes case is authority for the proposition that a set of defendants may conspire to give a bribe, or a set of defendants may conspire to receive or accept a bribe, but that bribery requires for its consummation an unlawful concert of one or more persons acting with one or more persons having a different motive or purpose. The court held that the defendants, other than Keyes, were properly charged with a conspiracy to offer and give a bribe, and that as to defendant Keyes the criminal conspiracy could not be charged.

It will be noted that the Keyes case presents a situation which was entirely bilateral, there being on one side the givers of the bribe and on the other the receiver. The rational of this holding would not be applicable to a situation as presented by the pleadings here. People v. Savage, 15

Cal.App.2d 72, 59 P.2d 190. In the indictment under attack the defendants are charged with a conspiracy to give and offer bribes to executive officers of this state with the intent to influence such officers with respect to their action and decision as such officers and * * * did wilfully conspire, combine, confederate and agree together, and with each other, to ask for and to receive bribes as executive officers and employees of this state.

It will be noted that the indictment is silent as to the identity of the executive officers to whom the bribes were to be given and offered. Under the framework of this part of the indictment evidence was introduced of bribes being given to Sheriff Broaddus and Deputy Sheriff White, nonmembers of the conspiracy.

The second portion of the indictment charging the receiving of bribes by an executive officer or employee of the state was likewise silent as to the person or persons from whom the bribes were to be received. Under the framework of this portion of the indictment the prosecution offered evidence that the money so received had been collected on behalf of the conspiracy directly from the operation of slot machines, and deducted from the resort owner's share of the proceeds.

[42] Under such circumstances we do not believe that the language of the Keyes case, supra, supports appellant's contentions here. An indictment may certainly allege a conspiracy in which an executive officer or employee of the state is charged with being a member of a combine which has for its purpose the offering or giving of bribes to another executive officer. It may also allege, as a part of the conspiracy, a further purpose to ask for and receive bribes. There is nothing incompatible with the same set of persons conspiring to commit both crimes, nor can it be maintained that in such a situation there follows a merger of conspiracy and of the substantive offense.

[43] It is true that the allegations of the indictment here were general, and in the face of a special demurrer could have been particularized. However, as pointed out in People v. Yant, 26 Cal.App.2d 725, 80 P.2d 506, the accusatory pleading shall be sufficient if it charges "in any words sufficient to give the accused notice of the offense of which he is accused." Penal Code, sec. 952. The details and particular circumstances thereof may be obtained from the transcript of the testimony given at the preliminary examination or upon which the indictment was founded. People v. Beesly, 119 Cal. App. 82, 6 P.2d 114, 970; People v. Curtis, 36 Cal.App.2d 306, 98 P.2d 228.

[44] In any event, a judgment will not be reversed because of an error in the form of an indictment unless the error complained of has resulted in a miscarriage of justice. This we do not find to have occurred here. Const. art. VI, sec. 4½; People v. Curtis, supra; People v. Beesly, supra; People v. Pierce, 14 Cal.2d 639, 96 P.2d 784.

Appellant's final contention is that the trial court erred in giving to the jury the following instruction:

"The jury will observe that in count I of the Indictment the defendants are charged generally speaking with conspiracy to give and offer bribes and also to ask for and agree to receive bribes.

"A count in an Indictment which so accuses defendants is deemed supported if the proof shows beyond a reasonable doubt that they are guilty of conspiracy to either give and offer bribes or to ask for and agree to receive bribes as so alleged in the Indictment.

"However, it is important for you to keep in mind that in order to convict a defendant in such a case it is necessary that you all agree as to the same one or more particular acts found to have been committed by such defendant. In other words, in order for you to convict under said count I it is necessary that you all agree that the conspiracy was either to give and offer bribes to executive officers of this State or to ask for and agree to receive bribes as executive officers and employees of this State, or both, as alleged in the Indictment."

[45] It is urged that such an instruction was erroneous for the reason that the jury was told that the conviction of a defendant would be proper if it were shown that all of the conspirators intended to violate only

one of the two named sections of the Penal Code. Stated conversely, the contention of appellant, if upheld, would have required an instruction by the court that the defendants could not have been found guilty of conspiracy unless it were shown that they conspired to violate both of the said Penal Code sections. This same proposition was urged in People v. Marvin, 48 Cal.App.2d 180, 119 P.2d 413, wherein the indictment charged a conspiracy both to violate the Corporate Securities Act and to commit grand theft. The court said, 48 Cal.App.2d at pages 196-197, 119 P.2d at page 423: "Appellants' request that the jury be instructed that it was necessary to find the existence of a conspiracy both to violate the Corporate Securities Act and to commit grand theft in order to find appellant Marvin guilty of the charge of conspiracy, contained in the first count against him, was properly refused." People v. Yant, supra. We must, therefore, hold that the instruction above quoted was properly given, and was a correct statement of the law.

We have canvassed seriatim the various assignments of error raised by appellants on their respective appeals, and find none that singly or jointly requires a reversal of the judgment of conviction here. On the contrary, a review of the record induces the conclusion that appellants and each of them were fairly tried and under the evidence justly convicted.

The judgments of conviction and orders denying motions or new trials are affirmed.

Hearing denied; GIBSON, C. J., and SCHAUER, J., dissenting.

97 Cal.App.2d 930

**Margaret V. WISSNER, Respondent, v.
Louise M. WISSNER et al.,
Appellants.
Civ. 7528.**

District Court of Appeal, Third District,
California.
May 5, 1950.

Prior opinion 89 Cal.App.2d 759, 201 P.2d 837.

Vernon F. Gant and Carlos J. Badger, Modesto, for appellants.

Cleary & Zeff, Modesto, for respondent.

PER CURIAM.

Pursuant to mandate of the Supreme Court of the United States filed herein on the 10th day of April, 1950, 338 U.S. 655, 70 S.Ct. 398, it is hereby ordered that the judgment of this court filed in the above entitled action on the 21st day of January, 1949, wholly affirming the judgment of the Superior Court of the State of California, in and for the County of Stanislaus, be and the same is hereby vacated and set aside, and the remittitur of this court heretofore filed with the clerk of the said superior court upon affirmance of the judgment, and the remittitur of this court thereafter and on the 12th day of April, 1950, filed with said clerk of said superior court are and each of them is recalled and annulled, and it is further ordered that the judgment of the superior court in favor of plaintiff and against defendants be and the same is affirmed in part and reversed in part as follows, to wit: That part thereof which adjudges that plaintiff have and recover judgment against defendants and each of them for $2,300 together with interest thereon at the rate of 7 per cent per annum from November 14, 1945, to date of judgment in said superior court, is affirmed; and that part thereof which adjudges that plaintiff recover from defendants one-half of all proceeds of the National Service Life insurance policy on the life of Leonard O. Wissner, deceased, theretofore received or thereafter to be received by the defendants or either of them, and ordering defendants to pay such one-half of said proceeds over to the plaintiff upon receipt thereof, is hereby reversed.

It is further ordered that in furtherance of justice the respective parties bear their own costs on appeal in the appellate courts of this state, that pursuant to said mandate of the Supreme Court of the United States appellants have and recover of respondent their costs in said Supreme

Court of the United States fixed by that court in the sum of $257.60, and that judgment to the foregoing effect be entered in this cause by said superior court. Let remittitur issue forthwith.

---

97 Cal.App.2d Supp. 931

INTERNATIONAL FISHERMEN & ALLIED WORKERS OF AMERICA, etc. v. STEMLAND.

Civ. A. 2036.

Appellate Department, Superior Court,
San Francisco County, California.
April 21, 1950.

Action by International Fishermen and Allied Workers of America, etc. against Adolph Stemland on a written guaranty. The Municipal Court for the City and County of San Francisco, Carl Allen, J., rendered a judgment for defendant, and plaintiff appealed. The Appellate Department, Superior Court, Murphy, J., held that whether the guaranty was a primary obligation or a collateral one, and whether it was entered into under duress were questions for the jury.

Judgment affirmed.

1. Guaranty 🔑92(1)

In action on written guaranty of payment of fines imposed by union on guarantor's employees, whether guaranty was a primary or collateral obligation was a question for the jury.

2. Guaranty 🔑92(2)

In action on written guaranty of payment of fines imposed by union on guarantor's employee, instruction to effect that guaranty was collateral obligation if signed by guarantor after union levied fines, and if parties intended that guarantor would be liable if employees failed to pay fines, and that if employer received some benefits or something of guarantee, then written guaranty was primary obligation of guarantor and any defenses available to employees would not be available to him was an adequate statement of the law.

3. Appeal and error 🔑1064(1)

In action on written guaranty of payment of fines imposed by union on guarantor's employees, giving of instruction that threat to exercise valid legal right is not duress, and that threat to exercise union's right to call men off of guarantor's boat did not constitute duress, although objectionable as not fully setting forth matter of duress, was not prejudicially erroneous.

4. Guaranty 🔑26

In action on written guaranty of payment of fines imposed by union on guarantor's employees, whether guaranty was entered into under duress was a question for the jury.

5. Guaranty 🔑9

Where union levied fine upon fishing boat crew for working on vessel during strike period and thereafter forced employer to sign written guaranty of payment of fines under threat that if he did not pay, union would not clear crew, payments by employer fell within class recognized as illegal charges.

Gladstein, Andersen, Resner & Sawyer, San Francisco, for appellant.

Joseph L. Alioto, San Francisco, for respondent.

MURPHY, Judge.

The respondent Stemland, at the time of the controversy which gave rise to this litigation was the owner and master of the fishing vessel "Excel." Its crew consisted of four men.

In March of 1947, the appellant union demanded that respondent pay fifteen dollars ($15.00) per day to each of his crew for each day spent in readying the vessel to sail, if for any reason it did not put out to sea. This demand was refused.

Appellant is a trade union, made up of commercial fishermen. A percentage of the proceeds of the vessel's catch is their compensation, after deduction for costs of the ship's operation. What remains goes to the owner and master, who in this instance, are one and the same.

In March and April of 1947 the operators of the fishing fleet sought an increase in their percentage of the catch and a decrease in that of the crew members. The union representing its members resisted and collective bargaining was resorted to by the parties.

While negotiations were being carried on, the fleet was tied up in port, and the crew members worked at mending nets and other tasks preparatory to the next trip.

Since the next voyage was a matter of uncertainty, the union asked that each operator enter into an agreement to compensate each member of the crew at fifteen dollars ($15.00) per day for services while the vessel was in port. Under ordinary conditions the men received no additional compensation for such work.

A number of operators became signatories to such an agreement, and the union ordered its members not to work for any operator who refused to sign. Respondent Stemland refused.

However, his four crew members, also members of the union, continued to work for Stemland. Each was fined one hundred dollars ($100.00) for working on the vessel while it was on the "unfair" list. The "Shark Committee" of the union also ruled respondent Stemland to be responsible for the collection of the fines imposed.

When the controversy was settled respondent Stemland wanted to go to sea. But he could not sail with his four crew members or any other union men without paying the fines or by guarantee of their payment. The latter he agreed in writing to do, and went to sea with his crew of four.

Upon their return the crew not having paid the fines the union sought to collect the four hundred dollars ($400.00) from the respondent Stemland. Upon his refusal to do so the union brought suit against him upon his written guarantee.

Trial by jury resulted in a verdict for respondent Stemland. Thereafter judgment was entered for the defendant (respondent herein).

It is urged upon this appeal that the verdict of the jury is not supported by the evidence; that the verdict is contrary to law and the judge's instructions; that the denial of appellant's motion for judgment notwithstanding the verdict was erroneous; that the judgment of the court is contrary to law.

Two questions therefore present themselves upon this appeal.

1. Was the guarantee executed by respondent Stemland a primary or principal obligation, or merely a collateral one?

2. Was the guarantee entered into under duress?

[1] Whether the guarantee was a primary obligation or collateral thereto, was a fact to be resolved by the jury. Vide Harris v. Frank, 81 Cal. 280, 286, 22 P. 856; Ackley v. Prime, 99 Cal.App. 534, 278 P. 932; Ingalls v. Bell, 1941, 43 Cal.App.2d 356, 366, 110 P.2d 1068.

[2] The court's instruction upon this subject reads as follows:

"If you find that the guarantee signed by the defendant was executed after the plaintiff organization levied fines on the members of the defendant's crew, and that the intent of the parties was that the defendant was to be liable if the crew members failed to pay the fines, and if you further find that Adolph Stemland did not receive some benefit or something of value as a consideration for signing the guarantee, then, as a matter of law, the guarantee is a collateral and secondary obligation subordinate to the primary obligation of the crew members to pay the fines levied upon them, and any defenses available to the crew members would be available to Adolph Stemland. If, on the other hand, you find that Adolph Stemland did receive some benefit or something of guarantee, then it is the primary obligation of Adolph Stemland, and any defenses that might be available to the crew members are not available to Adolph Stemland."

That this instruction constitutes a fair and adequate statement of the law is obvious and requires no further comment.

[3] Adverting to the second question, namely the matter of duress, it is to be observed that the court's instruction thereon is not as fully set forth as it well might have been. The court should have defined "duress" and amplified this instruction.

"Now, I instruct you that a threat to exercise a valid, legal right does not constitute menace or duress under the law of this State. As the union in this case had a legal right to call its men off the defendant's boat, the threat to exercise such right does not constitute menace and duress. The question of whether the union practiced duress in this case is for you to decide from all the testimony introduced."

However, its failure to do so is not error of such a prejudicial character as to create the necessity for reversal, for the following reasons:

[4] Duress is a question of fact. The transcript discloses that the respondent was coerced into signing the guarantee, and the jury so determined the question by its verdict.

[5] Payments of such a character as plaintiff and appellant required defendant and respondent to pay fall within that class which the law recognizes as exactions or illegal charges on the part of the payors. Such payments are made in apprehension and fear that business interests may suffer if they are not paid. Young v. Hoagland, 212 Cal. 426, 298 P. 996, 75 A.L.R. 654.

In the instant case respondent Stemland, facing the threat of a strike, signed the guarantee to prevent and safeguard his interests. There was no privity of contract between him and the union. He owed no duty to the union. A strike was not threatened because of poor working conditions, wages or hours. A strike was threatened unless respondent guaranteed an obligation which did not stem from him. The union levied a fine upon respondent's crew for working on the vessel during a strike period and forced its payment by respondent upon the threat that if respondent did not pay, the union would not clear the crew, thus making it impossible for respondent to take his ship to sea with other ships of the fishing fleet.

It is to be noted that the union did not deny the respondent the crew for the reason that he had employed them during the strike period. The union demanded that respondent pay the fine imposed as a condition of their further hire. This they had no legal right to do.

Thus it is apparent that this controversy is not the usual trade union conflict. Rather it represents a form of extortion which although not criminal in its character, would nevertheless if followed to its logical conclusion justify the "vilest blackmailer." Vide March v. Bricklayers' & Plasters Union, 79 Conn. 7, 63 A. 291, 4 L.R.A.,N.S., 1198, 118 Am.St.Rep. 127, 6 Ann.Cas. 848

For the foregoing reasons the judgment is affirmed.

GRIFFIN, P. J., and KAUFMAN, J., concurred.

35 Cal.2d 562

ODLUM v. DUFFY et al.

S. F. 18043.

Supreme Court of California, in Bank.

June 27, 1950.

Application by Jerome Odlum for writ of mandate against Clinton T. Duffy, Warden, California State Prison, and the Superior Court of the State to compel the Superior Court to vacate a judgment of conviction and set aside petitioner's plea of guilty. The Supreme Court, Spence, J., held that where District Court of Appeal declared in its opinion that trial court had denied petitioner's motion to vacate judgment upon the erroneous assumption that it was without jurisdiction to act, and decree of court merely stated "order reversed", trial court was not required to grant petitioner's motion but properly heard and determined motion on its merits and its order denying motion on its merits was final.

Petition denied.

Schauer and Carter, JJ., dissented.

1. Criminal law ⚷1190

Reversal of a judgment or order ordinarily leaves a proceeding in same situation in which it stood before judgment.

2. Criminal law ⚷1192

Where District Court of Appeal in its opinion declared that trial court had denied petitioner's motion to vacate judgment upon erroneous assumption that it was without jurisdiction to act, upon remittitur trial court had duty to entertain and decide motion.

3. Criminal law ⚷1188

Where an appeal was taken from an order denying a motion to vacate a judgment, statute requiring appellate court reversing judgment without ordering a new trial to order discharge of defendant was not applicable. Pen.Code, § 1262.

4. Criminal law ⚷1192

Where District Court of Appeal declared that trial court had denied petitioner's motion to vacate a judgment upon erroneous assumption that it was without jurisdiction to act, and decree of court merely stated "order reversed", trial court was not required to grant petitioner's motion but properly heard and determined motion on its merits and its order denying motion on its merits was final.

Jerome Odlum, in pro. per.

Fred N. Howser, Attorney General, and Clarence A. Linn, Deputy Attorney General, for respondents.

SPENCE, Justice.

This proceeding presents the single question of the effect of the reversal of the order of the trial court denying petitioner's motion to vacate a judgment of conviction. Petitioner contends that such disposition of his appeal required the trial court to give him the relief demanded in his motion—that is, vacation of the judgment and of his plea of guilty, and permission to enter a new plea—and he now seeks a writ of mandate compelling the respondent court to so proceed. Upon the undisputed facts presented here, we have concluded that petitioner is not entitled to the issuance of the writ.

Petitioner pleaded guilty to a charge of issuing checks without sufficient funds and on January 21, 1948, he was sentenced to imprisonment in the state prison. On September 27, 1948, petitioner, by a different attorney, moved to vacate the judgment upon a ground recognized in People v. Gilbert, 25 Cal.2d 422, 443, 154 P.2d 657. At the hearing of his motion petitioner introduced some evidence in support of his position but the trial court, acting inconsistently with the Gilbert decision, refused to admit certain other evidence or to determine the motion on its merits, stating "I have no jurisdiction whatsoever in the matter." Upon such basis the motion was denied.

Petitioner appealed from the order denying his motion. People v. Odlum, 91 Cal. App.2d 761, 205 P.2d 1106. The District Court of Appeal, after noting the trial judge's erroneous conclusion as to his lack of power to dispose of the motion upon the merits, said, 91 Cal.App.2d at page 772, 205 P.2d at page 1113: "Counsel for [petitioner] at the oral argument suggested that this court should vacate the judgment and the plea of guilty and direct the superior court to permit [petitioner] to enter a plea of not guilty. Our power is limited to review. It is for the superior court, after a hearing on the merits, to determine whether the judgment and plea of guilty should be vacated. If the plea of guilty is in fact and in law void it should be vacated, and both the People and the [petitioner] should be restored to their original positions * * * as [it was] immediately before entry of such plea." The decision of the District Court of Appeal then followed—"Order reversed"—without any further express direction.

After the going down of the remittitur and on June 22, 1949, the motion was again submitted to the trial court for hearing. While petitioner was not allowed to come from prison and testify, he was represented by counsel, various papers were presented, including the probation officer's report made before petitioner was sentenced, and upon such evidence the motion was denied. In so exercising its jurisdiction, the trial court heard and determined the merits of the motion as impliedly directed in the opinion of the District Court of Appeal. Petitioner's attorney attempted to appeal from the order of denial but his notice of appeal was filed too late, and the purported appeal was dismissed. People v. Odlum, District Court of Appeal, Second Dist., Div. Three, Minutes, July 29, 1949, 93 A.C.A. p. 4.

Petitioner contends in this proceeding that under the now final judgment of the District Court of Appeal, People v. Odlum, supra, 91 Cal.App.2d 761, 205 P.2d 1106, the trial court "had no jurisdiction again [on June 22] to hear and deny the motion to vacate" and that, regardless of the merits of the motion, its duty was to vacate the judgment. His position cannot be sustained.

[1, 2] It is well settled that the reversal of a judgment or order ordinarily leaves the proceeding in the same situation in which it stood before the judgment or order was made. 3 Am.Jur. § 1191, p. 697; 2 Cal.Jur. § 590, p. 996; In re Estate of Pusey, 177 Cal. 367, 371, 170 P. 846; Central Savings Bank of Oakland v. Lake, 201 Cal. 438, 443, 257 P. 521; Monson v. Fischer, 219 Cal. 290, 291, 26 P.2d 6; Sloan v. Court Hotel, 72 Cal.App.2d 308, 316, 164 P.2d 516. The same rule has been stated with respect to the reversal of orders in criminal cases. People v. Commons, 64 Cal.App.2d Supp. 925, 937, 148 P.2d 724. It therefore appears that upon the reversal of the trial court's order refusing to vacate the judgment of conviction, the parties were restored to the position that they had before the reversed order was made and with the same rights that they originally had, "with the exception that the opinion of the court on appeal must be followed so far as applicable." Central Savings Bank of Oakland v. Lake, supra, 201 Cal. at page 443, 257 P. 521, 523; Thomas v. Lavery, 125 Cal.App. 666, 669, 14 P.2d 158; see, also, 5 C.J.S., Appeal and Error, § 1950, p. 1476. In its opinion the District Court of Appeal declared that the trial court had denied petitioner's motion to vacate the judgment upon the erroneous assumption that it was without jurisdiction to act, and the trial court was directed, at least impliedly, to rule upon the motion after a hearing on the merits. This decision of the District Court of Appeal became final, and in conformity therewith it became the duty of the trial court to entertain and decide the motion, which duty was enforceable by mandamus. 16 Cal.Jur. § 37, p. 826; Katenkamp v. Superior Court, 16 Cal.2d 696, 698, 108 P.2d 1. The trial court here did so proceed; the motion was heard on its merits and denied; the appeal from that order was abortive because not timely taken; and the order of denial on the merits now stands as a final determination of petitioner's rights in that regard.

[3] Petitioner takes the position that where the appellate court reverses an order denying a motion, without incorporating as a part of the reversal thereof express directions to the trial court to proceed further with a hearing of the motion, the trial court has no power to act other than to grant the motion. To sustain his theory, petitioner cites certain cases wherein the reversal of an order denying a new trial was held in effect to constitute the ordering

of a new trial: People v. Hardisson, 61 Cal. 378, 380; People v. Lee Look, 143 Cal. 216, 220, 76 P. 1028, and People v. Hudson, 92 Cal.App. 593, 595, 268 P. 687. But such cases involved appeals taken from the judgment of conviction and the order refusing a new trial, and as *both* were reversed, the reversal of the order was deemed "equivalent to the granting of a new trial." People v. Hardisson, supra, 61 Cal. at page 380. In other words, such disposition of the appeals was held, in effect, to constitute "ordering a new trial" within the meaning of § 1262 of the Penal Code, which provides that "[i]f a judgment against the defendant is reversed *without ordering a new trial,* the appellate court must, if he is in custody, direct him to be discharged therefrom." Emphasis added; Ex parte Ballard, 149 Cal. 114, 115, 84 P. 833. Manifestly this code section and the above-mentioned cases have no application here in that the appeal was taken not from the judgment of conviction but from the order denying the motion to vacate the judgment. People v. Odlum, supra, 91 Cal.App.2d 761, 205 P.2d 1106. Furthermore, in each of the cited cases the trial court had purported to hear and determine the motion for a new trial upon the merits; and the reversal of both the judgment and the order denying the new trial necessarily implied that the appellate court was "ordering a new trial."

Other authorities are likewise clearly distinguishable. People v. Coronado, 144 Cal. 207, 79 P. 418, involved a motion to recall a remittitur. On the appeal in that case there had been a reversal, with express directions, of an order denying a motion in arrest of judgment, which order had been made by the trial court after hearing and determining defendant's motion on the merits. This court there denied the motion to recall the remittitur, although in its previous disposition of the appeal it had mistakenly "added to the judgment of reversal and order remanding the cause a *direction* to the superior court to sustain the demurrer", 144 Cal. at page 208, 79 P. at page 418, when in fact no demurrer had been interposed, the objection to the sufficiency of the information having been made solely by motion in arrest of judgment. The basis of the denial of the motion to recall the remittitur was that "the grounds of the decision and the judgment of reversal" indicated that the mistaken express direction was "wholly unnecessary," and further indicated that the correct course for the trial court to pursue was to order "a dismissal of the information, accompanied by such order or direction as to the filing of a new information as the superior court may have deemed proper." 144 Cal. at pages 208–209, 79 P. at page 418. People v. Lauman, 59 Cal.App. 144, 210 P. 421, involved a second appeal. On the prior appeal this court had reversed an order granting a motion in arrest of judgment, which order had been made by the trial court after a hearing and determination of defendant's motion on the merits. The judgment of reversal was "Order reversed, and cause remanded for further proceedings in contemplation of sections 1191 and 1202 of the Penal Code." People v. Lauman, 187 Cal. 214, 222, 201 P. 459, 462. Such directions to the trial court could no doubt have been implied from the opinion without any express directions accompanying the judgment of reversal, but in any event the reversal there was accompanied by express directions as above indicated. On the second appeal, People v. Lauman, supra, 59 Cal. App. 144, 210 P. 421, it appeared that the trial court had failed to pronounce sentence, as directed, within the time provided by § 1191 of the Penal Code, and the judgment of conviction and the order denying a new trial were therefore reversed. There is nothing in either of said cases to sustain petitioner's contentions.

[4] Not a single case has been cited in which a motion has been denied by the trial court upon the ground that it had no jurisdiction to hear and determine the motion on its merits, and in which the appellate court has thereafter reversed the order of denial upon the ground that the trial court did have jurisdiction and should have heard and determined the motion on its merits. Such was the case here, and the trial court later proceeded to such hearing and determination. Such procedure was

proper under the general rule above discussed as well as under the directions which were clearly implied in the opinion of the District Court of Appeal. As the trial court has now heard and determined the motion on the merits, and as its order denying the motion has become final, it is clear that petitioner is not entitled to the relief demanded in this proceeding.

The petition for a peremptory writ of mandate is denied.

GIBSON, C. J., and SHENK, EDMONDS, and TRAYNOR, JJ., concur.

SCHAUER, Justice.

I dissent. It has heretofore been well established law, consistently followed, that the judgment of a court, not its opinion stating reasons for its judgment, should be given effect. The majority here give controlling effect to the opinion of the District Court of Appeal rather than to its judgment.

On the first "hearing" of the motion the trial court refused to hear the petitioner's testimony—which apparently would have constituted the most substantial part of the evidence in support of the motion—and denied the motion. In refusing to hear the petitioner's testimony the trial judge remarked, "There is nothing I can do * * * I have no jurisdiction whatsoever in the matter." Upon petitioner-defendant's appeal (People v. Odlum (1949), 91 Cal.App.2d 761, 205 P.2d 1106) the District Court of Appeal properly concluded that the trial court had erred in refusing to hear and decide on its merits the defendant's motion to vacate the judgment and sentence. The District Court of Appeal also very properly stated that (p. 772 of 91 Cal.App.2d, at page 1106 of 205 P.2d) "It is for the superior court, after a hearing on the merits, to determine whether the judgment and plea of guilty should be vacated. If the plea of guilty is in fact and in law void it should be vacated, and both the People and the appellant should be restored to their original position in all four counts of the information as they stood immediately before entering of such plea." But the *judgment* of the District Court of Appeal is in two words "Order reversed"; there was no remand for retrial of the motion.

The trial court did not comply with the actual judgment of the District Court of Appeal. Instead, it purported to hear the motion and, relying on various papers including the probation officer's report made before Odlum was sentenced, but, as before, without hearing Odlum's testimony, again purported to deny such motion. Odlum's attorney attempted to appeal but his notice of appeal was filed three days late and the purported appeal was dismissed on motion of the People. Odlum then instituted the present proceeding in propria persona. He contends that, under the unqualified and now final judgment of reversal of the trial court's order denying the motion to vacate, that court "had no jurisdiction again [on June 22] to hear and deny the motion to vacate" and that, regardless of the merits of the motion, it must vacate the judgment. This contention is supported by law.

The decision of the appellate court was its unqualified order of reversal; its opinion was merely the statement of its reasons for that decision. (Houston v. Williams (1859), 13 Cal. 24, 27, 73 Am.Dec. 565.) Although the opinion may be a guide where the meaning of a judgment or order is unclear, "We do not look to an opinion to override an order." (People ex rel. McCanliss v. McCanliss (1931), 255 N.Y. 456 [175 N.E. 129, 82 A.L.R. 1141, 1145]; see Rogers v. Hill (1933), 289 U.S. 582, 587, 53 S.Ct. 731, 77 L.Ed. 1385, 88 A.L.R. 744; Strudthoff v. Yates (1946), 28 Cal.2d 602, 615, 170 P.2d 873. The meaning of a reversal without directions of an order denying a motion in a criminal case has heretofore not been unclear; it has consistently been held that such a judgment of unqualified reversal requires that the motion be granted. Thus, the unqualified reversal of an order denying a new trial is in effect the ordering of a new trial (People v. Hardisson (1882), 61 Cal. 378, 380; People v. Lee Look (1904), 143 Cal. 216, 220, 76 P. 1028; People v. Hudson (1928), 92 Cal.App. 593, 268 P. 687.) The like reversal of an order denying a motion in arrest of judgment, made on the gound of insufficiency of the information, as a matter of law required that the trial court dismiss the information, "accompanied by such order or direction as to the filing of a new information as the superior court may have deemed proper" (People v. Coronado (1904), 144 Cal. 207, 79 P. 418.) Similarly, after reversal of an order granting a motion in arrest of judgment, no proceeding to arrest judgment remains for disposition; the situation is as if the motion had been denied and there is before the trial court for disposition only a verdict or finding of guilty (People v. Lauman (1922), 59 Cal.App. 144, 146, 210 P. 421; People v. Commons (1944), 64 Cal.App.2d Supp. 925, 937, 148 P.2d 724.) It appears, then, as petitioner contends, that under established law the unqualified reversal of an order denying a motion to vacate the judgment requires that the trial court vacate the judgment.

For the reasons stated it appears that at the time of the purported second hearing and denial of the motion to vacate, respondent court was and it now is without discretion to proceed in any other manner than to obey the actual judgment (rather than statements in the opinion) of the District Court of Appeal. Since respondent court has the clear duty to act in this, the only manner in which it can act, such action can be compelled by mandate. (Dixon v. Risley (1896), 114 Cal. 204, 206, 46 P. 5 [mandate to compel trial court to comply with appellate court order of reversal with directions]; Newlands v. Superior Court (1916), 171 Cal. 741, 744, 154 P. 829; Hilmer v. Superior Court (1934), 220 Cal. 71, 73, 29 P.2d 175.)

It does not follow, however, that petitioner is entitled to be released from custody; rather, he should be returned to the custody of the sheriff of Los Angeles County and allowed to enter a new plea (People v. Butterfield (1940), 37 Cal.App.2d 140, 147, 99 P.2d 310; People v. Gilbert (1944), 25 Cal.2d 422, 440, 154 P.2d 657) and proceedings appropriate to such new plea should follow.

CARTER, J., concurs.

---

35 Cal.2d 570

PEOPLE v. LISS.

Cr. No. 5076.

Supreme Court of California, in Bank.
June 27, 1950.

Bella Liss was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., of petty theft, and she appealed. The Supreme Court, Edmonds, J., held that instruction relating to a false confession was erroneous, but not reversibly erroneous, that evidence that defendant three times gave a false name to police officers was evidence tending to show a consciousness of guilt, and that failure of defendant to testify could have been considered by jury as tending to indicate the truth of evidence connecting her with the theft and as indicating that, among inferences that might reasonably be drawn therefrom, those unfavorable to defendant were the more probable.

Judgment affirmed.

Carter, J., dissents.

Prior opinion 212 P.2d 547.

1. Criminal law 🔑829(1), 830

Where instructions requested by defendant were either irrelevant, too broad or adequately covered elsewhere, rejection thereof was not error.

2. Criminal law 🔑517(1)

An involuntary confession is not evidence, and cannot be considered by the jury.

3. Criminal law 🔑517(1)

A false confession, as distinguished from an involuntary confession, may be admissible for limited purpose of tending to prove something other than the matter falsely confessed or to discredit the honesty of a witness, but the false confession cannot be used as proof of commission of the act concerning which the confession is made.

4. Criminal law 🔑781(6), 1186(4)

In petty theft prosecution, instruction that even if jury should find that confession of defendant was false, either entirely or in part, confession remained, nevertheless, evidence for consideration of jury, to be given such significance as jury might determine, was erroneous, but was not reversably erroneous, where there was an abundance of substantial evidence, entirely independent of a confession, to support verdict. Const. art. 6, § 4½.

5. Criminal law ⚷351(5)

In prosecution for petty theft, evidence that three times during questioning of defendant by police officers defendant gave a false name, tended to show a consciousness by defendant of guilt.

6. Criminal law ⚷317

Failure of defendant to testify in her own behalf in prosecution for petty theft, could have been considered by jury as tending to indicate the truth of evidence connecting her with the theft and as indicating that among the inferences that might reasonably be drawn therefrom, those unfavorable to her were the more probable.

◆

Morris Lavine, Los Angeles, for appellant.

Fred N. Howser, Attorney General, and Dan Kaufmann, Deputy Attorney General, for respondent.

EDMONDS, Justice.

Bella Liss is charged with the crime of petty theft with prior convictions for felonies. Under section 667 of the Penal Code, the offense for which she is now being prosecuted is a felony. The appeal is from a judgment of conviction, and presents for decision questions as to the sufficiency of the evidence and the nature and effect of an instruction concerning confessions.

The information accused the defendant of wilfully, unlawfully and feloniously taking $27 from Von's Market. She pleaded "not guilty as charged in the information," but admitted the prior convictions in this state for burglary and grand theft. She did not testify at the trial by jury, and no evidence was introduced upon her behalf.

Morris S. Chalphon, a witness for the state, told the jury that he was in a telephone booth in Von's Market between 5:10 and 5:20 p.m. on the day of the alleged crime. The telephone booth was approximately 15 feet from a cash register in the candy department, and was within his view. According to his testimony, he saw the defendant go to a cash register in the candy department, ring the two-cent key, and take something from the register and place it in her handbag. As this person's back was toward him, he was unable to see what she took.

According to Chalphon, he saw the defendant's features clearly when she passed within eight feet of the telephone booth immediately after leaving the cash register. As she left the market, the manager of the drug department, Boris Elkin, went to the cash register. He testified that he noticed all of the one and five dollar bills were missing from it. Chalphon then informed Elkin of the incident, and pointed out the defendant, who by that time was 40 or 50 feet from the market.

Elkin testified that he followed and overtook the defendant, who looked over her shoulder at him as he approached and asked him, "What is the matter?" Elkin informed her that he would like to see her in the store for a minute. The reason for the proposed interview was not mentioned. "What do you want to see me about?", said the defendant. Elkin expressed his preference that they talk in the market. She told him she was in a hurry to get home, and although Elkin insisted it was vital that they talk in the market, she started to walk away. Elkin again caught up with her and stated that if she did not come with him he would call the police officer on the corner. At that point, she said, "All right, I will go back with you then, I want to straighten things out." Throughout this conversation, Elkin had not told defendant his reason for wishing to talk with her.

According to the record, when Elkin and the defendant returned to the market, they were joined by a police officer. In the officer's presence, she was told that she had been seen taking money from the cash register, and that money was missing. She denied having taken any money, and handed her purse to Elkin, who examined its contents. Although Elkin did not count the money, he testified that he noticed several one and five dollar bills "bunched up" in the coin purse. When again asked whether she had taken the money, she replied, "Yes," and explained that she needed funds for her sister. This testimony of Elkin was corroborated at the trial.

After this conversation, the manager of the grocery department joined the group. In the presence of the defendant and the police officer, the two managers checked the cash register, counting all of the money in it. According to their computation, $36.89 was missing. Elkin testified that the tape of the register showed a two-cent item and then the record of a sale made by him just before Chalphon told him of what he had observed from the telephone booth.

Following the check of the register, the group went to the market office, where the defendant offered to return the money if no further action would be taken. The money in the defendant's purse was then examined by the police officer, who counted five $5 bills, seventeen $1 bills, one half-dollar, one dime, one nickel and seven pennies. Shortly thereafter, the defendant was arrested.

At the police station, the defendant obtained permission to speak with Elkin alone. The latter testified that she said to him, "Will you please have them let me go?" As he related the incident, he replied, "Well, you did take the money didn't you?" She answered, "Yes," and in response to a question as to why she had done so, she told him she was "broke."

The record supports a conclusion that Elkin at no time promised the defendant immunity. According to his testimony, her statements were made freely, voluntarily and without duress, force or promise of reward. Other evidence is to the effect that, in the police station, when one of the arresting officers questioned the defendant as to her motive for taking the money, she told him she was "broke." There is testimony showing that this answer was made without any promise of reward or immunity, and that no force or violence was used to obtain it. The record also shows subsequent conversations at the police station in which the defendant denied taking the money. At this time she was asked why she had offered to return the money. She replied, as stated by an officer, "Just because she was a big-hearted person." Three times at the police station, according to the officer, the defendant gave a false name.

The defendant did not testify at the trial and no evidence was offered upon her behalf, but the prosecution's witnesses were vigorously cross-examined by her counsel at great length. At the conclusion of the evidence the jury was given instructions including one which reads as follows: "If under my instructions you find that a voluntary confession was made, you are the exclusive judges as to whether or not the confession was true; and in deciding that question you should consider all the circumstances connected with the making of the statement, as shown by the evidence. *But even if you should find that a confession was false, either entirely or in part, it remains, nevertheless evidence for your consideration, to be given such significance as your judgment may determine* under instructions." (Italics added.)

By another instruction the jury was told that if a confession of the defendant was not freely and voluntarily given, they must disregard it. A third instruction dealt with the circumstances which, under the law, would bring the statement of a defendant within the category of an involuntary confession.

The jury was also given definitions of confessions, admissions, and instructions relating to the credibility of witnesses and flight. Some instructions offered by the defendant which dealt with admissibility of evidence, the responsibility of the jury, and confessions were refused.

[1] The defendant generally complains that the court erroneously charged the jury and refused to give correct instructions offered by her. She also declares that the verdict is not supported by the evidence and is contrary to law. However, with the exception of the criticism of the instruction quoted in full, her objections have no foundation. The instructions given fairly stated the applicable rules of law. The rejected

instructions were either irrelevant, too broad or adequately covered elsewhere.

In challenging the quoted instruction, the defendant argues that it deprived her of due process of law. There was no showing that the confessions were free and voluntary, she insists, consequently they were improperly admitted as evidence.

The attorney general contends that the judgment of conviction should be affirmed because the record contains sufficient evidence to support the judgment, even apart from any confessions or admissions. He asserts that the instructions given were correct statements of the law. The record amply supports the conclusion that the defendant's statements were free and voluntary, he declares, particularly because she declined to testify to the contrary and introduced no evidence upon her own behalf. Finally he says that the due process requirement was satisfied by the two instructions charging the jurors to disregard any confession not given freely and voluntarily, and informing them as to the circumstances under which a confession would be involuntary.

[2, 3] An involuntary confession is not evidence, and cannot be considered by the jury, People v. Mehaffey, 32 Cal.2d 535, 548, 197 P.2d 12; People v. Fox, 25 Cal.2d 330, 340, 153 P.2d 729; People v. Jones, 24 Cal.2d 601, 150 P.2d 801. A false confession is, of course, quite different from an involuntary one. Although the involuntary confession, being the product of duress, is of no probative value, a false confession may be admissible for the limited purpose of tending to prove something other than the matter falsely confessed or to discredit the honesty of a witness. As is true of any other false evidence, a false confession cannot support an inference of the truth of the matter untruthfully stated. Obviously, the false confession of guilt of a specific act cannot be used as proof of the commission of that act. If the jury determines that the confession of a given act is false, the confession cannot be considered as tending to prove commission of that act. But, under certain circumstances, the false confession may tend to prove the commission of an entirely different act, or be admissible for the purpose of showing illegal conduct by a person other than the one who admitted his guilt, or to discredit the witness who made the false statement.

In People v. Ford, 89 Cal.App.2d 467, 200 P.2d 867, 871, the jury was instructed: "* * * [But even] if you [should] find that the confession was false either entirely or in part it remains nevertheless [evidence] for your consideration, to be given such significance as your judgment may determine under instructions [*that*] *I shall shortly give you concerning false statements made by a person accused of a crime.*" No additional instruction "concerning false statements" was given, and the District Court of Appeal, in holding that the quoted statement to the jury was erroneous, pointed out the unreasonableness of considering a false confession of guilt as an indication of guilt.

[4] Here the trial judge, in effect, told the jury that a false confession may be of some probative value as tending to prove the truth of the matter confessed. But such a confession is not evidence from which the jury may infer that the one who falsified committed the illegal act. When the confession is false, it may not be used to prove the truth of that which has been "confessed". Without explanation concerning the purpose of admitting a false confession the instruction is erroneous, although under certain circumstances, with adequate clarification for the guidance of the jury, it may be given.

If the instruction here challenged was given to inform the jury that a false confession, when relevant, may be used to prove a fact other than the matter confessed, the charge was completely inadequate for that purpose. If the purpose of the instruction was to tell the jury that a false confession may be considered in connection with the issue as to the credibility of a witness, it was likewise incomplete without supplementary explanation.

Under Article VI, section 4½ of the Constitution of California, "No judgment shall be set aside, or new trial granted, in any case, on the ground of * * * improper admission or rejection of evidence, or for any error as to any matter of * * * procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." In People v. Ford, supra, "* * * there was only slight circumstantial evidence of defendant's guilt aside from the confession." Here there is an abundance of substantial evidence, entirely independent of a confession, to support the verdict of guilty. The record includes the uncontradicted evidence that the defendant was at the cash register, and an eye witness described her actions in taking something from it. She was identified by this witness and when the cash register was opened, all of the $1 and $5 bills were missing from it. In the defendant's purse, seventeen $1 bills and five $5 bills were found.

[5, 6] In addition to this evidence, the jurors heard testimony to the effect that three times during the questioning of her by police officers the defendant gave a false name. This testimony was evidence tending to show a consciousness of guilt. People v. Costa, 137 Cal.App. 617, 619, 31 P.2d 248; People v. Meile, 97 Cal.App. 56, 59, 274 P. 1003. Also, the defendant did not testify in her own behalf, and her failure to do so could have been considered by the jury "as tending to indicate the truth of such evidence [connecting her with the crime], and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to [her] are the more probable." People v. Adamson, 27 Cal.2d 478, 479, 490-491, 165 P.2d 3, 9.

An examination of the entire record clearly shows that the giving of the erroneous instruction as to false confessions did not result in a miscarriage of justice.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent. In my opinion the instruction here complained of to the effect that a false confession may be considered by the jury in determining the guilt of a defendant, is clearly erroneous and prejudicial and for the reason stated in my dissenting opinion in People v. Woods, 35 Cal.2d 504, 218 P.2d 981, the judgment should be reversed and defendant granted a new trial.

98 Cal.App.2d 270

VISTA IRR. DIST. v. SAN DIEGO COUNTY.

Civ. 4201.

District Court of Appeal, Fourth District, California.

June 29, 1950.

Action by Vista Irrigation District against San Diego County for refund of taxes paid under protest. The Superior Court of San Diego County, William A. Glen, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Griffin, J., held that irrigation district had authority to itself file a petition with its board of directors for inclusion within district of land outside its boundaries owned by district and that construction of statutes as giving district such authority does not render them unconstitutional.

Judgment affirmed.

1. Taxation 🔑217

An irrigation district is a "municipal corporation" within meaning of constitutional provision excepting from tax exemption certain lands and improvements owned by such a corporation and located outside of its corporate limits. Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Municipal Corporation".

2. Waters and water courses 🔑226

Irrigation district, as holder of title to land located outside its boundaries, had authority under Water Code, even before its amendment in 1947, to file with its board of directors a petition for inclusion of such land within boundaries of district. Water Code, §§ 1000 et seq., 20528, 20566.1, 26876, 26901.

3. Waters and water courses ⚷226

The purpose of 1947 amendment of Water Code was to clarify the already existing right of an irrigation district to itself petition for inclusion within district of land owned by district. Water Code, §§ 1000 et seq., 20528, 20566.1, 26876, 26901.

4. Waters and water courses ⚷226

Provisions of Water Code authorizing irrigation district to itself petition for inclusion in district of land owned by district and located outside its boundaries are not unconstitutional on ground that they permit district to pass upon and judge the advisability of its own act, since district has no such personal or private interest as would disqualify it to pass upon its own petition for such inclusion. Water Code, §§ 1000 et seq., 20528, 20566.1, 26876, 26901.

5. Waters and water courses ⚷226

Any defect in proceedings by which land owned by irrigation district and located outside its boundaries was included within the district in 1947 with respect to authority of district to itself file the petition for such inclusion was cured by validating acts of 1949 in so far as county and its power to tax such land were concerned. Water Code, §§ 1000 et seq., 26876, 2o901; St.1949, p. 1508, §§ 6, 8; p. 1511.

◆

James Don Keller, District Attorney, by Carroll H. Smith, Chief Trial Deputy, by Robert G. Berrey, Deputy, all of San Diego, for appellant.

Wright, Thomas, Dorman & Fox, by Leroy A. Wright II, San Diego, for respondent.

GRIFFIN, Judge.

Action for refund of taxes paid under protest. Plaintiff Vista Irrigation District was organized under the California Irrigation District Law. Water Code Div. 2. It alleges that it acquired certain real property in 1946, which was then located outside the boundaries of plaintiff district and was then subject to tax by defendant in the hands of the plaintiff's grantor; that on February 4, 1947, the board of directors of plaintiff district, pursuant to proceedings duly noticed and had in accordance with law, made its order of inclusion, whereby that property was included within the boundaries of plaintiff district. The order of inclusion was recorded on February 21, 1947. It then alleges that on March 3, the county assessor assessed said property then located within the district, and the board of supervisors levied county and district taxes thereon for the fiscal year 1947-1948, and 1948-1949, and said taxes were computed upon the assessment roll as a tax and lien upon said property. It is claimed by plaintiff that said assessments were void as being in violation of law and in violation of Article XIII, sec. 1 of the Constitution of California.

Plaintiff, having failed to pay said taxes when due, obtained a certificate of redemption for the property and on September 20, 1949, paid defendant county, under protest, $526.72, as and for said taxes and penalties which it now seeks to recover by this action.

Defendant admits that the Board of Directors made and recorded the order of inclusion as alleged, but denies that the property was located within the boundaries of the district because said proceedings were illegal and void. The trial court found that the assessment by the county was void and in all other respects found in favor of plaintiff.

In Vista Irrigation District v. Board of Supervisors, 32 Cal.2d 477, 196 P.2d 926, plaintiff and petitioner sought mandate against defendant county to cancel the assessment for taxes here levied. The writ was denied for the reason that such writ was not available because petitioner had an adequate remedy at law. The general points here presented are there tersely stated.

[1] An irrigation district is a municipal corporation within the meaning of sec. 1, article XIII of the Constitution, excepting from tax exemption certain lands and im-

provements owned by such a corporation and located outside of its corporate limits. Imperial Irrigation District v. County of Riverside, Cal.App., 215 P.2d 518.

On January 7, 1947, plaintiff caused to be filed with its board of directors a petition for the inclusion into the district of the land here involved, and the order above mentioned followed. These proceedings were had under the provisions of the Water Code as it existed prior to the amendment in 1947 of section 26901, and the amendment of section 20566.1. Prior to the amendment there was no special provision for the filing by a district of a petition for inclusion of lands which were owned by it. Defendant argues that the only statutory authority under which plaintiff could have proceeded were sections 20566, 26876, 26878 and 26907 of the Water Code and that none of these sections authorized the district to petition itself to include its own lands within its own boundaries. It is then contended that although, by the amendment mentioned, section 20566.1, a district may, through "its board sign any petition provided for in this division", such amendment was not retroactive and, when considered in connection with section 26901, it did not breath life into the previously void action of the district. It is then argued that as a settled principle of statutory construction, amendments to prior legislative acts demonstrate an intent to change the preexisting law, citing such cases as Loew's Inc. v. Byram, 11 Cal.2d 746, 82 P.2d 1, and People v. Weitzel, 201 Cal. 116, 255 P. 792, 52 A.L.R. 811; that, under the facts here presented, or even under the amendment mentioned in section 20566.1, any interpretation given which sanctions an administrative tribunal exercising quasi judicial powers thus to sit in judgment on itself and actually judge its own cause is violative of fundamental constitutional principles, citing 14 Cal.Jur. 809, 810, and such cases as Nider v. Homan, 32 Cal.App.2d 11, 89 P.2d 136; Wulzen v. Board of Supervisors, 101 Cal. 15, 35 P. 353, 40 Am.St.Rep. 17; Imperial Water Co. No. 1 v. Board of Supervisors, 162 Cal. 14, 120 P. 780; Cooley on Constitutional Limitations, 8th Ed., Vol. II, p. 870; and Vol. I, p. 354.

[2] Plaintiff points out that before the 1947 amendment, under sec. 26876 of the Water Code "A majority of the holders of title to any tract of land who are also the holders of title to one-half or more of the area of the tract may file in the district office a petition praying that the tract of land be included within the district." Under the provisions of this section the only requirement is that the petitioners be "holders of title". Sec. 20528 broadens this term to some extent. It is conceded that the district was the "holder of title" of the land. Therefore, under sec. 26876, it was authorized to file a petition for the inclusion of the lands described. This conclusion is fortified by a statement of the author of the opinion in County of Mariposa v. Merced Irrigation District, 32 Cal.2d 467, 196 P.2d 920, where many of the points here involved are elaborately discussed. It was there definitely held that Water Code sec. 26901, as amended in 1947, authorizing the inclusion of land in an irrigation district on a petition by the "owner" of the land regardless of whether it can be irrigated, authorized the district itself to petition to include its own land. Quoting the language of sec. 26901 referring to the right of an "owner" to petition, it was said that there was nothing in the section which excluded the district from being such an "owner".

[3] We conclude that the purpose of the amendment in 1947 was to clarify the right which already existed which permitted irrigation districts to petition for the inclusion of a tract of land which they owned within the district.

Defendant's claim of unconstitutionality is predicated upon the theory that under the sections of the Water Code pertaining to a petition for inclusion, if a district is permitted to so petition, it would, in effect, be passing upon and judging the advisability of its own act and therefore its determination would be void; that therefore plaintiff should not sit in review of the advisability of including the property in its district to the detriment of the county taxing authority. There is considerable authority to the effect, and persuasive argument that "no man ought to be a judge in his own case".

It is argued that a proceeding for the formation of an irrigation district for the inclusion of lands within its boundaries is *quasi judicial* in nature, citing Imperial Water Co. v. Board of Supervisors, 162 Cal. 14, 120 P. 780.

[4] The argument overlooks vital factors not included in the general rule. This rule, as stated by counsel for respondent, is "founded upon a desire for purity in the exercise of judicial power and a pragmatic realization of human frailties where self interest is involved and has developed as an adjunct to the requirement of due process". The self interest is generally present where the rule is invoked. We have found no case in which the limitation has been invoked to disqualify for *public interest* as distinguished from one *personal or private.* A public interest has been held to be non-disqualifying. Cooley on Constitutional Limitations, 8th Ed., Vol. II, p. 870. This personal or private interest is non-existent in the instant proceeding. Who could have such an adverse interest to the inclusion of district-owned lands within the district as would preclude this procedure. The district owned the land to be included. The law might well have provided, without constitutional objection, that the directors could have included such lands within its district without petition, hearing or notice. Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369; Miller & Lux, Inc. v. Board of Supervisors, 189 Cal. 254, 208 P. 304.

In County of Mariposa v. Merced Irrigation District, supra, a constitutional attack was made on the right of a district to include property within its boundaries and thus escape taxation without notice or hearing, and allowing the district to decide its own matter. It was there held that a county does not have a vested right to tax property of irrigation districts, and it is only an exception in sec. 1 of article XIII of the Constitution that makes taxable some of such property. The constitutional provision contemplates the power of an irrigation district to annex additional area and thus incidentally achieve tax exemption. It was likewise there claimed that permitting a district to file a petition, authorized by its directors, for inclusion within its boundaries of land owned by it was an executive function, and that its determination of the petition was judicial; and that hence it was granted powers to exercise both executive and judicial functions, in violation of the separation of powers doctrine. The court said: "It should be noted, however, that the 1947 amendment of section 26901 of the Water Code may not have been necessary (that is, the provision authorizing the inclusion of land in a district upon consent of the owner, regardless of whether it was suitable for irrigation) except for the change in the Irrigation District Law in 1927 * * * Hence it may well be that in 1914 a district's land lying outside its boundaries could have been included or annexed by inclusion proceedings.

* * * * * *

We see no reason why a district could not have been authorized to include its own land within its boundaries merely by resolution of its directors. Presumably the directors will protect the interests of the owners of land in the district, and the district is the only land owner involved in the land to be included. We fail to see where the petitioner county has any grounds to object to this procedure. If it could be done in that way we see no invalidity in pursuing the petition method." [32 Cal.2d 467, 196 P.2d 922.]

To adopt the construction urged by defendant would frustrate an agency of a government in the exercise of its powers. We see no basis for the application of the rule mentioned by the defendant.

Plaintiff then argues that even though it may be determined that plaintiff was not such an owner as could petition for itself, nevertheless, under the validating acts of 1949, Stats.1949, p. 1508, chap. 781; and Stats.1949, p. 1511, chap. 782, any such procedural defect was cured, and they accordingly supplied any lack of authority which might have existed at the time of the inclusion proceedings.

Section 6 of the first validating act reads: "All acts and proceedings heretofore taken by any public body under any law, or under color of any law, for the annexation or inclusion of territory into any such public body are hereby confirmed, validated, and declared legally effective. This shall include all acts and proceedings of the governing board of such public body and of any person, public officer, board or agency heretofore done or taken upon the question of the annexation or inclusion of such territory."

"Section 8. This act shall operate to supply such legislative authorization as may be necessary to validate any such acts and proceedings heretofore taken which the Legislature could have supplied or provided for in the law under which such acts or proceedings were taken * * *"

[5] In view of the conclusions first reached, it becomes unnecessary to determine this question. However, our conclusion would be that in so far as defendant county is concerned, any such claimed defect in the proceedings would come within the provisions of the validating act. City of Fairfield v. Hutcheon, 33 Cal.2d 475, 202 P.2d 745.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

---

98 Cal.App.2d 171

SHELLHAAS et al. v. PETROLANE, Ltd., et al.

Civ. 17307.

District Court of Appeal, Second District, Division 2, California.

June 23, 1950.

Rehearing Denied July 10, 1950.

Hearing Denied Aug. 17, 1950.

Action by Marguerite C. Shellhaas and another, against Petrolane, Ltd., and another, for injuries allegedly suffered by plaintiffs in a collision between an automobile in which they were riding and a truck owned by defendant, Petrolane, Ltd., and driven by their employee. The Superior Court, Los Angeles County, Charles S. Burnell, J., entered an order granting plaintiffs a new trial after the jury had rendered a verdict in favor of defendants and judgment had been entered on the verdict, and defendants appealed. The District Court of Appeal, Wilson, J., held that since there was a direct conflict in the evidence as to the speed of defendant's truck immediately before the collision, as to its position when the traffic signal light changed, and as to whether the green light was on at the time automobile in which plaintiffs were riding entered the intersection, granting of a new trial was not an abuse of discretion.

Order granting a new trial affirmed.

McComb, J., dissents.

1. Courts 🔑116(1)

If the minutes of the trial court do not speak the absolute truth the remedy is by motion in that court to amend them since the minutes import absolute verity unless and until amended.

2. Courts 🔑117

No proof is admissible to show facts contrary to those which appear in the records and minutes of judicial proceedings.

3. Appeal and error 🔑608(1)

The transcript on appeal must be a true and precise copy of the proceedings in the trial court.

4. Appeal and error 🔑712

An appellate court's decision must be based on the record of the trial court.

5. Appeal and error 🔑648, 939

Where order of trial judge recited that plaintiffs' motion for new trial was granted on certain grounds and after clerk had certified transcript and after trial judge's death, a minute order by another judge granting defendants' requested correction of transcript on appeal changing grounds upon which new trial was granted, without a motion to amend original order, was void and District Court of Appeal would deem order granting new trial to have been on grounds stated in original minute order.

6. Appeal and error ⚷854(6)

Where ground for motion for new trial was not one recognized by law and was not included in the notice of motion for a new trial and court's remarks and affidavit of attendant attorney showed that it was made in a jocular manner, such ground would not be considered by the District Court of Appeal.

7. Appeal and error ⚷977(3)
New trial ⚷6

The granting of a motion for a new trial rests within the discretion of the trial judge and an appellate court will not interfere with his order unless it clearly appears that there has been a manifest abuse of discretion.

8. Appeal and error ⚷854(6), 933(1)

Upon an appeal from an order granting a new trial, all presumptions favor the order as against the verdict and the order will be affirmed if it may be sustained on any ground.

9. New trial ⚷71

The court does not abuse its discretion in granting a new trial when there is a conflict in the evidence as to material facts and where there is any evidence that would support a judgment in favor of the moving party.

10. New trial ⚷71

Where there was a direct conflict in the evidence as to the speed of defendant's truck immediately before the collision, as to its position when the traffic signal light changed and as to whether the green light was on at the time automobile in which plaintiffs were riding entered the intersection, granting plaintiffs' motion for a new trial was not an abuse of discretion.

11. Appeal and error ⚷854(6)

Where no abuse of discretion was shown in granting a new trial on ground of insufficiency of evidence, the District Court of Appeal was not required to consider whether trial court had erred in including newly discovered evidence, accident or surprise among grounds for the order.

Betts, Ely & Loomis, Los Angeles, for appellants.

A. J. O'Connor, George J. Hider, Birger Tinglof, all of Los Angeles, for respondents.

WILSON, Justice.

This action was brought to recover damages for personal injuries alleged to have been suffered by plaintiffs in a collision between an automobile in which they were riding, driven by one Elsie Kay, and a truck owned by defendant Petrolane, Ltd., and driven by their employee, defendant Maxwell, in the course of his employment. The case was tried by a jury which rendered a verdict in favor of defendants and judgment was entered on the verdict. Plaintiffs' motion for a new trial was made upon all the statutory grounds (Code Civ.Proc., sec. 657) and, as shown by the minute order and by the written order signed by the trial judge, was granted on the grounds of insufficiency of the evidence to sustain the verdict and judgment, newly discovered evidence, and accident and surprise which ordinary prudence could not have guarded against. Defendants have appealed from the order granting a new trial.

By reason of the unusual proceedings to be discussed which occurred after the death of the trial judge and after the clerk had prepared and certified the transcript on appeal, this court, pursuant to Rule 12 of the Rules on Appeal (22 Cal.2d 11), ordered the original files relating to the motion for a new trial and to the purported "correction" of the transcript, including the notices of motions and affidavits used in connection therewith, to be transmitted to this court and to be made a part of the record on appeal.

It appears that the motion for a new trial came on for hearing on May 9, 1949, before Judge Burnell, who had tried the case. On that date the following minute order was made which was entered on May 13: "Come now the parties by their respective counsel, A. J. O'Connor for the plaintiffs and Walter Ely for the defendants, and the plaintiffs move the court for a new trial herein, upon the grounds stated in the notice of intention to move for a new trial, filed herein. After argument by counsel, the said motion is by the court granted on the grounds of insufficiency of the evidence to sustain the verdict or judgment, accident, surprise and newly discovered evidence."

On May 16 Judge Burnell signed and filed an order which was entered on May 24, reciting that the motion for a new trial came on for hearing, that the parties, plaintiffs and defendants, were present by their respective attorneys, naming them, and "It is hereby ordered, adjudged and decreed and the same [the motion] be and is hereby granted on the grounds of the insufficiency of the evidence to support the verdict and judgment and upon the grounds of newly discovered evidence and accident and surprise which ordinary prudence could not have guarded against."

On May 31 defendants filed their notice of appeal to this court.

On August 15 defendants filed a request for correction of clerk's and reporter's transcripts. On the following day the clerk of the superior court, apparently having overlooked the request for correction, certified the transcript to be full, true and correct. Thus the transcript of the orders made by Judge Burnell reflected accurately the minute order entered by the clerk and the formal order signed and filed by the judge.

But defendants being dissatisfied with a true picture of the record made by the trial judge filed an application after the latter's death to have it corrected. Such application and the hearing thereon occurred more than four months after the appeal had been lodged in this court. The contents of such application and action taken appear in the original files which we ordered to be made a part of the record on appeal. Such files disclose that the hearing on the application was referred to Judge Hanson for decision.

Under date of October 5, 1949, a minute order was made by Judge Hanson purporting to order the "correction" of the transcript on appeal, which reads as follows: "Request for correction of transcript comes on for hearing; Birger Tinglof and A J O'Connor by A. J. O'Connor appearing as counsel for plaintiffs; Betts, Ely & Loomis by Forrest Betts appearing for defendants. Request is granted."

The particulars in which the transcript was ordered to be changed are not made to appear in the order. Two changes were made in the clerk's transcript: (1) In the transcript of the minute order of May 9, 1949, above quoted, granting a new trial, the words "accident, surprise and newly discovered evidence" are deleted and the following inserted in lieu thereof: "newly discovered evidence and the fact that defendants' counsel has won too many law suits in this court." The result of this change is that the grounds now appearing in the transcript are: "insufficiency of the evidence to sustain the verdict or judgment, newly discovered evidence and the fact that defendants' counsel has won too many law suits in this court." In the margin of the transcript appears the legend "Deleted per Minute Order of October 5, 1949. S.M." (2) A like deletion and insertion were made in the transcript of the written order signed by Judge Burnell on May 16, 1949, and a similar legend is in the margin of the transcript.

Accompanying the request for correction of the transcript is an affidavit of one of defendants' counsel to the effect that at the hearing of the motion for a new trial Judge Burnell said: "I am granting this motion for new trial upon three grounds: one, insufficiency of the evidence; two, newly discovered evidence; three, Mr. Ely has won too many lawsuits in this Court"; that affiant then requested the court to place his ruling on the last two grounds "so that at least my clients will have a fair chance to upset this ruling which we believe to be erroneous"; that the judge replied, "Well, of course, the last ground is not a legal ground." Mr. Kelly, an attorney not connected with this case, who was waiting in the courtroom to begin the trial of another action and who heard the proceedings on the motion for new trial, made an affidavit that the judge's reply was thus: "The last ground is not a legal ground, and I am going to grant this motion on the ground of the insufficiency of the evidence," and that the judge's statement was made "in fun" and not in a malicious way.

[1, 2] No motion appears in the transcript, and none is in the original files of the superior court, to amend either the minute order or Judge Burnell's signed order granting a new trial. In the absence of an amendment of the orders there could be no valid change in or amendment of the transcript of such orders. If the minutes of the trial court do not speak the absolute truth the remedy is by motion in that court to amend them. Halpern v. Superior Court, 190 Cal. 384, 386, 212 P. 916. The minutes import absolute verity unless and until amended. Govea v. Superior Court, 26 Cal.App.2d 27, 31–32, 78 P.2d 433; Halpern v. Superior Court, supra; In re Connor, 16 Cal.2d 701, 708, 108 P.2d 10; 15 C.J., p. 979, § 404, 21 C.J.S., Courts, p. 442, § 237. No proof is admissible to show facts contrary to those which appear in the records and minutes of judicial proceedings.

[3, 4] The transcript on appeal must be a true and precise copy of the proceedings in the trial court. If it is not a true copy it is a false certification and is not a transcript at all. An appellate court's decision must be based on the record of the trial court and it cannot be so unless the court of appeal has before it the exact, authentic and true record of the action of the trial court. In the instant case the original record of the proceedings in the superior court above quoted, to wit, the minute order and the written order signed by Judge Burnell, evidences what actually occurred before the trial judge and the grounds upon which he granted the motion for a new trial. The transcript as "corrected" shows something entirely different.

[5] Had Judge Burnell been living he would have had power to amend the orders if they did not disclose what actually took place in his court and to amend the transcript accordingly, but he would have been without jurisdiction to order a correction to be made in the transcript which did not conform to the judicial record of the orders made in his court. Judge Hanson was without jurisdiction to order a change in the transcript which is contrary to the record then before him as made by Judge Burnell. His order of October 5, 1949, purporting to grant the request for correction of the transcript has caused a transcript to be filed in this court which purports to show facts different from and contrary to those shown by the minutes and records of the proceedings in the action. The order is void and will be disregarded. In determining this appeal no consideration will be given to the deletions from and amendments to the transcript of the proceedings before Judge Burnell but the decision of this court will be based on the original records of the superior court which have been made a part of the record of this court. We shall therefore deem Judge Burnell's order granting a new trial as having been made upon the grounds stated in the original minute order of May 9 and in the written order signed by Judge Burnell on May 16, 1949.

[6] Since the purported ground above discussed upon which defendants contend the motion for new trial was granted is not a ground recognized by the law (Code Civ.Proc., sec. 657) and was not included in the notice of motion for a new trial and since it appears from the tenor of the court's remarks and from Mr. Kelly's affidavit that the statement was made in a jocular manner and was not intended to be taken seriously, such ground may be dismissed from further consideration.

Passing now to the actual grounds on which Judge Burnell granted the motion for a new trial, the first is the insufficiency of the evidence to sustain the verdict and judgment. There is an irreconcilable conflict in the evidence relating to the collision. The accident was between a Chevrolet automobile in which plaintiffs were riding as guest passengers and a tanker truck owned by defendant corporation and driven by its employee, defendant Maxwell. It occurred at the intersection of South Street and Lakewood Boulevard at about 3:00 o'clock in the afternoon when the sun was shining. Lakewood is a well-traveled, four-lane, divided highway extending northerly and southerly and crossed by South Street at right angles. Standard three-light signals were in operation at the time. The Chevrolet was proceeding westerly on South Street and defendants' truck was traveling southerly on Lakewood Boulevard. The vehicles collided at a point about 21 feet east of the west curb line of Lakewood as extended and 36 feet south of the extended north curb line of South Street. No buildings or obstructions were on either corner. All five passengers in the Chevrolet (the driver did not appear at the trial) testified that as their car approached the intersection it was immediately north of the center line of South Street traveling at a speed of 20 to 25 miles an hour; that the signal showed a green light as they entered the intersection and remained green up to the time of the collision; that the truck was from 200 to 300 feet north of the intersection when they entered it and was traveling 40 to 50 miles an hour. It was stipulated that the basic speed limit on Lakewood was 55 miles an hour.

One witness testified that as the Chevrolet entered the intersection he saw cars on Lakewood south of South Street waiting for the "Go" signal on Lakewood.

Maxwell testified that when he was 64 feet north of South Street the signal light changed to green on Lakewood; that he was traveling at 20 to 25 miles an hour. Other witnesses corroborated him in saying that the Chevrolet went into the intersection after the light had changed to green on Lakewood.

[7-10] The granting of a motion for a new trial rests within the discretion of the trial judge and an appellate court will not interfere with his order unless it clearly appears that there has been a manifest abuse of discretion. Upon an appeal from an order granting a new trial all presumptions favor the order as against the verdict and the order will be affirmed if it may be sustained on any ground. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The court does not abuse its discretion in granting a new trial when there is a conflict in the evidence as to material facts and where there is any evidence that would support a judgment in favor of the moving party. Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 359, 170 P.2d 465. In the instant case there is a direct conflict in the evidence as to the speed of defendant's truck immediately before the collision, as to its position when the traffic signal light changed, and as to whether the green light was on South Street or Lakewood Boulevard at the time the Chevrolet entered the intersection. There is conflicting evidence upon other features of the case not necessary to be narrated.

[11] Since by reason of the settled rule, supported by innumerable authorities, that the granting of a new trial on the ground of insufficiency of evidence, no abuse of discretion being shown, cannot be disturbed by this court we need not consider whether the trial court erred in including newly discovered evidence, accident or surprise among the grounds for the order.

The order granting a new trial is affirmed.

MOORE, P. J., concurs.

McCOMB, J., dissents.

Rehearing denied; McCOMB, J., dissenting.

---

98 Cal.App.2d 350

PEOPLE v. SOLLOWAY.

Cr. 680.

District Court of Appeal, Fourth District,
California.
July 7, 1950.

Lillian Gertrude Solloway was convicted in the Superior Court of San Bernardino County, A. D. Mitchell, J., of murder in the second degree of her husband, and she appealed. The District Court of Appeal, Barnard, P. J., held that the evidence was insufficient to sustain conviction.

Reversed and remanded for a new trial.

1. Homicide ⚿233

While proof of motive is not essential in sustaining a conviction for murder it is important in considering the effect of other evidence.

2. Homicide ⚿234(7)

Where evidence of guilt of defendant of murder of her husband was entirely circumstantial and could not be held to be both consistent with guilt and inconsistent with any other rational hypothesis with respect to the time element or the identity of the killer, it was insufficient to establish the essential facts beyond a reasonable doubt and did not sustain a conviction of second-degree murder.

◆

Taylor F. Peterson, Thomas C. Parry, San Bernardino, for appellant.

Fred N. Howser, Attorney General, Frank Richards, Deputy Attorney General, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the murder of her husband and a jury found her guilty, in the second degree. She appeals from the judgment and from an order denying her motion for a new trial.

The deceased was killed on September 9, 1948, at or near a house in Crestline where the defendant and their three small children were living. He was in the liquor business in San Pedro, coming home at weekends or occasionally. He came on September 8 and that night went to a show with his wife, leaving two children with a Mrs. Walls. About 10:30 the next morning, Mrs. Walls called at the home and saw them all. The defendant and her husband were trying a test given in the Reader's Digest. When she left about 11, the deceased said he intended to leave for San Pedro as soon as possible. He appeared at Mr. Walls' service station about 11:45. After Mr. Walls repaired a flat tire for him he said he was leaving immediately for San Pedro.

About 1:20 or 1:30 that afternoon Mrs. Walls saw the defendant near her home in the deceased's car, with her oldest boy. The defendant told her that "Daddy" had left the house with two "characters" and she was worried about him. She always called her husband "Daddy". About 2:30 Mrs. Wall saw her at the same place and the two took some children to a theater and returned to the defendant's home. Later, Mrs. Walls took two of the children in deceased's car, to get their hair cut, and returned to defendant's home with all of the children. She did not see the deceased that afternoon. About 5:00 o'clock she and the defendant, with all the children, went up town to get some "frosties" and then parted. About 7:30 that evening she again saw the defendant and the children waiting at the skating rink.

About 11:45 that night the defendant appeared at a neighbor's house about 60 feet from her home, and asked the neighbor to call the police. She was badly excited and frightened and he had difficulty in ascertaining the reason. He was unable to get the sheriff's office on the phone and, leaving his wife to continue the attempt, went back with the defendant. As they walked up the driveway she screamed, and shifting his flashlight he saw the body. They returned to his home and he drove to the village to find an officer. The defendant remained and told his wife that her husband had left about 1:30 with a peculiar looking couple, that they were out to get her and the children, and that she was worried.

A constable and another officer, sent by the neighbor, arrived shortly after midnight. The constable saw the deceased lying face down near the side of the driveway. There was some blood on the ground near his head, and some leaves in his hair. He rolled him over and saw that he was dead. Underneath his body was a .22 caliber automatic pistol which was jammed, with a live round in its firing chamber and another against it. The defendant had purchased this gun and a box of cartridges on September 1, 1948. After the body was later turned face down a much larger amount of blood appeared on the ground.

A deputy sheriff and another officer arrived a few minutes later and questioned the defendant. Three other officers arrived about 3:30 A.M. and again questioned her.

About 5:00 A.M., and about 8:00 A.M. two of these officers and a deputy district attorney again questioned her. While her story remained the same and was not impeached, on essentials, it contained a few elements the explanation of which was not too satisfactory. She said she did not know whether her husband had any insurance "or whether we have got anything or not." She stated that her husband left the house at 1:30 P.M. to practice shooting; that as he walked down the driveway with this gun in his hand a car drove up and someone hailed him; that he told her he would be back in a few minutes and got in the car and they drove off; that they were rough looking characters, a man and a woman; that about 2:00 o'clock she took the children to a show, leaving a note telling her husband where she had gone; that when she finally returned about 6:00 P.M. her husband was not there; that after giving the children their dinner she took them to the skating rink but found it closed; that she purchased ice cream rolls for the children and returned home about 9:00 o'clock; that after putting the children to bed she washed some clothes and then locked the cellar door about 10:00 o'clock; that she went to bed and read a magazine, and the radio was playing; that she fell asleep and was awakened about 10:30; that she then heard a commotion in the driveway, with loud voices and much profanity; that she was nervous and frightened and did not get up; that she lay in bed until she heard a car leave; that she then got up and went to the neighbor's; and that while returning with the neighbor they found the body. She also said she had bought this gun to take along on a proposed vacation and for protection.

The house was on the side of a hill, with a basement underneath. Across the bottom of the doorway to this basement was a concrete slab a foot high, from the middle of which the sharp end of a screw stuck up ¾ths of an inch. About 15 feet away was a steep bank, 4 or 5 feet high, with the driveway below. The prosecution theory was, and is, that the defendant shot her husband in this basement about 1:00 o'clock, and that shortly before midnight she dragged his body over this sill and on down the bank and driveway. No cloth threads or foreign matter were found on this screw.

The officers found a number of blood spots in the basement. There was a small one on the slab and others on an old picture frame, on some small pieces of wood, on a garden hose, and on the floor. The defendant had two dogs, a fox terrier and a cocker spaniel, which had constant access to this basement. Some of the blood spots were shown to have come from one of those dogs, and the evidence is conflicting as to whether others were human blood. The eyeglasses worn by the deceased were found between the basement door and the bank, with blood spots on them, and some red stains on the ferns and shrubs near by. An area near the basement door appeared to have been swept. The deceased's car was in the driveway below the bank, backed up against the garage door. Another small area between this car and the bank appeared "as though a burlap sack had whipped it around and disturbed the ground." Underneath the car there were two parallel marks which appeared to be cut off by the tracks of the car, and also two tracks of a bare foot. The area between the car and the body had not been swept and there were no marks on it. There was a disturbed area of about two feet on the slope of the bank. There was a red stain, looking like blood, on a rock which appeared to have been dislodged from the bank.

A large number of articles of clothing was found on the back porch. Most of these were dry, but some in a stationary tub were wet and had a strong odor of chlorox or purex. The defendant explained that she had to use purex as clothes became very dirty in the mountains. A pair of shoes, which had been worn by the defendant on September 9, had been washed and had a strong odor of purex or chlorox. There was a spot of blood on one which the prosecution expert said had been dry before the shoes were washed. An old stain, which may have been blood, was found on a dress worn by the defendant on that day. There were some scratches on the rear of deceased's shoes, and his heels could have made the parallel marks beneath the car. His shirt had a tear back of the left shoulder. While there was some dirt on him, his body and clothes showed surprisingly little evidence of having been dragged over this screw and down the bank and driveway.

Death was caused by a bullet which entered below and behind the left ear and emerged at a point in front of and above the tip of the right ear. There were powder burns around the point of entrance. There were other marks on the body. His right eye was black and "somewhat swollen", and he had bruises on his nose and eyebrows. There were several marks on his left shoulder about an inch in diameter. There is no evidence as to whether the body was warm or cold when found, or whether it was limp or rigid. There is evidence that an empty shell, also found in the basement, had been fired from this gun at some undisclosed time. There is evidence that the bullet wound might have been made by a .22 caliber bullet, or might well have resulted from a larger steel-nosed bullet.

The appellant first contends that the evidence is not sufficient to prove, beyond a reasonable doubt, that she killed her husband. The respondent contends that it was clearly established that the deceased was shot and killed in the basement and that his body was later dragged to where it was found; that he was killed about noon since he then left the service station intending to go to San Pedro, was not in his car with the defendant at 1:30, and was not again seen although Mrs. Walls visited the house twice that afternoon; and that the defendant was the killer since he was killed with her gun and since her story, that he took the gun for target practice and then left with two rough "characters", is unbelievable.

The theory that the shooting and death occurred in the basement and that the body was thus dragged to the driveway, while possible, is not entirely convincing. The evidence is conflicting as to whether some of the blood found in the basement was human blood. While there were some marks and footprints under the car, and small areas appeared to have been swept or brushed, there were no signs of dragging on the larger area which had not been swept. No bullet was found in the basement or its walls. With children around that would be a natural place to find an empty shell. The fact that a larger amount of blood ran out after the body had been twice turned over is rather inconsistent with the theory advanced. The condition of the body and clothes were at least unusual, if such a dragging had occurred. It would seem more probable that a fight took place in the area where the glasses were found, which was followed by the shooting.

As to the time of death, the physician who performed the autopsy at 8:30 the following morning testified that only a moderate amount of rigor mortis appeared, that death had occurred between eight and twelve hours prior to that time, and that there was no post-mortem lividity. He testified that lividity is a discoloration which appears where a body remains over four hours in one position, and that after lividity once forms it remains in the same place when the body is turned over. The evidence is not sufficient to establish, beyond a reasonable doubt, that the killing occurred about 1:00 o'clock that day. The preponderant, if not the conclusive, evidence is to the contrary. This time element was, and is, strongly relied on by the respondent as showing opportunity, and because the deceased was not seen after that time.

The facts relied on as disclosing the identity of the killer are far from satisfactory, especially in view of the theory on which a conviction was obtained and is here supported. The defendant's statement, that the deceased left the house with the gun and then drove away with two people, is neither inherently unbelievable nor necessarily disproved by the fact that he had previously expressed an intention to leave at once for San Pedro. It was shown that he had recently been engaged in a violent encounter in San Pedro, in which a deadly weapon was used. While the defendant had purchased the gun found under the body, it was not shown to have been recently fired or, with any certainty, that the fatal bullet came from it. If the defendant shot her husband with this gun no good reason appears why it later became jammed. This matter is entirely unexplained unless he had attempted to use it in defending himself. The bruises on his face, which the autopsy surgeon said could have been caused by fist blows, would also indicate a fight before the shot was fired. There were no marks of such a struggle on the defendant. There was no evidence of any ill feeling between them, they had gone to a show the night before, and they were playing a friendly game when Mrs. Walls saw them that morning. The defendant displayed no nervousness when she took the children to a picture show about 1:30, or during the afternoon when Mrs. Walls saw much of her, but she was badly frightened when she ran for help that night.

Moreover, the effect of the testimony of two doctors is that she could not have lifted and dragged this body in the manner contended. Her own doctor testified that he removed her appendix on August 17, 1948, and that it burst during the operation; that he took out the stitches on August 31; and that he then told her not to do any lifting for three months. He further testified that, knowing her condition, he believed she would have suffered serious damage if she had lifted or dragged a body of this size for some 35 or 40 feet. Another doctor who examined the defendant during the week of September 13, 1948, testified that he looked for but found no bad results from the operation caused by exertion. Aside from any physical impossibility, it hardly seems reasonable that she would dare to go away for most of the afternoon and evening, leaving the body in an open basement. While the doctor who performed the autopsy testified that he then believed that the deceased could not have shot himself, he had testified at the inquest and preliminary hearing that the bullet wound could have been self-inflicted. It cannot be said that the evidence discloses, beyond a reasonable doubt, that the fatal shot was fired by the defendant.

[1] The evidence as to motive is also unsatisfactory. While proof of motive is not essential, People v. Greig, 14 Cal.2d 548, 95 P.2d 936, it is important in considering the effect of other evidence. There is much evidence about some debts owed by the defendant and which she had promised to pay soon. She had borrowed money from two of her friends, one of whom testified that she said she wanted it for investment, asking her not to tell the deceased. The other testified that in July the deceased had remarked in defendant's presence that he had taken out a $50,000 insurance policy for her benefit. The respondent argues that this supports the conclusion that she killed her husband to enable her to use whatever he had to repay her friends. She testified that she borrowed this money for her husband, at his request, telling the lenders what he told her to tell them. There is no evidence that she used any of the borrowed money, which nearly equals a business debt paid about that time by the deceased. She denied having ever heard of an insurance policy, and it was not shown that one existed. It does appear that the deceased was in financial trouble, and that she knew it. It is also argued that she killed her husband because she knew he was living with another woman in San Pedro. This contention is made for the first time on appeal and is not too forceful, in view of the evidence as a whole. While there is some evidence of a motive, it can hardly be said to be convincing.

[2] The evidence is entirely circumstantial and cannot be held to be both consistent with the idea of guilt and inconsistent with any other rational hypothesis. It does not meet this test with respect to the time element or the identity of the killer, even if it could be deemed sufficient as to the place where the killing occurred. Not being sufficient to establish the essential facts, beyond a reasonable doubt, it does not sustain the judgment. People v. Lamson, 1 Cal.2d 648, 36 P.2d 361; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631. While some suspicious circumstances appear, a conviction cannot rest upon mere suspicion or conjecture.

It is unnecessary to consider the many assignments of error in connection with the evidence and instructions. The trial lasted nine weeks, many hours were wasted on immaterial and trivial matters, and dozens of worthless exhibits were introduced. These factors were confusing at best and may well have caused the jury to consider the question of where the killing occurred, presented repeatedly and at great length throughout the trial, as the controlling issue.

It may be that the defendant knew more about this matter than she told, and the prosecution should not be foreclosed from retrying the case if better evidence has become available. The judgment and order are reversed, and the cause remanded for a new trial.

GRIFFIN and MUSSELL, JJ., concur.

BAILARD et al. v. MARDEN et al.*

Civ. 17259.

District Court of Appeal, Second District,
Division 1, California.
June 28, 1950.

Hearing Granted Aug. 24, 1950. *

Suit by Willis R. Bailard, and another, against Muriel Marden, and others, to enjoin defendants from using a lot purchased by them for other than private residential purposes. The Superior Court, Los Angeles County, Alfred E. Paonessa, J., rendered a judgment for the plaintiffs, and the defendants appealed. The District Court of Appeal, Drapeau, J., held that the plaintiffs were entitled to an injunction on the ground that business property was sold as the result of mutual and unilateral mistake.

Judgment modified, and, as modified, affirmed.

1. Injunction 🔑128

In action by vendors to enjoin purchasers of realty from using lot for other than private residential purposes, evidence supported finding of mutual and unilateral mistake affecting contract of sale. Civ. Code, § 3399.

2. Appeal and error 🔑996

To draw inferences and determine truth of legal controversies upon conflicting evidence is province of trial court.

3. Appeal and error 🔑1010(1)

When findings are supported by substantial evidence, they will not be disturbed by reviewing court.

4. Injunction 🔑113

Where vendors executed contract and deed to land with idea that no part of business area of subdivision was being conveyed, and purchasers prepared plans for a motel and were about to build, action thereafter by vendors to enjoin use of property for other than private residential purposes was not barred by laches.

5. Equity 🔑66

Parties who seek injunctive relief must do equity.

6. Injunction 🔑189

Where vendors sold business portion of subdivision as result of mutual and unilateral mistake and believed that residential realty only was being sold, court of equity would enjoin use of realty for other than residential purposes on condition that vendors permit purchasers to retain title with all improvements if they so elected, or that vendors pay purchase price of lot together with interest, cost of improvements and costs connected with transaction and litigation.

◆

Hiram T. Kellogg, Los Angeles, for appellants.

McGinley & Hanson and Howard D. Hanson, Los Angeles, for respondents.

DRAPEAU, Justice.

Plaintiffs purchased 434 acres of land in the Rancho Malibu in Los Angeles county. This famous old rancho runs along Pacific Coast highway for miles westerly from Santa Monica, and overlooks the Pacific ocean. The deed to plaintiffs contained restrictions providing that the major portion of the 434 acres could be used only for private, single-family dwelling houses. These restrictions were modified as to a strip 3,000 feet long and 1,300 feet deep, fronting on Pacific Coast highway.

---

* Subsequent opinion 227 P.2d 10.

Within that area residential income property and one motel could be maintained. And the motel could have a store and restaurant, including the sale of liquor. This part of the 434 acres will be referred to as the "business area."

Plaintiffs decided to subdivide and sell part of the tract which they had purchased. Surveyors were employed to prepare and record a subdivision map, to be used by reference for descriptions in deeds of lots within the subdivided land. The surveyors were instructed not to include any of the business area within the subdivision map. But, unfortunately, the instructions were overlooked or disregarded, and, unbeknownst to plaintiffs, a portion of the business area was included within the map. As one of the witnesses said: "Somebody pulled a boner."

Lot 21 as shown on the map was within the business area, and was purchased by defendants. This lot contained about 9/10 of an acre, faced 100 feet on the state highway, and was 430 feet in depth.

Neither plaintiffs nor defendants had any direct dealings with one another. Plaintiffs instructed their selling agents to sell residential lots only. However, the description in the contract of sale which was first entered into, and in the deed which followed, was by reference to the map. Plaintiffs executed the contract and the deed, still with the idea that no part of the business area was being conveyed.

Plaintiffs would not have executed either the contract or the deed had they known that any part of the business area was conveyed by either instrument. It was always their intention to themselves build, maintain, and operate the one motel permitted on the property. When they learned that defendants were preparing to put a motel on lot 21 they promptly moved to correct the mistake.

Defendants are a mother, one son, and two daughters. They purchased the lot as a family enterprise, "for a home and income." Defendant mother first saw the lot while motoring to San Francisco. She was attracted by its appearance and location. Considering its possibilities for business and for a home, defendants made inquiry of plaintiffs' selling agents. They did not ask as to restrictions.

The defendant son was technically qualified as an architect, to search title records, and to read maps. He and his mother went to the official county records and found the deed from plaintiffs' grantor. They read the description and the restrictions in that deed, and they also looked at maps which they were shown in the County Surveyor's office. These they compared with plaintiffs' subdivision map, and determined that lot 21 was within the business area.

Defendants then offered plaintiffs' agents $850 for the lot. The offer was presented to plaintiffs and accepted, contract of purchase and sale was entered into, and the deed followed later.

Defendants understood that only one motel would be permitted on the 434 acres. Their testimony is that while lot 21 was but a small portion of the business area, and a smaller portion of the whole tract, they hoped to get started first and thus acquire the right to maintain the one motel. They prepared plans for a motel, which were submitted to and approved by plaintiffs' grantor. They were about to build according to the plans when plaintiffs commenced this action, and defendants' financial backers withdrew.

The trial court found mistake on the part of plaintiffs in making the contract of purchase, and in making the deed, and rendered judgment enjoining defendants from using the lot for other than private residential purposes. From the judgment defendants appeal.

[1] Civil Code section 3399 provides that a contract may be revised for mutual mistake, or when a mistake is made by one party which the other at the time knew or suspected. The evidence supports the court's finding of mutual and unilateral mistake, as defined in this section.

The inference of unilateral mistake that defendants suspected plaintiffs would make a mistake in conveying lot 21 by reference to the map may be drawn from their knowledge and conduct. When they offered $850 for the lot they knew of the basic deed and maps; they knew that only one motel would be permitted on the whole tract; and they knew that lot 21 was but a small part of the whole property, and that the offered purchase price was but a small fraction of its real value for a motel. Auerbach v. Healy, 174 Cal. 60, 161 P. 1157; Baines v. Zuieback, 84 Cal.App.2d 483, 191 P.2d 67; Carpenter v. Froloff, 30 Cal.App.2d 400, 86 P.2d 691.

The inference may also be drawn of mutual mistake—that plaintiffs intended to sell and defendants intended to buy the lot for residential purposes only. The size, price, and location of the lot bear upon this issue. Such "for sale" signs as were on the property were all for residential sales. After defendants purchased the lot they did nothing about a motel until they made further inquiries of plaintiffs' grantor and were advised that lot 21 was in the business area, and possibly a motel could be built upon it. And such improvements as they built upon the lot, while called a tool shed, in fact constitute a family dwelling house, in which some of defendants have lived for a long time.

[2, 3] Of course, inferences to the contrary of those stated could have been drawn from the testimony. In our law, to draw inferences and determine the truth of legal controversies upon conflicting evidence is the province of the trial court. When findings are supported by substantial evidence they will not be disturbed by a reviewing court.

[4] Errors claimed in the admission of evidence, and in that specific findings are not supported by evidence, do not affect the pertinent findings upon which the judgment rests. No laches of plaintiffs are apparent.

[5] It is to be noted that the judgment enjoins defendants from using the lot except for residential purposes. As stated, there is substantial evidence to support the findings and judgment as to mistake. However, having appealed to equity, plaintiffs must do equity.

[6] Therefore, the judgment is modified and the cause remanded with directions to the trial court to restore defendants to the position they occupied at the time of the purchase of the lot, either (a) by permitting defendants to retain title to said lot as residential property with all the improvements thereon should they so elect; or (b) to ascertain and require plaintiffs to pay to defendants the purchase price of said lot, together with interest to date, and together with the costs of all improvements thereon and interest from the date of construction thereof, and together with all costs in connection with the transaction including costs of the litigation and taxes, all with interest and reasonable attorneys fees to be fixed by the court, whereupon title to revest in plaintiffs.

As so modified, the judgment is affirmed. Defendants to recover costs on appeal.

WHITE, P. J., and DORAN, J., concur.

---

98 Cal.App.2d 209

HALL v. HALL.

Civ. 3966.

District Court of Appeal, Fourth District, California.

June 26, 1950.

Action by William Walter Hall against Bessie M. Hall to quiet title to certain realty. The Superior Court, San Diego County, William A. Glen, J., entered a judgment for the plaintiff, and the defendant appealed. The District Court of Appeal, Griffin, J., held that evidence sustained finding that realty was not a gift from plaintiff, and sustained finding that plaintiff made all payments on contract of purchase.

Judgment affirmed.

1. Vendor and purchaser ⟹179

In action to quiet title to realty, title to which was in defendant's name, evidence sustained finding that all payments on contract to purchase were made by plaintiff.

2. Gifts ⟹49(4)

In action to quiet title to realty, title to which was in defendant's name, evidence sustained finding that realty was not a gift from plaintiff notwithstanding claimed presumption of gift allegedly arising out of parties' meretricious relationship.

3. Common law ⟹9

One should not be permitted to do indirectly that which he is forbidden to do directly.

4. Appeal and error ⟹931(1)

In support of a judgment, every intendment is presumed in its favor unless contrary is shown.

5. Convicts ⟹3

Where defendant agreed that she would purchase realty in her own name and convey title to plaintiff, a paroled convict, when his civil rights were restored, and thereafter plaintiff's civil rights were restored so as to enable him to bring action to enforce rights against defendant, effect of such restoration was to ratify plaintiff's action in executing agreement through defendant and to restore to him rights necessary to effect a complete recovery. Pen. Code, § 2600.

F. W. Powell, San Diego, for appellant.

Roy Daily, Sacramento, for respondent.

GRIFFIN, Justice.

Plaintiff brought this action against defendant in the form of an ordinary quiet title action, alleging generally that defendant claimed an adverse interest in certain property in El Cajon; that in November, 1944, plaintiff instructed defendant to negotiate for the purchase of said property by a contract of purchase for and on his behalf, and that plaintiff would furnish the money therefor but title was to be taken in defendant's name with the understanding that after all payments were made and plaintiff was entitled to hold title thereto, defendant would transfer said property to him. Under the prayer of the complaint plaintiff asked that it be declared that defendant held such title as trustee for plaintiff, that title be quieted in him and that defendant be ordered to convey it to him.

Defendant Bessie M. Hall met plaintiff William Walter Hall in 1944. She was at that time employed as a waitress. She was then married to one Sipes who was overseas. She was living with one Harrington, by whom she became pregnant. Harrington married another woman and left defendant stranded. Plaintiff, who was on parole from Folsom prison, pitied her because she feared her husband would find out about her condition and he took her into his parents' home for care. After remaining there for some time they moved to various auto courts and lived together as husband and wife without the benefit of a marriage ceremony. Plaintiff decided to purchase a little home for $900, where they might live unharmed from verbal attacks of gossip. Plaintiff, who, under the rules pertaining to his parole, was precluded from entering into any civil contract, agreed with defendant that she might purchase the property in the name of Bessie M. Hall, and when he was eligible to hold title to the property she was to transfer such title to him. As between plaintiff and defendant there was some "talk" about defendant obtaining a divorce from her husband and also about them getting married, and that after plaintiff "got out" of prison they would be married and that he then wanted the place in his name.

[1] The evidence is conflicting as to who made the bulk of payments on the contract of purchase. However, the court found that plaintiff made all such payments and the evidence fully supports the finding. Plaintiff encountered financial straits in meeting all of his obligations. He purchased an oil station, on contract, and during the rationing days he burglarized different establishments, stole gasoline ration stamps, and sold them. Apparently some of this

money was used in finishing the house payments and paying other outstanding obligations. His parole was revoked and he was recommitted. During the interim defendant visited plaintiff at Folsom and also wrote to him. The letters bear evidence that both plaintiff and his mother were endeavoring to have defendant relinquish title to the property but defendant refused unless she was paid some money. Later, her husband, Sipes, died. She left for the East and married one James Hall on October 31, 1945. She then threatened to sell the property. Plaintiff secured written consent of the Adult Authority, apparently giving him the right to institute this action. He later was released from prison, appeared at the trial, and testified to the facts related. Defendant appeared by deposition only.

The court found in all respects in favor of plaintiff, and quieted his title against defendant.

Defendant appealed and claims first that in a case of this kind where the parties are living in a meretricious relationship, there is a presumption of the gift on the part of the man to the woman, and secondly, that where the man (plaintiff) in such a situation, after having placed the title to the real property in the name of the woman (defendant), being in *pari delicto* with her, sues to recover the property from her in an action to quiet title and to establish a trust, both of which are equitable proceedings, that the courts of this state, as courts of equity, will not grant relief to such a plaintiff, particularly when it was part of his own scheme to circumvent the criminal parole laws, citing Bertelsen v. Bertelsen, 7 Cal.App. 258, 94 P. 80; Porter v. Douglass, 7 Cal.App. 429, 94 P. 591; Elliott v. Merchants Bank, etc. Co., 21 Cal.App. 536, 132 P. 280; Chateau v. Singla, 114 Cal. 91, 45 P. 1015, 33 L.R.A. 750, 55 Am.St.Rep. 63; and 15 Cal. Law Review, 160; Kimbro v. Kimbro, 199 Cal. 344, 249 P. 180.

[2] As to the first complaint, the court's finding that the property was not a gift from defendant, notwithstanding the claimed presumption of gift, is sufficiently supported by the evidence and such finding is conclusive on appeal. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301.

The second point presents a closer question. In the Bertelsen case the trial court found that there was a gift. However, the decision gives an expression to the thought that, under the evidence pertaining to the parties living in meretricious relationship, the payments upon the property were made *in consideration* of a continued course of prostitution, and the court should have left the parties where it found them in respect to the judicial relief sought. In the instant case it does not affirmatively appear that the *consideration* flowing to plaintiff was a continued course of prostitution. The understanding was that plaintiff and defendant *contemplated matrimony* at some future time and the defendant was to hold the title to the property in her name until the plaintiff was relieved of the restrictions imposed upon him by virtue of the conditions under which he was paroled.

Norman v. Burks, 93 Cal.App.2d 687, 209 P.2d 815, 816, is somewhat similar in principle to the question here involved. Plaintiff there was separated from his wife. He met defendant, "talked" of marriage, and placed considerable property in her name. Later, defendant called plaintiff and told him "all was off" between them and that she was going to marry another man, which she did. There, as here, "thus ended this idyl of Acadie". It was there held that the payment of the purchase price of the property gave rise to the presumption that the one paying for it had an equitable interest therein; that the breach of defendant's agreement to marry plaintiff, even though at that time plaintiff was married to another, was a promise fraudulently made and therefore defendant held the property for plaintiff's use and benefit. To the same effect is Janes v. Goyne, 80 Cal.App.2d 686, 182 P.2d 231, in which case plaintiff and defendant lived in illicit relationship under promise of marriage and plaintiff acquired property with defendant as joint tenants with the understanding that they would subsequently marry. When defendant later refused, plaintiff brought a quiet title action and the court found it was a proper case for equitable relief in favor of the plaintiff.

The evidence here presented brings plaintiff within the rule established in those cases, where the defendant holds title under an agreement to marry and fraudulently breaches the agreement and marries another.

The only remaining question is whether or not the placing of the property in defendant's name for plaintiff's benefit, while plaintiff was subject to rules that would prevent him from entering into any civil contract, would preclude a recovery herein.

Section 2600 of the Penal Code provides that a sentence of imprisonment in a state prison suspends all the civil rights of the person so sentenced, but the adult authority may restore such rights as it may deem proper, with certain exceptions not here involved. See, also, sec. 3054 Penal Code, which provides that the scope or extent of such civil rights shall be determined by such board as, in the judgment of such board, is for the best interest of society and such paroled person. It has been held that such suspension prevails during the term of parole. In re Sanders, 47 Cal.App. 368, 190 P. 647. Sec. 2603 of the Penal Code provides that these sections should not be construed as rendering the persons mentioned incapable of making a will or making or acknowledging a sale or conveyance of property.

[3] It is a general rule of law that one should not be permitted to do indirectly that which he is forbidden to do directly. Hunter v. Superior Court, 36 Cal.App.2d 100, 109, 97 P.2d 492. In re Gainfort, D.C., 14 F.Supp. 788, states that the status of convicts in regard to civil rights in California is rather uncertain and that the trend of the law is to lessen the severity and harshness of the common-law penalties in relation to convicts, their property and rights; and that this is in accord with the modern notion that imprisonment of a felon is rather a means for protecting society than a punishment imposed upon an individual. Citing California Highway Commission Department of Engineering v. Industrial Accident Commission, 200 Cal. 44, 251 P. 808, 49 A.L.R. 1377.

[4, 5] The exact terms of the grant of authority is not before us in the record. Counsel for plaintiff informed the court that he had "here a permission of the Adult Authority, which we have procured before we filed our suit", and offered it in evidence. The trial judge ruled that "that is a part of the defendant's case". The agreement to purchase was made while plaintiff was on parole. It may have required the limited restoration of plaintiff's civil rights before he could properly execute such an agreement. The extent of the authority is not clear. The court found that plaintiff was entitled to recover. In support of the judgment every intendment is presumed in its favor unless the contrary is shown. Owen v. Morton, 24 Cal. 373. Nevertheless, when the Adult Authority did restore to plaintiff his civil rights, which would enable him to bring this action to enforce those particular rights, it, in effect, must have ratified his action in executing the agreement through defendant, as trustee, and it would follow that it intended to restore to him such rights as were necessary to effect a complete recovery in the action. Should it be otherwise, there would be no point in granting plaintiff the bare right to bring such an action, knowing that the agreement under which the action was brought could not be legally enforced by him in a court of equity. Since the court found, upon sufficient evidence, that defendant was merely holding title to the property in trust for plaintiff, in the absence of clearer showing of a more limited restoration of civil rights and in the absence of objection on the part of the Adult Authority, defendant, as trustee, should not be allowed to take advantage of section 2600 of the Penal Code, retain the property as her own, and dispose of it to the detriment of the plaintiff. Nishi v. Downing, 21 Cal.App.2d 1, 67 P.2d 1057; 16 Am.Jur. 14, 15, secs. 8 and 9; 41 Am.Jur. 912, sec. 39; 16 Am.Jur. 487, 488, sec. 87; Shiba v. Chikuda, 214 Cal. 786, 7 P.2d 1011; Hart v. Kanaye Nagasawa, 218 Cal. 685, 24 P.2d 815.

Judgment affirmed.

BARNARD, P. J. and MUSSELL, J., concur.

98 Cal.App.2d 296

ARMSTRONG et ux. v. ZIBELL et al.

Civ. 17590.

District Court of Appeal, Second District, Division 1, California.

July 6, 1950.

Rehearing Denied July 31, 1950.

Hearing Denied Aug. 31, 1950.

Tom Armstrong and wife brought an action against Hazel Brown Zibell, also known as Hazel B. Zibell, and others, to recover damages for personal injuries sustained when plaintiff wife tripped and was thrown to the ground while walking along a driveway used in common by all occupants of premises owned by the defendant Zibell. The Superior Court, Los Angeles County, Stanley Mosk, J., entered judgment for the plaintiffs and denied defendants' motion for judgment notwithstanding verdict, and the defendants appealed. The District Court of Appeal, Drapeau, J., held that whether defendants had failed to use ordinary care and whether plaintiff wife was contributively negligent were questions of fact for the jury, and that the record disclosed sufficient evidence to sustain a jury's verdict.

Affirmed.

1. Landlord and tenant ⚷164(1)

Landlord is not liable to tenant for injury due to defective condition or faulty construction of demised premises in absence of fraud, concealment, or covenant, except when portion of premises is reserved by landlord for use in common by himself and his tenants, or by different tenants, in which case duty is imposed upon landlord to use ordinary care to keep that particular portion of premises in safe condition.

2. Landlord and tenant ⚷164(6)

Landlord may not be charged with responsibility for defective condition unless he had actual knowledge of condition or condition existed for such period of time as to justify conclusion that, in exercise of ordinary care, landlord should have known of its existence within such time as would have given him reasonable opportunity to make repairs.

3. Negligence ⚷10

One test for determining issue of negligence is whether person of ordinary prudence should have foreseen or anticipated that someone might be injured by his action or nonaction.

4. Appeal and error ⚷1008(1)

Ordinarily, it is function of trial court to determine from evidence whether person has failed to use ordinary care.

5. Negligence ⚷66(1)

Previous knowledge of defective condition is not, of itself, conclusive evidence that plaintiff failed to exercise due care.

6. Landlord and tenant ⚷169(6)

In action by tenant to recover damages for personal injury resulting from fall on driveway used in common by all occupants of premises allegedly caused by defective condition of driveway, evidence sustained jury's finding that landlord had failed to use ordinary care and that tenant had not been contributively negligent.

◆

Moss, Lyon & Dunn, Los Angeles, Henry F. Walker, Los Angeles, of counsel for appellants.

Edward Raiden, Los Angeles, and A. J. Weiss, Hollywood, for respondents.

DRAPEAU, Justice.

Plaintiffs were lessees and defendants were lessors of an unfurnished bungalow apartment in a multiple unit building. The only means of ingress and egress to such building was upon a concrete driveway leading to garages in the rear. This driveway was used in common by all occupants of the premises, including the owner defendant Zibell. It is conceded that the driveway was broken and cracked in several places.

Plaintiff wife was returning to her home about 5:30 in the evening of July 18, 1947. As she walked along the driveway near the entrance to her apartment she tripped and was thrown to the ground. In such fall she fractured her left femur, resulting in probable permanent disability.

The instant action for damages against the owners of the property was tried with a jury. At the conclusion of plaintiffs' case a motion for nonsuit was made and denied; at the end of the trial a motion for directed verdict was denied. The jury returned its verdict in favor of plaintiffs for $10,000, and thereafter motions for judgment notwithstanding the verdict and for new trial were made and denied.

Defendants appeal from the judgment based upon the verdict and also from the order denying their motion for judgment notwithstanding the verdict.

At its entrance near the street, the driveway was cracked and broken but level. Proceeding from the street toward respondents' apartment it was more cracked than broken. In front of the stairs leading to respondents' apartment, the middle flagstone was about two inches higher than the lower one. At the time she fell, respondent wife was carrying several packages of groceries. She turned north to go into her apartment, crossed the crack and started to speak to appellant Zibell and another tenant, who were standing nearby, and "the ball of my left foot hit the crack and down I went. * * * the ball of the foot slid down the crack and threw me off balance. * * * turning my foot under, and I fell."

Respondents admitted that the driveway was cracked at all times during the five years they had lived on the premises. And it was stipulated that appellant Zibell (who was both a tenant and an owner during that period) knew of the condition of the driveway prior to the accident.

Appellants urge that the evidence fails to establish any right of recovery against them, because (a) respondent wife had equal knowledge with them of the alleged defective condition of the driveway; (b) having such knowledge, she remained and exposed herself to the hazard, hence she assumed the risk of harm arising therefrom; and (c) by her continued use of the driveway, she was guilty of contributory negligence.

In support of their contentions, appellants rely upon Mautino v. Sutter Hospital Association, 211 Cal. 556, 560, 296 P. 76, 77, where a private nurse on duty in defendant's hospital fell on a slippery floor. It was there held:

"It is clear from the plaintiff's testimony that she had full knowledge of the condition of the floor during all the afternoon of September 28th and for two hours in the forenoon of the next day. It does not appear that the defendant's knowledge thereof was superior to that of the plaintiff. * * *

"'The owner is not an insurer of such persons, even when he has invited them to enter. Nor is there any presumption of negligence on the part of an owner or occupier merely upon a showing that an injury has been sustained by one while rightfully upon the premises. The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant *and not to the person injured* that a recovery is permitted. * * * There is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant.' 20 R.C.L. pp. 55–57; Goldstein v. Healy, 187 Cal. 206, 211, 201 P. 462; Shanley v. American Olive Co., 185 Cal. 552, 555, 197 P. 793."

Appellants also direct attention to Walker v. Greenberger, 63 Cal.App.2d 457, 147 P.2d 105, which follows the ruling in the hospital case.

[1, 2] However, in Harris v. Joffe, 28 Cal.2d 418, 423, 170 P.2d 454, 458, where a tenant slipped and fell while walking through the entrance way to the apartment where she lived, our supreme court stated as follows:

"The general rule that a landlord is not liable to a tenant for injuries due to the defective condition or faulty construction of the demised premises in the absence of fraud, concealment or covenant, is subject to exception. When a portion of the premises is reserved by the landlord for use in common by himself and his tenants, or by different tenants, a duty is imposed upon the property owner to use ordinary care to keep that particular portion of the premises in a safe condition. Bock v. Hamilton Square Baptist Church, 219 Cal. 284, 287, 26 P.2d 7; Dorfer v. Delucchi, 61 Cal.App.

2d 63, 64, 141 P.2d 905; Turner v. Lischner, 52 Cal.App.2d 273, 277, 126 P.2d 156; Reiman v. Moore, 42 Cal.App.2d 130, 136, 108 P.2d 452; Kossine v. Styliano, 40 Cal. App.2d 721, 723, 105 P.2d 952; Ellis v. McNeese, 109 Cal.App. 667, 670, 293 P. 854. But a landlord may not be charged with responsibility for a defective condition unless he had actual knowledge of the condition, or it has existed for such a period of time as to justify conclusion that, in the exercise of ordinary care, he should have known of its existence within such time as would have given him a reasonable opportunity to make repairs. [Citation of authorities.]

[3, 4] "One test for determining the issue of negligence is whether a person of ordinary prudence should have foreseen or anticipated that someone might be injured by his action or nonaction. Terrell v. Key System, 69 Cal.App.2d 682, 686, 159 P.2d 704; Schwerin v. H. C. Capwell Co., 140 Cal.App. 1, 2, 34 P.2d 1050; Sweatman v. Los Angeles Gas & Electric Corp., 101 Cal. App. 318, 322, 281 P. 677; see Rest., Torts, §§ 284, 289, 290, 291. And, ordinarily, it is the function of the trial court to determine from the evidence whether a person has failed to use ordinary care. Reiman v. Moore, supra; Kossine v. Styliano, supra. * * *

"It was necessary for the tenants to use the vestibule since it was the only entrance from the front of the apartment house. It was at all times under the care and control of the owner. * * * There is in the record substantial evidence which, with inferences deducible therefrom, amply support the findings in favor of the plaintiff."

[5] On the question of contributory negligence, the cited case holds: "* * * the finding of the trial court on this issue is also fully justified by the evidence. Previous knowledge of the defective condition is not, of itself, conclusive evidence that a plaintiff failed to exercise due care. Hughes v. Quackenbush, 1 Cal.App.2d 349, 356, 37 P.2d 99; Finch v. Willmott, 107 Cal.App. 662, 667, 290 P. 660 * * *."

[6] In the circumstances presented, whether appellants had failed to use ordinary care and whether respondent wife was contributively negligent were questions of fact for the jury to determine. The record discloses amply sufficient evidence to support the jury's verdict.

The judgment and the order appealed from are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

98 Cal.App.2d 220

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. GREENBACH et al.

Civ. 14064.

District Court of Appeal, First District,
Division 1, California.
June 27, 1950.

The Bank of America National Trust & Savings Association (a national banking association) brought action against Joseph Greenbach and others to set aside a settlement of the indebtedness of the named defendant to the plaintiff for a fraction of its face value on ground of alleged fraud and misrepresentations of the named defendant as to the amount of his assets. The Superior Court, City and County of San Francisco, James G. Conlan, J., rendered a judgment that plaintiff was entitled to rescission and cancellation of the settlement but was not entitled to a judgment for the full amount of the original judgment, and all parties appealed. The District Court of Appeal, Peters, P. J., held that the defendants were properly denied a jury trial, that evidence sustained finding that plaintiff acted with reasonable diligence in discovering alleged fraud, so that action was not barred by limitations or laches, and that plaintiff was not limited to a judgment for the pro rata share of the assets of the named defendant as they existed on date of settlement, but was entitled to have the original judgment reinstated.

Judgment affirmed on appeal of defendants, and judgment reversed on appeal of plaintiff.

1. Pleading ⚷249(3)

In action by bank against former judgment debtor and third persons to whom he had transferred his property, to set aside settlement of judgment for fraction of face value because of alleged fraud and misrepresentation of former judgment debtor as to extent of his property, and to recover difference between amount of judgment and settlement, when defendants sought a jury trial, on ground that action was one at law, court properly allowed amendment of complaint to seek rescission, even if, by amendment, action was changed to one in equity.

2. Jury ⚷14(6)

An action for rescission is equitable in nature and a jury trial is not allowed as a matter of right, and the mere fact that a conspiracy is charged in the complaint does not change nature of the cause of action.

3. Torts ⚷22

Where two or more persons are sued for a civil wrong, it is the civil wrong resulting in damage and not the conspiracy, which constitutes the cause of action.

4. Pleading ⚷62

Where two or more persons are sued for a joint wrong, it may be necessary to prove a previous conspiracy between them in order to secure joint recovery, but it is not necessary to aver such previous combination in the complaint, and, if averred, it is not to be considered as of the gist of the action.

5. Fraud ⚷31

When a creditor is induced by the fraud of the debtor to settle a judgment for less than its face value, the creditor may either affirm the contract and sue for damages for the fraud, or he may rescind.

6. Jury ⚷13(1)

In determining whether an action is legal or equitable and consequently whether a jury may be demanded as a matter of right, court is not bound by the form of the action, but rather by the nature of the rights involved, as determined from the whole of the pleadings, and the facts of the particular case.

7. Jury ⚷14(6)

In action by bank against former judgment debtor and third persons to whom he had transferred his property, to set aside settlement of judgment for a fraction of its face value because of alleged fraud and misrepresentation of former judgment debtor as to extent of his property, and to recover difference between amount of judgment and settlement, defendants were not entitled to a jury trial as a matter of right, since the action was equitable.

8. Jury ⚷13(15)

A plea by defendant of the statute of limitations does not ipso facto turn an equitable action into a legal one so as to entitle the defendant to a jury trial, since the statute may be availed of as a defense in suits in equity as well as at law.

9. Trial ⚷139(1), 382

If an action is in equity, the trial judge is empowered to find the facts, and if it is at law, a jury has that power.

10. Jury ⚷13(15)

In action by bank against former judgment debtor and third persons to whom he had transferred his property, to set aside settlement of judgment for a fraction of its face value because of alleged fraud and misrepresentation of former judgment debtor as to extent of his property, and to recover difference between amount of judgment and settlement, defendants were not entitled to a trial by jury because they pleaded the statute of limitations, where the action was for rescission and therefore equitable. Code Civ.Proc. §§ 338, subd. 4, 343.

11. Fraud ⚷22(1)

A party has a duty to investigate where he has notice of facts which indicate fraud, but such duty to investigate is a relative matter.

12. Compromise and settlement ⚷8(3)

A judgment creditor, in entering into a settlement with debtor, has a legal right to rely on the statements made by the debtor, and, if the debtor is guilty of deliberate fraud, he cannot say that the creditor was too credulous because he placed too much reliance on the statements made by the fraudulent debtor, and was therefore barred from having the settlement rescinded.

13. Compromise and settlement ⇨8(3)

A debtor seeking to compromise an admitted debt must make a full and complete disclosure, and must exercise the utmost good faith.

14. Compromise and settlement ⇨8(3)

In effecting a composition agreement, the law demands the utmost good faith on the part of the debtor and will not permit him, by pretending to be insolvent, to induce his creditor to accept a small portion of the debt in lieu of the whole when in fact his property is amply sufficient to pay the creditor in full.

15. Compromise and settlement ⇨8(3)

Good faith requires of a debtor, before he shall be permitted to profit by a composition agreement, to make a full and fair disclosure of his effects, and that no concealment, deception, or fraud should be practiced.

16. Fraud ⇨17

Even though one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiry, he is bound, not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which materially qualify those stated, and, if he speaks at all, he must make a full and fair disclosure.

17. Fraud ⇨23

When a fact is peculiarly within knowledge of a person making a representation and not within the knowledge of the person to whom it is made, the latter has the right to rely on the representations of the former respecting such fact.

18. Fraud ⇨20

A party making a false representation cannot escape responsibility by showing that the other party might have ascertained that such representation was untrue, or that he had no right to believe it.

19. Fraud ⇨23

Where one is justified in relying, and in fact does rely, on false representations, his right of action is not destroyed because means of knowledge were open to him.

20. Fraud ⇨23

The doctrine of constructive notice does not apply where there has been a misrepresentation of fact, and if the representation is of a character to induce action and does induce it, that is enough to give a right of action.

21. Appeal and error ⇨1008(1)

Though there is a reasonable duty to investigate, and though it is generally true that notice of facts and circumstance that would put an ordinary man on inquiry may be held to be the equivalent of discovery, question as to whether known facts were sufficient to put defrauded person on inquiry is one of fact for trial court.

22. Fraud ⇨23

Whether a plaintiff was negligent in relying on the truth of misrepresentations by defendant is immaterial, and, if under the facts, because of relation of parties involving trust and confidence, or because defendant was in a position to know the facts which was definitely superior to position of plaintiff, or where an investigation by plaintiff could not be easily made, plaintiff is justified in relying on false statements.

23. Fraud ⇨22(1)

Unless the circumstances are such that inquiry becomes a duty of one to whom misrepresentations are made, and failure to make inquiry is a negligent omission, there is no duty of inquiry.

24. Fraud ⇨23

Courts will not lightly seize on some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him, on ground that he did not discover that he had been cheated as soon as he might have, and it is only where party defrauded should plainly have discovered fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part.

25. Compromise and settlement ⚷19(3)
Limitation of actions ⚷197(2)

In action by bank against former judgment debtor and third persons to whom he had transferred his property, to set aside settlement of judgment for a fraction of its face value because of alleged fraud and misrepresentation of former judgment debtor as to extent of his property, and to recover difference between amount of judgment and settlement, evidence sustained finding that bank acted with reasonable diligence in discovering alleged fraud, so that recovery was not barred by laches or limitations. Code of Civ.Proc. §§ 338, subd. 4, 343.

26. Compromise and settlement ⚷19(2)

Bank which was induced by alleged fraud of its judgment debtor to enter into a settlement of judgment on alleged misrepresentations by judgment debtor as to his assets, should not have been limited in rescission action to a judgment for the pro rata share of the assets of the judgment debtor as they existed on date of settlement when judgment debtor was indebted to other creditors, and original judgment should have been reinstated, where assets of judgment debtor were sufficient at time of suit to pay the original judgment. Civ.Code, § 1691, subd. 2.

27. Compromise and settlement ⚷19(2)

The legal effect of a rescission of a settlement agreement because of fraud of debtor in inducing the settlement is to restore both parties to their former position as far as possible.

28. Compromise and settlement ⚷19(2)

Concurrent with award of rescission of settlement agreement induced by debtor, trial court may award money damages or order such other relief as justice may require.

29. Compromise and settlement ⚷19(2)

The purpose of a decree awarding rescission of a settlement agreement induced by fraud of debtor is to restore, so far as possible, the "status quo" which means the return to each party, so far as possible, of the property that he parted with at time of settlement. Civ.Code, § 1691, subd. 2.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Status Quo".

30. Compromise and settlement ⚷19(2)

Statute providing that one defrauded in purchase of property is entitled to recover difference between actual value of that which he received, together with any additional damage arising from transaction, and providing that nothing in the statute shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled, was not applicable in action to rescind settlement agreement because of alleged fraud of judgment debtor, since the statute is limited to actions for damages for fraud and deceit. Civ.Code, § 3343.

◆

Erskine, Pillsbury & Tulley, Ulysses A. Gribble, George D. Schilling, all of San Francisco, for plaintiff and appellant and respondent.

Thos. J. Riordan, Young, Hudson & Rabinowitz, Leon A. Blum, all of San Francisco, for defendants and respondents and appellants.

PETERS, Presiding Justice.

This action was commenced by the Bank against Greenbach and others to set aside the settlement, for a fraction of its face value of a judgment against Greenbach, held by the Bank, on the ground that such settlement had been secured by the fraud and misrepresentations of Greenbach. Over the vigorous objection of defendants that they were entitled to a jury trial, the cause was tried before the court without a jury. Judgment was entered decreeing that the settlement should be set aside because of fraud in its procurement, and awarding to the Bank a money judgment for a portion of its demand. The judgment also ordered the other named defendants to apply the property in their hands belonging to Greenbach in satisfaction of the judgment. From this judgment all the defendants and the Bank appeal.

Facts.

The facts as disclosed from the findings and record are as follows: On November 17, 1939, the Bank obtained a judgment against Greenbach for $88,050.66. On January 2, 1940, Greenbach, who had paid nothing on this judgment, began negotiating with the Bank for a settlement. During these negotiations Greenbach represented that he was unable to pay the judgment, that he owned no properties not exempt from execution, and that unless he could settle the claims of his various creditors, including that of the Bank, he would be forced into bankruptcy. He offered the Bank $5,000 in full settlement of its judgment. In connection with these negotiations, and as part of the settlement agreement, Greenbach signed and delivered to the Bank an affidavit dated February 5, 1940, in which he averred and agreed that:

> "With knowledge that said Bank * * is accepting said settlement of $5,000.00 only because it relies upon my statement that I have no assets, and upon this affidavit, I hereby certify, state and declare under oath, that I have no property or assets of any kind or nature; no money due me from any person; no real property; no stocks; no bonds; no money in bank; no credits due me; no beneficial interest in any property held by any other person for me; no property standing in the name of assignees; trustees or any other persons whatsoever; for me and for my benefit" with the exception of certain designated properties exempt from execution, and an "Undetermined equity in some shares of stock in the Newbridge Park Realty Co., and Bayshore Realty Co., subject to present negotiations with the record owner thereof.
>
> "I definitely understand and agree that said Bank shall be bound by said settlement and by its acceptance of said $5,000.00 settlement, only upon the condition that the statements herein made by me as to my personal responsibility and as to my assets, are true.
>
> "I further agree that in the event of a rescission of this settlement, the said Bank may retain the sum received hereunder and apply said sum on account of the original obligation, and further waive the right to plead the Statute of Limitations as a defense to said original obligation."

As to the "undetermined equity" in the two corporations above referred to, just prior to the execution and delivery of the affidavit, Greenbach represented to the Bank that he owned none of the capital stock of these corporations, that his sister-in-law was the owner of all of such stock, and that he had worked for her and for the two companies for a number of years at a nominal salary. He told the Bank that, after settling with his creditors, he hoped to obtain from his sister-in-law some stock in these two companies.

The trial court found, and the findings are not challenged, that all of these representations were made by Greenbach with the intent of obtaining the settlement of the outstanding judgment by fraud and deceit; that they were false; that the Bank believed that these statements were true and had no notice or knowledge that they were not true; and that if the Bank had not believed the representations it would not have agreed to the settlement.

The record shows, the trial court found, and such findings are not challenged, that the representations as to assets were false and known by Greenbach to be false, when made by him. In this connection the trial court found that at the time the settlement was entered into, there was owing to Greenbach from the Bayshore Realty Company the sum of $3,272.07; that this amount was on the corporation's books as a credit to him; that, in addition, at that time Greenbach was the owner of one-half of the capital stock of the Mutual Hotel Operating Company, Ltd.; and was the real and beneficial owner of all of the capital stock of the Bayshore Realty Company and the Newbridge Park Realty Company; that on December 2, 1939, all of the shares in these latter two companies (except two shares in each held by other directors) were issued in the name of his sister-in-law, Katherine de Salas; that, after the certificates had been issued to her, they were endorsed by her to Greenbach who kept them under his control; that on December 2, 1939, Greenbach had these certificates canceled and new certificates issued by these corporations to his wife; that at the time of the negotiations and settlement the shares stood in her name; that she held them for Greenbach and he was the real owner of them; that the statement made by Greenbach in his affidavit that he had an undetermined equity in these shares subject to present negotiations with the record owners, was untrue and false, for he was the real and beneficial owner of all these shares; that on December 2, 1939, Greenbach had de Salas removed as the president and director of these corporations and had his wife appointed in her place; that had the Bank known of these holdings of Greenbach, it would not have made the settlement; that Greenbach had the certificates representing these shares of stock placed in the names of his sister-in-law and wife for the purpose of concealing his assets from his creditors and to avoid paying them; that for many years prior to the settlement these corporations owned real and personal properties of substantial value, and during this period Greenbach owned all of the capital stock, was the managing officer, and completely controlled the corporations for his own benefit, causing valuable properties of his own to be transferred to them; that on January 10, 1940, Greenbach had created the Belle Haven Realty Company, and on February 28, 1940, he had the Bayshore and Newbridge companies transfer a substantial part of their assets (including the Californian Hotel in Sacramento, and other hotels and bars in California) to Belle Haven; that the certificate showing stock ownership in Belle Haven was issued to William Greenbach (Greenbach's son) for the purpose of concealing Greenbach's ownership from his creditors; that Greenbach has always been and is the real and beneficial owner of Belle Haven.

The record shows, the trial court found, and such findings are not attacked, that the falsity of the representations was discovered by the Bank under the following circumstances: That on December 19, 1944, Greenbach filed an action in Sacramento against one Casey and the Mutual Hotel Operating Company (which conducted the Californian Hotel) in which he alleged that he had at all times owned one-half of all Mutual's capital stock; that this complaint came to the attention of Clayton, an employee of the Bank and the employee who had carried on the settlement negotiations with Greenbach; that subsequent investigations by the Bank eventually led to the uncovering of the concealed assets; that, among other things, the Bank discovered that in 1930, Greenbach had transferred certain of his hotel properties to his sister-in-law in exchange for property which she claimed to own in Guatemala; that the investigation revealed that his sister-in-law was never the record owner of this Guatemala property, and that no transfer of the property to Greenbach was indicated by the Guatemalan records; that further investigation revealed information which indicated the concealments set forth above.

After making these investigations the Bank commenced the instant action on November 9, 1945.

The court further found that the Bank had the right to rely and did rely upon Greenbach's representations; that it was not required, after the settlement, to make any investigation as to the truth of the representations; that the Bank acted with reasonable diligence and promptness in investigating the truth of the representations after discovering the complaint in the action against Casey; that in the time which elapsed between the discovery and the commencement of the action, Greenbach did not change his position in any way to his detriment; that the Bank was not barred from bringing this action by laches nor by section 338, subd. 4, or section 343, of the Code of Civil Procedure.

The court also found that the Bank did not request information from Greenbach to substantiate his representations as to his assets, because it relied on their truth, as it had the right to do; that the papers and records of Greenbach were not available to the Bank at the time of the settlement or thereafter, and none of the public records relating to Greenbach's assets, or the assets of the corporations, would have revealed the true ownership of the properties controlled by Greenbach; that each of the defendants named in the complaint was a party to the fraud and knew that Greenbach was attempting to conceal his assets; that the net worth of Greenbach at the time of the settlement was $100,000.

On these facts the trial court concluded that the Bank was entitled to a rescission and cancellation of the settlement, but was not entitled to a judgment for the full amount of the original judgment ($88,050.66), but was only entitled to judgment for $24,300, with seven per cent interest from February 5, 1940, the date of the settlement agreement. The court arrived at this figure of $24,300 by its findings that if Greenbach, in February of 1940, had divided the $100,000 then owned by him *pro rata* among all his creditors, the Bank would have received but $29,300, and that the $5,000 already received should be deducted from that figure. The court also concluded that the other defendants named in the complaint should be ordered to apply property of Greenbach's in their hands to the satisfaction of the Bank's claim. Judgment was entered accordingly. Greenbach, the other defendants, and the Bank appeal.

Defendants' Appeal.

Were the defendants entitled to a jury trial because of the form of the action?

The defendants do not attack the sufficiency of the evidence to support the basic findings that Greenbach knowingly made the false statements and that the Bank relied upon them, but seek to reverse the judgment on other grounds. Their first major contentions are that the complaint was for damages for fraud, that such an action is in law, and that they were entitled to a jury trial as a matter of right. The complaint, as originally filed, set forth the facts substantially as above set forth and prayed for a money judgment against all of the named defendants, including Greenbach. Defendants demanded a jury trial on the ground that the complaint was framed upon the theory that defendants had entered into a fraudulent conspiracy, and prayed for a money judgment in the nature of damages. Such a complaint, it is urged, is in law and not in equity.

This problem was thoroughly discussed before the trial court at the commencement of the trial. The first 133 pages of the transcript contain the account of the battle between counsel over the issue as to whether the action was one in law for money damages, or in equity for rescission. The main contention of Greenbach at that time was that the action was not one for rescission because of the allegations of conspiracy, and because paragraph 1 of the prayer of the complaint alleged: "Wherefore, plaintiff prays:

"1. That the said settlement of plaintiff's judgment against the said Joseph Greenbach be set aside and that plaintiff have judgment against all the defendants herein, for the sum of $83,050.66 [$88,050.66 less the $5,000 received] with interest thereon at 7% per annum from November 17, 1939." During the course of the argument the court indicated that, because of the form of the prayer, it was inclined to grant a jury trial. The Bank insisted that what it wanted was to rescind the settlement and to reinstate the judgment against Greenbach and to compel the other defendants to apply the property in their hands belonging to Greenbach in satisfaction of this judgment. The Bank finally requested permission to amend the prayer of its complaint to make this position clear. The request was granted. Thereupon, the paragraph above quoted was amended to read: "Wherefore, plaintiff prays:

"1. That the said settlement of plaintiff's judgment against the said Joseph Greenbach be set aside and plaintiff have judgment against the defendant Joseph Greenbach for the sum of $83,050.66 with interest thereon at 7 per cent per annum from November 17, 1939."

After this amendment had been allowed, the trial court denied defendants' request for a jury trial.

[1] It should be first pointed out that the trial court acted well within its powers in allowing the amendment to the complaint, even if it be assumed that, by the amendment, the nature of the action was changed from one at law to one in equity. Walsh v. McKeen, 75 Cal. 519, 17 P. 673.

The transaction involved in both pleadings is the same, no new cause of action was added, and no legal injury resulted to Greenbach. There was, therefore, no abuse of the wide discretion allowed trial courts in determining whether or not to permit an amendment. Woods v. Cook, 14 Cal. App.2d 560, 563, 58 P.2d 965; Frost v. Witter, 132 Cal. 421, 424, 64 P. 705, 84 Am.St.Rep. 53; Rosemead Co. v. Shipley Co., 207 Cal. 414, 420, 217 P. 1038; Farnsworth v. Hunter, 11 Cal.2d 27, 31, 77 P.2d 840; Peters v. Binnard, 219 Cal. 141, 148, 25 P.2d 834.

[2-4] It is not disputed that an action for a rescission is equitable in nature in which a jury trial is not allowed as a matter of right. It is also clear that the mere fact a conspiracy is charged in the complaint does not change the nature of the cause of action. In 5 Cal.Jur. p. 528, § 29, the proper rule, supported by many authorities, is stated as follows: "It is a general and well-settled principle of law that, where two or more persons are sued for a civil wrong, it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action." In the same volume, p. 533, § 34, it is stated: "Where two or more persons are sued for a joint wrong, it may be necessary to prove a previous conspiracy between them in order to secure a joint recovery; but it is not necessary to aver this previous combination in the complaint, and if averred, it is not to be considered as of the gist of the action."

[5] It is the theory of Greenbach that the complaint here involved was patterned after that in Campbell v. Birch, 19 Cal.2d 778, 122 P.2d 902, and that such a complaint states but one cause of action, and that is a cause of action against all the named defendants for fraudulently conspiring to induce the Bank to settle with Greenbach. There can be no doubt that the complaint is quite similar to that in the Birch case. But the big difference is that in the Birch case the relief sought was money damages against all the defendants, and there was no attempt to rescind, while in the instant case rescission is the gist of the action. Where a creditor is induced by the fraud of the debtor to settle a judgment for less than its face value, the creditor may either affirm the contract and sue for damages for the fraud, or he may rescind. Campbell v. Birch, 19 Cal.2d at page 791, 122 P.2d 902. The damage action is legal, while the rescission action is equitable. Obviously, the allegations of the complaints in either type of action will necessarily be quite similar, and the solution as to the nature of the action will depend on the type of the relief sought against the debtor and against the co-conspirators.

A reading of the complaint, as amended, demonstrates that what the Bank sought was rescission. Although the defendants, other than Greenbach, are constantly referred to in the complaint, the amended prayer and the argument of the Bank's attorney during the discussion over the allowance of a jury trial make it quite clear that the Bank sought a cancellation of the settlement agreement and reinstatement of the judgment—i. e., a rescission. It is also quite clear that the Bank sought no money damages from the other defendants. They were joined in order that the Bank, if entitled to rescind, could secure the properties that had fraudulently been conveyed to them. This is clearly demonstrated by the four paragraphs of the prayer of the complaint following the amended paragraph, and which were not amended, in which the Bank prayed that the other defendants be required to account for all properties and their proceeds that had been received from Greenbach, that such defendants be enjoined from disposing of these properties, or any interest in them, pending the outcome of the action, and that a receiver be appointed to hold these properties until final judgment.

[6] It is apparent that what the complaint sought was to set aside the settlement and to reinstate the original judgment against Greenbach. The original judgment was for $88,050.66. That was the precise amount, less the $5,000 already received, set forth in the prayer. No money judgment was sought against anyone but Greenbach. The proper rule in such cases was stated as follows in Re Estate of Cazaurang, 75 Cal.App.2d 217, 225, 170 P.2d

694, 699: "In determining whether an action is legal or equitable, and consequently whether a jury may be demanded as a matter of right, the court is not bound by the form of the action, but rather by the nature of the rights involved, as determined from the whole of the pleadings, and the facts of the particular case." The same rule is set forth in 15 Cal.Jur. p. 334, § 12, which adds: "The allegations of the complaint, the answer, and the cross-complaint may be considered, as may also the prayer for relief in the complaint and in the answer."

Similar language is to be found in Bettencourt v. Bank of Italy, etc., Ass'n, 216 Cal. 174, 179, 13 P.2d 659; Cauhape v. Security Savings Bank, 127 Cal. 197, 201, 59 P. 589; Wulfjen v. Dolton, 24 Cal.2d 891, 151 P.2d 846. Greenbach argues that the Bettencourt case was overruled in Pacific Western Oil Co. v. Bern Oil Co., 13 Cal.2d 60, 69, 87 P.2d 1045. An examination of the two cases demonstrates, however, that the Bern Oil Co. case did not overrule the Bettencourt case on the point here involved, and that as to that point the Bettencourt holding, and the holding in the above-cited cases, stand unimpaired. The Bettencourt case had held, in addition to the rule under discussion, that a party is not entitled to a jury trial in an action essentially equitable but in which a legal remedy is sought. That was the point that was overruled in the Bern Oil Co. case. The proper rule applicable to that problem is that "even though the action is essentially equitable, if the plaintiff requests legal relief, the parties are entitled to a jury trial on the legal issue." Crouser v. Boice, 51 Cal.App.2d 198, 200, 124 P.2d 358, 360. The same case, 51 Cal.App.2d at page 203, 124 P.2d 358, pointed out that the mere fact that damages may be awarded by the trial court or are sought by the parties does not, in itself, require a jury trial, because, if the action is equitable in nature, the court, in the exercise of its equity jurisdiction, may award damages.

The proper application of these rules was well illustrated in Peterson v. Peterson, 74 Cal.App.2d 312, 168 P.2d 474. That was an action to quiet title to property, to recover its reasonable rental value, to cancel a deed of trust, and to recover damages for fraud. It was properly held that as to the issues raised by the cause of action based on fraud and the prayer for money damages the parties were entitled to a jury trial as a matter of right, because that action was legal.

[7] From these cases it can confidently be asserted that where no individual money damages are sought, and where the plaintiff seeks only to rescind and to recover the fraudulently conveyed assets, the action is equitable, and a jury trial is not a matter of right. That is this case. The trial court properly denied the request for a jury trial.

Contention that defendants were entitled to a jury trial because of their plea of the statute of limitations.

[8] The answer of defendants pleaded the statute of limitations by reference to sections 338, subd. 4, and 343, of the Code of Civil Procedure. The precise point sought to be raised by defendants in reference to the statute of limitations is not very clear. In their opening brief they argue that in some way their plea raised a legal issue that should have been tried before a jury. It certainly is not the law that a plea of the statute of limitations *ipso facto* turns an equitable action into a legal one. "* * * a plea of the statute of limitations does not change the character of an action from one in equity to one in law, for the statute may be availed of as a defense in suits in equity as well as at law." 15 Cal.Jur. p. 338, § 14; see, also, Hancock v. Plummer, 66 Cal. 337, 338, 5 P. 514.

Moreover, these defendants do not deny but admit the execution by Greenbach of the affidavit of February 5, 1940, above quoted, and in which Greenbach specifically waived the statute of limitations.

[9] These defendants quote from Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958, and West v. Great Western Power Co., 36 Cal.App.2d 403, 97 P.2d 1014, to the effect that, in such actions, whether one has notice of circumstances sufficient to put a prudent man upon inquiry as to a

particular fact, and whether the prosecution of an inquiry would have revealed such fact, are questions to be determined by the trial court or jury. They also contend that whether the Bank acted reasonably in failing to discover the fraud is a question of fact which should have been settled by a jury, and cite Taylor v. Wright, 69 Cal.App.2d 371, 383, 159 P.2d 980. Just what solace defendants secure from these cases is not clear. It seems to be their thought that all questions of fact, whether the action is at law or in equity, must be settled by a jury. To state the contention is to refute it. Of course, if the action is in equity the trial judge is empowered to find the facts—if at law, a jury has that power. See Fish v. Benson, 71 Cal. 428, 434, 435, 12 P. 454; cases collected 12 Cal.Jur. p. 837, § 83.

[10] In their closing brief the defendants try to explain what they have in mind in reference to this statute of limitations point. They state that a jury trial was required because this statute of limitations plea is "based upon the fact that the complaint was drawn on a theory of recovery for a money judgment by reason of the alleged fraudulent scheme perpetrated by the defendants. * * * Appellant [Greenbach] is standing on the proposition that the complaint was drawn on the law side of the Court." Defendants' Closing Brief, p. 9. This is but another way of raising the basic point that the action is one for damages for fraud. Once it is determined that the action is for rescission and therefore equitable, this argument falls.

Defendants' contention that their motion for a nonsuit should have been granted.

This is perhaps the major point raised by the defendants. They argue that the motion for a nonsuit should have been granted by reason of the statute of limitations and laches. This argument really amounts to an attack on the findings that the Bank was not guilty of negligence in failing to discover the fraud sooner. They argue that, inasmuch as Greenbach's affidavit disclosed an "undetermined equity" in the shares of the Newbridge Park Realty Co. and of the Bayshore Realty Co., the Bank, as a matter of law, was put on notice and was bound to pursue its inquiry on this point or be bound by the settlement. It is argued that the information contained in the affidavit is much more substantial than the information that came to it in January, 1945, when it investigated and discovered the fraud. It is contended that the record shows that the Bank made no investigation of the nature of this "undetermined equity." It is also argued that the record shows that in 1942 the Newbridge and Belle Haven companies filed with an Oakland branch of the Bank a statement setting forth all the assets and liabilities of the two corporations in connection with a loan Greenbach was seeking from the Bank. It is urged that, although this statement put the Bank on notice, no investigation was made. This, according to Greenbach, amounted to laches as a matter of law.

The evidence on these points is as follows:

The Bank's representative during the negotiations leading to the settlement was Clayton, an assistant cashier of the Bank. Clayton testified that Greenbach had told him that he had no interest in the two realty corporations referred to above; that these corporations were owned by Greenbach's sister-in-law, Katherine de Salas; that Greenbach had organized the corporations for her and served as general manager; that Greenbach told him that he had been working for his sister-in-law as manager of these corporations for a number of years; that their success was due largely to his efforts, and that after he had settled with his creditors, he intended to demand of Katherine an interest in the business. Thus, according to Clayton, Greenbach's statements were to the effect that he had no legal claim, but some sort of a moral claim to an interest in the business. The record does show that when the original affidavit was prepared by the Bank, it called for Greenbach to aver that he had no property interests. Greenbach refused to sign this affidavit and insisted that the amended form of the affidavit be substituted. But, at that time, as the above evidence shows, the Bank, through Clayton, believed that this "moral claim" was what the "undetermined equity" clause referred to. Clayton checked the assessment rolls in Sacramento, San Mateo and San Francisco Counties to determine whether Greenbach and his wife had any property listed there, and also to see whether the two realty corporations possessed property there. The account books and records of the Bayshore and Newbridge Realty corporations were not investigated, however, because Clayton believed from all the information which he could gather, including Greenbach's own statements to him, that Greenbach had no interest in these corporations. Clayton's report to the General Finance Committee of the Bank recommended that Greenbach's offer of settlement be accepted, and contained the following paragraph: "Several years ago his sister-in-law, Katherine G. de Salas, inherited some money from her deceased husband, who formerly owned a coffee plantation in Guatemala. With Greenbach's assistance, she organized the Newbridge Park Realty Company, the Bayshore Realty Company, and the Belle Haven City Building Company. She owns the stock in these various Corporations with Greenbach operating them as general manager. Various investigations have been made, both by this Department and, in a number of instances, by outside creditors into the affairs of both Greenbach and these Corporations in an attempt to uncover assets. To date no one has been successful in proving that Greenbach actually is possessed of any assets."

Greenbach claims that the Bank had in its files many documents which gave it complete information concerning the assets, holdings and interests of the realty companies, and that the Bank, therefore, had notice of Greenbach's status concerning these companies. The Bank lists these documents as Dun & Bradstreet report on Bayshore dated September 28, 1939; Bayshore's application for a building mortgage loan dated February 16, 1937; September 30, 1938, consolidated balance sheet of Bayshore and Newbridge filed with the F.H.A.; profit and loss statement for 1938 of these companies filed with the F.H.A.; and the consolidated balance sheet of December 31, 1938, filed with the F.H.A. The Bank states, and the documents show, that in none of them was any interest of Greenbach in these corporations disclosed. Some of them never came to or went through the Bank but went directly to the F.H.A., and there was nothing contained in them which would have given the Bank notice of Greenbach's interests in the corporations. Greenbach states in his brief that he gave Clayton a list of all of his assets and liabilities prior to the signing of the settlement. The Bank asserts that there is no evidence to show that this list was ever given to Clayton or to the Bank, and that it would have been ridiculous for the Bank to have entered into a $5,000 settlement if it had received such a list. The record shows that the title to these properties was never in Greenbach's name.

The record also shows that Greenbach was represented during the settlement negotiations by an attorney who testified that he had told Clayton that there was a "vague understanding" that Greenbach was to participate in the assets of the two corporations, and that he had told Clayton substantially the same story as did Greenbach. It also appeared that prior to the date the settlement agreement was signed, de Salas had agreed to transfer all of the stock in these companies to Greenbach's wife, and had resigned as president and director of both corporations. Admittedly, the attorney did not disclose these facts to Clayton.

On these facts Greenbach et al. argue that, as a matter of law, the Bank had constructive notice of his interest and assets, and its failure to investigate must be held to be a bar to the action.

[11, 12] It is, of course, the law that a party has a duty to investigate where he has notice of facts which indicate fraud. Levy v. Irvine, 134 Cal. 664, 671, 66 P. 953; Merrill v. Los Angeles Cotton Mills, Inc., 120 Cal.App. 149, 157, 7 P.2d 329; Merchants' Ice & Cold Storage Co. v. Globe Brew. Co., 78 Cal.App.2d 618, 624, 177 P.2d 963. But this duty to investigate is a relative matter. The creditor has a legal right to rely upon the statements made by

the debtor. If the debtor is guilty of deliberate fraud, it is not good morals, nor does it make good sense or good law, to say that the creditor was too credulous because he placed too much reliance on the statements made by the fraudulent debtor, and is therefore barred.

[13-16] The principles applicable to such an action are well settled. It is established law that a debtor seeking to compromise an admitted debt must make a full and complete disclosure, and must exercise the utmost good faith. In Boas v. Bank of America, 51 Cal.App.2d 592, 597, 125 P.2d 620, 623, this rule was stated as follows: "* * * in effecting a composition agreement the law demands the utmost good faith on the part of the debtor and it will not permit him by pretending to be insolvent to induce his creditor to accept a small portion of the debt in lieu of the whole when in fact his property is amply able to pay the creditor in full; * * * good faith requires of the debtor, before he shall be permitted to profit by a composition agreement, to make a full and fair disclosure of his effects, and that no concealment, deception or fraud should be practiced. * * * and in dealing with the question of false representations it is held generally that even though one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiry, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all, he must make a full and fair disclosure." See, also, United States Nat. Bank v. Stiller, 216 Cal. 324, 332, 14 P.2d 78.

[17-20] It is also well settled that when a fact is peculiarly within the knowledge of the person making the representation and not within the knowledge of the person to whom it is made, the latter has the right to rely upon the representations of the former respecting such fact. See cases collected 12 Cal.Jur. p. 751, § 30. In the same volume, p. 758, § 34, after quoting fom Dow v. Swain, 125 Cal. 674, 58 P. 271, it is stated: "The party making the representation cannot escape responsibility by showing that the other party might have ascertained that such representation was untrue, or had no right to believe it. Where one is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case, no duty rests upon him to employ such means of knowledge, even though by reason thereof, in the absence of any representation at all, a constructive notice would be inferred. The doctrine of constructive notice does not apply where there has been such a representation of fact. If the representation is of a character to induce action and does induce it, that is enough. It matters not that a person misled may be, in some loose sense, negligent, for it is said not to be just that a man who deceives another should be permitted to say to him, 'You ought not to believe or trust me,' or 'You are yourself guilty of negligence.'" See, particularly, McKeehan v. Pacific Finance Corp., 120 Cal.App. 578, 588, 8 P.2d 213; French v. Freeman, 191 Cal. 579, 586, 217 P. 515.

[21, 22] While there is a reasonable duty to investigate, and while it is generally true that notice of facts and circumstances that would put an ordinary man on inquiry may be held to be the equivalent of discovery, see cases 12 Cal.Jur. p. 795, § 59, the question as to whether the known facts were sufficient to put the defrauded person on inquiry is one of fact for the trial court. McCray v. Title Ins. & Trust Co., 12 Cal. App.2d 537, 55 P.2d 1234; West v. Great Western Power Co., 36 Cal.App.2d 403, 97 P.2d 1014. In the instant case this question has been resolved against Greenbach by the trial court, and its determination is amply supported. In modern times the courts have been quite reluctant to hold that, as a matter of law, negligent reliance on deliberate fraudulent representations constitutes laches. In "A Treatise in Equity" by Walsh at p. 491 the modern view is stated as follows: "There is no doubt that the plaintiff cannot recover if the facts were apparent so that he could be misled only as a result of ignoring what any average person should have observed and understood. Nevertheless the rule laid down

in some of the earlier cases that the plaintiff must have investigated with reasonable care, and if he has been negligent in relying on the defendant's false statements he cannot recover, are very much modified by later cases. Whether or not the plaintiff was negligent in relying upon the truth of the defendant's representations seems to be immaterial. If under the facts, because of the relation of the parties, involving trust and confidence, or because the representor was in a position to know the facts which was definitely superior to that of the representee, or where an investigation by the representee could not be easily made, the courts hold that he was justified in relying on the truth of the false statements." That California has adopted this modern view, see Hefferan v. Freebairn, 34 Cal.2d 715, 214 P.2d 386.

[23] The California courts have held that there is no duty of inquiry unless the circumstances are such that inquiry becomes a duty and the failure to make it a negligent omission. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 438, 159 P.2d 958; see, also, Laraway v. First Nat. Bank of La Verne, 39 Cal.App.2d 718, 730, 104 P.2d 95; Anderson v. Thacher, 76 Cal.App.2d 50, 71, 172 P.2d 533; Lewis v. Beeks, 88 Cal.App.2d 511, 520, 199 P.2d 413; see annotation 33 A.L.R. 853, particularly p. 902 et seq.

[24] The problem of the statute of limitations in such actions has been so recently reviewed by the Supreme Court in the Hobart case, supra, 26 Cal.2d at pages 436–439, 159 P.2d 958, that it is not necessary to repeat what was there said, except to repeat the conclusion of the court. 26 Cal.2d at page 439, 159 P.2d at page 973, appears the following: "The reason for the rule is well stated in Victor Oil Co. v. Drum, supra, 184 Cal. at page [226] 241, 193 P. [243] at page 249: 'The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part.' It follows that plaintiff is not barred because the means of discovery were available at an earlier date *provided* he has shown that he was not put on inquiry by any circumstances known to him or his agents at any time prior to the commencement of the three-year period ending June, 1941."

[25] From the above authorities it is quite clear that the statute of limitations or laches cannot be held, as a matter of law, to bar the present action. The finding that the Bank acted with reasonable diligence is amply supported. The further finding that Greenbach had not, since the execution of the settlement, changed his position in any way that would justify denying recovery, is also amply supported. This being so, there is no merit to Greenbach's defense that, as a matter of law, he was entitled to a nonsuit because of the statute of limitations or laches.

The Bank's Appeal.

The appeal of the Bank is based on the contention that the amount of the judgment, as a matter of law, is incorrect. It will be remembered that the settlement agreement was entered into in February, 1940. The judgment then settled was dated November 17, 1939, and was for $88,050.66. Interest on this judgment had accrued. When the Bank commenced this action in November, 1945, it prayed that the court set aside the settlement and give judgment against Greenbach for the full amount of this judgment, less the $5,000 received in the settlement, with interest from November 17, 1939. The trial court's judgment was not in accord with the prayer. In the first paragraph of the judgment it decreed that "the agreement of settlement * * * be, and the same is hereby cancelled, set aside and annulled"—the normal provision in a successful rescission action. But in the second paragraph, instead of expressly reinstating the judgment, it granted a money judgment of $24,300 with interest from February 5, 1940. It is from this portion of the judgment that the Bank appeals.

The trial court arrived at the amount of the money judgment by finding that the net worth of Greenbach, at the date of the settlement, including his interests in the corporations made defendants in this action, was $100,000; that on that date Greenbach was indebted to other creditors; that the proportion that the Bank's judgment bore to Greenbach's total indebtedness was .293 per cent; that if all of Greenbach's assets on February 5, 1940, had been liquidated and applied to his debts, the Bank would have received $29,300; that the $5,000 paid by Greenbach as part of the settlement should be credited against this amount; that therefore the Bank was damaged as a result of the fraudulent representations in the amount of $24,300.

The trial court arrived at this unusual result apparently because it was impressed by some dicta in the case of Greenawalt v. Rogers, 151 Cal. 630, 91 P. 526. That case, like the instant one, involved an action to set aside the settlement of a judgment on the ground of the debtor's alleged fraudulent misrepresentations as to his assets. The judgment at the time of settlement, was worth about $3,500. The settlement was made for $100, and was entered into upon the representation of the debtor that he could pay but $100 on the judgment. The trial court found that, as a matter of fact, at the time of settlement, the debtor owned some property worth $400, and it granted judgment to the creditor for the full amount of the original judgment, plus interest, less the $100 paid. This was reversed by the Supreme Court. The ground of the reversal was that there was no misrepresentation of a material fact, and no showing that the plaintiff would not have consented to the settlement even if he had known of the property. The Supreme Court emphasized the fact that the debtor had not stated that he owned no other assets, but had merely stated that he was able to pay but $100 on the judgment. The Court also pointed out, in emphasizing the unimportance of the misrepresentation that, because the debtor owed other creditors about $11,000, it was doubtful whether the creditor could have recovered anything had he not agreed to the settlement. In this connection the Supreme Court used the language which seems to have impressed the trial court in the instant case. 151 Cal. at page 636, 91 P. at page 528, it is stated: "The judgment satisfied amounted at the time of the settlement to about $3,500. This was less than one-fourth of the total indebtedness of Rogers. If, therefore, this lot, which is the only property found by the court to have been owned by him, had been applied to the payment of his debts *pro rata,* whether by voluntary agreement, or through the bankruptcy proceedings, which, as the complaint alleges, the defendant was contemplating, the share which plaintiff * * * could have received would have been less than the $100, which they did in fact receive."

This holding cannot be distorted into a holding that in a rescission action the creditor is limited to a *pro rata* judgment in the amount that he could have collected had the debtor liquidated all of his assets on the date of the settlement. All that was held in the above-cited case was that the misrepresentation was not as to a material fact, and the above language was used to demonstrate that.

[26–29] There is no authority cited, and no logical argument made, that support the conclusion that a creditor, fraudulently induced to enter into a settlement of his claim upon material misrepresentations as to assets, can or should be limited, in a rescission action, to a judgment for the *pro rata* share of the assets of the debtor as they existed on the date of settlement. The cancellation of an agreement of settlement necessarily has the effect of placing the parties where they were before the settlement was made. It is as if the settlement had never been made. Authorities are legion and uniform to the effect that the legal effect of a rescission is to restore both parties to their former position as far as possible. 3 Pomeroy, Equity Juris., 5th Ed., 578; 3 Black on Rescission and Cancellation, p. 1660, § 700; 15 Cor. Jur. Sec. p. 767, § 43. The authorities also agree that, concurrent with the award of rescission, the trial court may award money damages or order such other relief as justice may require. 4 Cal.Jur. p. 797, § 29.

In the present case the court cancelled the settlement agreement. It should then have reinstated the original judgment. The amount of that judgment is fixed and certain. Perhaps a money judgment in the precise amount of the original judgment would have been proper. In any event, the purpose of the decree, whatever its form, is to restore, so far as possible, the *status quo*. That means the return to each party, so far as possible, of the property that he parted with at the time of the settlement. § 1691(2), Civ.Code; Spreckels v. Gorrill, 152 Cal. 383, 392, 92 P. 1011; Perkins v. Farmer etc. Sav. Bank, 12 Cal.App.2d 495, 499, 55 P.2d 524; Arthur v. Graham, 64 Cal.App. 608, 612, 222 P. 371.

The result worked out by the trial court is inequitable and immoral. It compels the Bank to accept a *pro rata* division of assets as of 1940, and deprives it of the many alternatives it might have exercised in that year other than dividing up the assets. The Bank could, for example, had the fraud not been practiced, waited to see what some of the other creditors were going to do. Some might and did settle for less than their *pro rata* share, and some claims might have become barred by the statute of limitations. The Bank might have contested some of the claims. It might have assisted Greenbach to become solvent. In any of these events, its proportional share of the assets would be increased. The judgment, as rendered, deprives it of these alternatives.

The solution worked out by the trial court places a premium on and encourages fraud. Such a decree encourages a debtor fraudulently to conceal his assets, because, even if caught, he will only have to pay the amount of the assets he held at the time of the fraud. That is not sound public policy. On the other hand, restoration of the original judgment merely restores the creditor to his original position. It is not inequitable to the fraudulent debtor because it merely places him subject to the original obligation which burdened him and would have continued save for the fraud.

It should also be pointed out that in the instant case, whatever the law may be generally, the judgment violates the terms of the settlement agreement. By that contract Greenbach agrees that:

"I definitely understand and agree that said Bank shall be bound by said settlement and by its acceptance of said $5,000.00 settlement, only upon the condition that the statements herein made by me as to my personal responsibility and as to my assets, are true.

"I further agree that in the event of a rescission of this settlement, the said Bank may retain the sum received hereunder and apply said sum on account of the original obligation, and further waive the right to plead the Statute of Limitations as a defense to said original obligation."

Thus, by the very terms of the settlement agreement the Bank was given a contract right to have the original judgment restored in the event of a rescission. The portion of the judgment under discussion clearly violates this provision of the agreement.

[30] Greenbach argues that § 3343 of the Civil Code controls the measure of damages in a rescission action. That section provides that one defrauded in the purchase of property is entitled to recover the difference between the actual value of that which he received, together with any additional damage arising from the transaction. The section concludes with this language: "Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled." Thus, the section is limited to actions for damages for fraud and deceit, and specifically excludes "equitable" remedies, one of which is the remedy of rescission. Bagdasarian v. Gragnon, 31 Cal.2d 744, 763, 192 P.2d 935; see, also, Hefferan v. Freebairn, 34 Cal.2d 715, 214 P.2d 386.

On the appeal of the defendants the judgment is affirmed; on the appeal of the Bank, that portion of the judgment appealed from is reversed, the Bank to recover its costs on both appeals.

BRAY, J., and SCHOTTKY, Justice pro tem., concur.

GARFIELD v. BOARD OF MEDICAL EXAMINERS OF STATE et al.*

No. 14118.

District Court of Appeal, First District,
Division 1, California.
June 26, 1950.

Rehearing Granted July 26, 1950.

Sidney Roy Garfield brought a proceeding against the State Board of Medical Examiners and the members thereof for a writ of mandate to set aside the Board's orders suspending petitioner's license to practice as a physician and surgeon. From a judgment of the Superior Court in and for the City and County of San Francisco, Edward P. Murphy, J., for petitioner, respondents appealed. The District Court of Appeal, Bray, J., held that the trial court erred in finding that petitioner was not guilty of unprofessional conduct in employing unlicensed physicians at his hospital and aiding and abetting one of such physicians to practice medicine, where there was no evidence that unlicensed physicians employed by petitioner as interns were registered with the Board and the evidence showed conclusively that other such physicians employed by petitioner were not interns.

Judgment reversed with direction.

1. Mandamus 🔑174

In mandamus proceeding to set aside decision of State Board of Medical Examiners suspending license of physician and surgeon for unprofessional conduct, Superior Court was authorized to exercise its independent judgment after hearing of alternative writ on pleadings, parties' stipulations and transcript of proceedings before court without offer of any additional evidence. Business and Professions Code, § 2392.

2. Physicians and surgeons 🔑6(1)

Under statutory provision that any graduate medical student registered with State Board of Medical Examiners may treat the sick as an intern in approved hospital, registration of unlicensed physician as an intern is mandatory to enable him to treat the sick. Business and Professions Code, § 2147.5.

3. Physicians and surgeons 🔑6(1)

Failure of State Board of Medical Examiners to adopt and file with Secretary of State a regulation on registration with Board of medical school graduates, not licensed as physicians, to serve as interns in hospitals, does not excuse licensed physician and surgeon, operating hospital, from complying with self-executing statutory provision requiring registration of such graduates to enable them to treat the sick as interns, as Board needs no regulations other than registry forms adopted by it, and such interns owe duty to apply to Board for registration. Business and Professions Code, § 2147.5; Government Code, §§ 11380, 11381.

4. Physicians and surgeons 🔑5(2)

Physicians' letters to State Board of Medical Examiners, enclosing completed forms of applications for licenses to practice, in which they stated that they were residents in surgery at certain hospital, did not constitute compliance with statutory requirement that graduate medical students register with Board in order to treat the sick as interns in hospitals. Business and Professions Code, § 2147.5.

5. Evidence 🔑75

In mandamus proceeding to set aside decision of State Board of Medical Examiners, suspending petitioner's license to practice medicine on ground of unprofessional conduct in employing non-registered physicians as interns at petitioner's hospital, respondents' failure to offer evidence that such physicians were not registered with Board as interns raised no presumption that they were registered, as required by law and found by court. Business and Professions Code, § 2147.5.

6. Physicians and surgeons 🔑6(1)

An "intern" is an indoor or resident physician, surgeon, or similar officer in a hospital and specifically one serving in hospital as preparation for independent practice after completing required course of study.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Intern".

---

* Subsequent opinion 221 P.2d 705.

7. Mandamus ⚷168(4)

In mandamus proceeding to set aside decision of State Board of Medical Examiners suspending petitioner's license to practice medicine on ground of unprofessional conduct in employing unlicensed physicians not registered with Board as interns at petitioner's hospital evidence warranted trial court's finding that such physicians were interns. Business and Professions Code, §§ 2141, 2147.5, 2378, 2392.

8. Physicians and surgeons ⚷6(1)

University medical school graduates, holding doctors' degrees, licensed to practice and practicing medicine in other states, serving in Army Medical Department as hospital surgeons and surgical consultants, taking refresher courses at hospital in state, and examining, prescribing for, and assisting in surgery on, out-patients therein under other physicians' direction and supervision, for salaries of $700 per month, were not interns within statute requiring registration of graduate medical students with State Board of Medical Examiners to enable them to treat the sick as interns in hospitals without having licenses to practice medicine in state. Business and Professions Code, § 2147.5.

9. Physicians and surgeons ⚷11(2)

The words "aiding and abetting" in statutory provision that aiding or abetting of unlicensed person to practice medicine constitutes unprofessional conduct, authorizing revocation or suspension of employing physician's license, impliedly requires guilty knowledge by employer that employee has no right to practice medicine. Business and Professions Code, § 2392.

10. Mandamus ⚷168(4)

In mandamus proceeding to set aside decision of State Board of Medical Examiners, suspending petitioner's license to practice medicine on ground of unprofessional conduct in aiding and abetting unlicensed physician to practice medicine at petitioner's hospital, evidence supported trial court's finding that petitioner lacked guilty knowledge that such physician had no right to practice medicine, so as to justify judgment for petitioner. Business and Professions Code, § 2392.

11. Mandamus ⚷168(4)

In mandamus proceeding to set aside decision of State Board of Medical Examiners, suspending petitioner's license to practice medicine on ground of unprofessional conduct in employing unlicensed physicians at petitioner's hospital and aiding and abetting one of them to practice medicine, where there was no evidence that some of such physicians, who were interns, were registered with Board as required by statute, and evidence showed conclusively that other physicians involved were not interns, trial court erred in finding that petitioner was not guilty of unprofessional conduct. Business and Professions Code, §§ 2147.5, 2392.

12. Mandamus ⚷187(10)

Where there was substantial evidence supporting trial court's finding that allegations of one count of accusation filed by State Board of Medical Examiners, that physician was guilty of unprofessional conduct in aiding and abetting unlicensed physician to practice medicine at accused's hospital, were not sustained, but Board made single order suspending accused's license on its findings and conclusions of his guilt under both such count and another count charging him with employing unlicensed physicians, trial court's judgment for accused in his mandamus proceeding to set aside Board's order must be reversed and matter remitted to Board for reconsideration of penalty, as appellate court has no way of knowing what penalty Board would have imposed for violation of such other count alone.

◆

William A. O'Brien, Thomas K. McCarthy, Thelen, Marrin, Johnson & Bridges, San Francisco, for petitioner and respondent.

Fred N. Howser, Atty. Gen., J. Albert Hutchinson, Deputy Atty. Gen., for respondents and appellants.

BRAY, Justice.

Appellant medical board, after hearing an accusation filed with it against respondent, found him guilty of unprofessional conduct as defined in section 2392 of the Business and Professions Code. It ordered his license to practice as a physician and surgeon suspended for one year, and then suspended its order for a five year period of probation, on condition that he comply with the laws of the United States and of the State of California and Rules and Regulations of the board, and that he personally report to the board at each of its regularly scheduled San Francisco meetings.

[1] Thereafter respondent petitioned the superior court for a writ of mandate to set aside the decision of the board. The hearing of the alternative writ was had on the pleadings, the stipulations of the parties and the transcript of the proceedings before the board. No additional evidence was offered. Exercising its independent judgment, as it was authorized to do, Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20, the trial court set aside the action of the board and entered judgment in favor of respondent. The board appealed.

Question Presented.

The primary question for us to determine "is whether the evidence, viewed in the light most favorable to petitioner, sustains the findings of the trial court to the effect that the charges against petitioner were not supported by the weight of the evidence." Moran v. State Board of Medical Examiners, supra, 32 Cal.2d at page 309, 196 P.2d at page 25. Involved in this question is that of whether there is substantial evidence to support the court's findings that the doctors employed by respondent were (1) registered with the board, and (2) interns.

As to the second count in the accusation, the main question is whether guilty knowledge is necessary in a charge of aiding and abetting an unlicensed person to practice medicine.

Facts.

Taking the evidence and the reasonable inferences therefrom most favorable to respondent, the facts follow. (Actually there is little, if any conflict in the evidence. The bulk of the testimony is that of respondent himself and one of the unlicensed physicians, Keene. However, there is considerable conflict in the inferences which the parties draw from the testimony.) The first count of the accusation charged respondent with employing ten unlicensed physicians, including Dr. Flint (one was later withdrawn); the second count referred to Dr. Flint alone and charged respondent with aiding and abetting him to practice medicine. It is admitted that none of the physicians in question had ever been licensed to practice in California.[1] Each was a graduate of an approved medical school, and had served an internship in an approved hospital, had received an M.D. degree, and had been licensed to practice medicine in another state, and was eligible to licensure in California on a reciprocity basis. All were employed by respondent at his hospital from August 20, 1945, to May 17, 1946; all, except Keene and Murphy, were paid salaries ranging from $125 to $225 per month, and resided at the hospital. All except Keene and Murphy were assigned to the hospital during the war (prior to May, 1945) by the Procurement and Assignment Board (a medical adjunct to the War Manpower Board) for the performance of medical services under supervision.

Certain exhibits presented to the board also showed that Dr. Garfield maintained a "call-board" at the hospital which listed no interns, but listed some of these unlicensed persons as doctors; that a list of respondent's employees included categories of "staff physicians," "interns" and "residents," and none of the unlicensed persons in the accusation was listed as "intern." Also a schedule of duties refers to some of the unlicensed persons, but not as interns.

Findings.

The trial court found that Permanente Foundation Hospital was operated by petitioner and approved by the board for the training of interns (no question of approval was involved, and it is still approved); that all of the persons named in count I except Flint were graduate students registered with the board and engaged as interns for the purpose of study; that to the extent such persons treated the sick, etc., it was under supervision, and for the purpose of obtaining education and training; that at no time referred to in said accusation did the board issue any regulations for the registration of interns, nor did it file any regulations for the registration of interns with the Secretary of State, or otherwise comply with the provisions of the Government Code, particularly chapter 4, part 1, division 3, title 2 (which requires filing of regulations); that the findings of the board that petitioner employed unlicensed persons are not supported by the weight of the evidence; that the findings of the board that the employment of such persons was not during a course of study and that they were not employed as interns, and that petitioner knew such facts, were not supported by the weight of the evidence; that on the contrary, the weight of the evidence was that such persons, other than Flint, were graduate students pursuing a course of study in the practice of medicine and surgery, engaged as interns, and registered with the board.

---

[1] Except Dr. Flint, whose license was revoked. His situation will be discussed later and he will be omitted in the discussion of the first count except when specifically mentioned.

Statutory Provisions.

Those applicable at the time involved here follow. Section 2141, Business and Professions Code, prohibits any person from practicing any mode of treating the sick or prescribing for any mental or physical condition without having the certificate to practice provided in the Code. Section 2142 makes it a misdemeanor for any one without such certificate to use the prefix "Dr." or the letters "M. D." implying that he is a physician and surgeon or either. Section 2392 provides: "The employing, directly or indirectly, of any suspended or unlicensed practitioner in the practice of any system or mode of treating the sick or afflicted or the aiding or abetting of any unlicensed person to practice any system or mode of treating the sick or afflicted constitutes unprofessional conduct within the meaning of this chapter." This is the section which the first count of the accusation charges respondent with violating. The second count charges him with violating section 2378: "The violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter constitutes unprofessional conduct within the meaning of this chapter."

Inasmuch as it is conceded that none of the physicians had the necessary certificate to practice, it is necessary that the evidence bring them within the exceptions provided by the statute.

Section 2147.5 provides: "*Any graduate student registered with the board* and upon whom a degree of doctor of medicine, bachelor of medicine, or doctor of osteopathy has been conferred by a school, approved by the board, and any regularly matriculated student in a school approved by the board *may, during and as a part of his course of study,* but not for a period of more than two years, treat the sick and afflicted either as such student in a school approved by the board, teaching medicine, surgery or osteopathy in this State, *or as an interne* in a hospital approved for the training of internes, and may, for rendering such treatment, receive compensation therefor from the hospital or school.

* * *

"Except to the extent authorized by this section, *no graduate student* * * * *may treat the sick or afflicted or receive compensation therefor, or otherwise engage in or offer to engage in the practice of medicine or surgery.*" (Emphasis added.)

All were graduate students of and held M. D. degrees from schools approved by the board. (It was stipulated that it would not be claimed that the two year limitation had been violated.) Permanente is a hospital approved for the training of interns by the American Medical Association, American College of Surgeons and by the board. The questions to be determined under the first count are, was there substantial evidence to show that (1) they were registered with the board, and (2) they were interns. (It is not contended that

Permanente is a school approved by the board teaching medicine, etc.)

1. Registry.

With the exception of letters written to the board by Doctors Keene and Murphy asking to be admitted to practice and stating they were residents at Permanente, there is no claim of actual registration with the board of any of the other physicians, even though the court found that they had so registered. It is respondent's position (a) that the statutory requirement is merely directory and not mandatory, and (b) that the necessity for registration was obviated by the failure of the board to adopt regulations concerning registry.

[2] a. *Is registration mandatory?*

The section provides, "Any graduate student registered with the board" may as an intern treat the sick. It is clear from reading the section that registry is an important element of the situation in which an unlicensed person may treat the sick, and is mandatory. Respondent's attempt to read a different legislative intent into the section is unfounded. He refers to the fact that the section, on the second reading of the bill, was amended to provide that the section would not apply to a graduate student who prior to undertaking gradulate work had failed to register. This amendment was stricken out before final passage. If this fact has any bearing on the subject, it would indicate that the Legislature was unwilling to permit even graduate work without registry, and strengthens, rather than weakens, the position that the section is mandatory. Estate of Mitchell, 20 Cal.2d 48, 123 P.2d 503, cited by respondent, is not in point. It was held in Mann v. Board of Medical Examiners, 31 Cal.2d 30, 187 P.2d 1, that the fact that a number of graduates of a certain medical school had been admitted to practice by the board, did not constitute an approval of the school and, in effect, that the provision requiring approval of the school by the board was a mandatory one.

[3] b. *Was nonregistry excused?*

Admittedly the board had never adopted any rule or regulation upon the subject of registration. There had been, however, an "Interneship Registration Card, Required by Chapter 341, Statutes 1939" adopted by the board, which card stated that it was "To be filed by every graduate of a medical school not licensed in California who is serving an interneship or a resident service in a California Hospital." Section 11380 of the Government Code defined regulations of a state agency and section 11381 provided for the filing of such regulations with the Secretary of State and stated that a regulation becomes effective a certain time after filing. Respondent contends and the court found that the board's failure to adopt a regulation on registration and to file the same with the Secretary of State excused him from complying with section 2147.5 of the Business and Professions Code. He cites no authority to support this position. Section 2147.5 is self-executing. There is no provision in the Government Code requiring regulations to be adopted concerning self-regulating provisions of the Code. Before a person can treat the sick he must register with the board. The burden is on him. The board had registry forms. It needed no regulations other than the form which it had adopted. It is interesting to note that all of respondent's employees who were carried on the hospital records as "interns" had complied with the section by registering with the board on these cards. The fact that the card contains a statement that it was used for both interns and residents does not affect the requirement that interns must register. In view of the statute, it was the duty of the physicians to apply to the board for registration.

[4] There is no evidence that the other physicians applied to the board in any way for registry; therefore the charges of unprofessional conduct are proved against respondent in employing nonregistered persons, even if it be assumed that Doctors Keene and Murphy had applied for registration. The letter written by Dr. Keene (presumably that of Dr. Murphy was similar) enclosed a completed application form for California licensure. It in no wise asked for registry as an intern. It stated that he was a resident in surgery at Per-

manente. In no sense could this letter be a compliance with the statutory requirement.

[5] Respondent contends that inasmuch as appellants offered no evidence that the physicians were not registered it must be presumed that the interns obeyed the law and that that presumption is sufficient to support the court's finding. He cites Head v. Wilson, 36 Cal.App.2d 244, 97 P.2d 509, which was an action for damages resulting from a collision between defendant's automobile and a county ambulance causing the ambulance to careen into plaintiff's store and service station, setting the store on fire and otherwise damaging his property. In holding that the trial court erred in giving an instruction to the effect that if the county permitted the ambulance driver to drive without a license the county was prima facie negligent, the higher court said, 36 Cal.App. 2d at page 253, 97 P.2d at page 514: "While there is no evidence that Biggs did not have a driver's license, it is a misdemeanor to drive a motor vehicle without one. There is a presumption that he obeyed the law in this respect, which is the only material evidence in the record on this subject. There is no evidence, therefore, to justify the giving of this instruction." It is obvious that such case is not in point here. Nor is Robbins v. Hercules Gasoline Co., 80 Cal.App. 271, 251 P. 697, where, in an action for damages for injuries received by falling into an excavation in a sidewalk, it was held where there was no evidence on the subject, that it would be presumed defendant had obtained the necessary permit to make the excavation. Nor is City of National City v. Dunlop, 86 Cal.App.2d 380, 194 P.2d 788, in point either. That was an action brought by the city to eject defendants from certain real property. On appeal, it was held that in considering whether or not to accept the testimony of the superintendent of streets and the city engineer as proof that notices of street vacation had not been posted the trial court had the right to consider the presumption that official duty had been legally performed and the law obeyed.

The case applicable to the situation here is Anderson v. Board of Dental Examiners, 27 Cal.App. 336, 149 P. 1006. There the petitioner, a licensed dentist, had been accused in a proceeding before the Board of Dental Examiners of unprofessional conduct in employing unlicensed persons to practice dentistry. After holding that it was Anderson's duty before employing the person in question as a dentist to find out if he were licensed, the court answered Anderson's contention that the evidence failed to disclose that the person was not licensed, by saying that the board could take judicial notice of the persons it had licensed. The court then put the burden of proof on Anderson, stating, 27 Cal.App. at page 340, 149 P. at page 1008: "It would have been an easy matter for petitioner to produce proof of the fact that Munn had been licensed, if such were the fact, for by the statute the board is charged with the duty of keeping a roll of licensed practitioners; and under these circumstances it would be idle to say that it could not judicially notice who were and who were not duly licensed."

[6, 7] 2. Were the Physicians Interns?

Dr. Garfield testified that the unlicensed doctors (except Flint, Murphy and Keene) were carried on the hospital records as residents, and that this did not mean residents in the sense, as in some hospitals, of doctors acting without supervision; that at Permanente first year interns were called interns, but the second year men were called junior residents. The six doctors were paid in salary ranges from $125 to $225 per month plus maintenance, which was the salary paid interns, the first year men getting $125 and the second year men $225. Gould's Medical Dictionary (Fifth Revised Edition, 1941) defines an intern as "An in-door or resident physician in a hospital." Webster's International Dictionary (Second Edition, Unabridged, 1941) defines an intern as "A resident physician, surgeon, or similar officer in a hospital; specif., one who upon completion of the required course of study serves in a hospital in preparation for independent practice." While there is considerable evidence upon which the court could have found that the six doctors were not interns, there is substantial evidence together with the reasonable inferences which could be drawn therefrom that they were.

[8] But a different situation arises in the cases of Doctors Keene, Murphy and Flint. (As far as Flint is concerned, he was considered by respondent to be a licensed physician and surgeon and not an intern.) Dr. Keene, a graduate of the University of Michigan Medical School with the degree of M. D. and of M. S. in surgery, was licensed to practice medicine in the State of Michigan in 1935 and practiced there until 1941. From 1942 until January, 1946, he was in the medical department of the United States Army, during which time he served in various capacities, such as chief surgeon for the Lovell General Hospital in Massachusetts, surgeon for the 311th General Hospital, surgical consultant for the 26th Hospital Center in Manila, surgical consultant for the 24th Corps Army Service. After a conversation with respondent, who was the medical consultant to the Kaiser Fraser Company, Keene contacted the company at Willow Run, Michigan, and apparently was offered the position of medical director and surgeon for them. In February, 1946, he arranged with respondent to come to Permanente to observe their methods and to take a refresher course in industrial medicine and surgery and to learn the administration aspects of an industrial hospital. He "worked in the Out Patient [department], under the direction of the doctors there, and discussed the industrial cases with them"; he "had no understanding concerning hours," and "was around there almost all the time." He received $700 per month from the hospital, "according to the dignity of his position." He prescribed "the usual physio therapy, or some times novocaine injections, * * * a form of aspirin—" He assisted in doing surgery, "The duties of a regular assistant, and occasionally * * * did minor procedures under the direction of another man." He saw outpatients in the absence of other physicians in the room but the latter were in the hospital. He examined outpatients, noted findings and prescribed a course of treatment for them.

"Q. And in what way did your conduct of these examinations and prescribing treatment differ from your practice as a physician if there is any? A. No difference.

"Q. In other words, the things you were doing there in this hospital were the same as you did in your private practice at home, is that right? A. No, (sic) except that when I was in private practice I had no one to supervise me.

"Q. But as far as your actual conduct of these operations of one kind or another, you proceeded as a trained physician, isn't that true? A. It is ." It was understood that he would be called a resident. His definition of resident was "any physician who lives or works exclusively in a hospital for the purpose to gain knowledge." In his experience the only distinction between an intern and a resident is in the degree of experience, a resident having more experience than an intern and is given much less supervision. He made no application to the board other than the one heretofore discussed. It was stipulated that if Dr. Murphy were called as a witness his testimony would be substantially the same as that of Dr. Keene except that his specialty was obstetrics while Keene's was surgery. Murphy also received $700 per month. Respondent classified Keene as an intern, as a man in training—"We called him a resident * * * he was there to learn under the refresher course * * *"

The Directory at the entrance to the hospital commenced with Dr. Garfield "& Associates." Then followed the names of certain doctors. Under the heading "Obstetrics and Gynecology" appears "Joseph Murphy M.D." Murphy was not licensed to practice in California, and having in mind section 2142 of the Business and Professions Code had no right to use the letters "M.D." nor did respondent have the right to so list him.

Plaintiff's Exhibit 3, "Essentials of An Approved Internship, Prepared by the Council on Medical Education and Hospitals of the American Medical Association," upon which respondent testified Permanente's intern-training program was based, states: "The internship is a form of apprenticeship. The intern assists in the care of patients and receives in return instruction from the hospital staff in the clinical and laboratory aspects of his profession. 2. Length of Internship.—An internship should be of not less than twelve month's duration. * * *" Then follows a definition of the types of internship, all requiring "supervised experience" in the work to be undertaken. Other provisions applicable here are: "Assignments should be made so that the intern has opportunity each day to meet his attending physician for the conduct of systematic ward rounds or clinics and for the study of the patients under his care. * * * Each intern on duty in any clinical department should write or dictate the history, physical examination and his own diagnostic impression of all patients assigned to him. He should have laboratory work assigned to him of such nature as to give him familiarity with clinical laboratory methods and to develop in him competence in the use of all those which the average physician may be called on to perform. The non-operative treatment of each patient should, in the main, be his responsibility under critical guidance by the visiting physician. The intern's record should be checked within twenty-four hours by a competent supervising physician, calling attention to errors in observation and adding supplementary notes containing any relevant data which the intern may have omitted. * * * 1. Bedside Teaching.—The most important phase of intern instruction consists in well conducted teaching at the bedside. By this is meant systematic instruction of the intern by the attending physician with an ample discussion of the history, the clinical and laboratory findings, the diagnosis and the treatment of each patient. * * * 3. Internal Medicine.—This department should afford each intern an adequate amount of instruction and experience in general medicine and in such special medical technics as transfusion, intravenous and other parenteral therapy, and paracentesis. * * * 4. Surgery.—Surgical training should be planned to emphasize diagnosis and preoperative and postoperative treatment of surgical cases rather than skill in operative technic. Thus the intern's work in surgery should be rather that of an assistant than of an operator. * * * 5. Obstetrics.—The intern should obtain training and experience by delivering under supervision at least 10 patients. At other deliveries he should act as an assistant, not merely as an anesthetist. 6. Pathology.—The intern should receive experience in clinical laboratory work to perfect his skill in routine laboratory procedures. He should also receive instruction from the pathologist in the procedures of pathologic diagnosis. * * * 7. Outpatient Department.—It is desirable that each intern should have supervised experience in outpatient work under circumstances comparable to the office practice of medicine. * * * 5. Relationship Between Hospital and Intern.—To avoid misunderstanding, it is desirable that each intern at the time of his appointment should enter into a formal agreement with the hospital defining mutual obligations. * *"

While respondent now calls Doctors Keene and Murphy "interns" it is stretching one's imagination beyond all limits to so characterize them. Comparing these rules with the duties performed by Doctors Keene and Murphy, it is obvious that they were not interns. They were physicians and surgeons who undoubtedly had come to the hospital for a certain amount of refreshing but who were actually practicing medicine the same as any other practitioners except that they were under supervision. Boiled down, respondent's contention is that because interns act under supervision and the doctors here acted under supervision, ergo, they were interns. To hold that men with the medical experience of these men, doing the type of work they were doing at Permanente, and receiving the salaries they received, are interns, would make such a wide hole in the statute as to make it practically unenforceable. Courts have to be realistic and not misled by attempts to attach a nomenclature which is completely unfounded.

Second Count.

There is practically no dispute as to the facts under this count. On March 10, 1943, after a hearing before the board, Dr. Flint's license to practice in California was revoked. On March 26 a petition for a writ of mandate was filed in the superior court and an alternative writ issued. On June 6 a judgment in favor of the board was entered. Motion for new trial was made and denied. Thereafter a notice of appeal by Dr. Flint was filed. On February 4, 1946, this court (Division Two thereof) made an order dismissing the appeal. Flint v. Board of Medical Examiners, 72 Cal.App.2d 844, 165 P.2d 694. The remittitur was filed in the superior court on April 8, 1946. At no time during any of the court proceedings was there any stay of the order of revocation. Early in June, 1943, and after the revocation of the license by the board and apparently after the superior court had rendered judgment supporting the board's action, respondent, who did not know that the license had been revoked, employed Dr. Flint and immediately notified the Procurement and Assignment Service of his employment. Three or four weeks later they notified respondent that there was some question about Dr. Flint's license. Respondent notified Flint in writing on July 2 that his employment was terminated until the matter was clarified. A few weeks later respondent received a call from Dr. Fletcher of the Procurement and Assignment Service to the effect that Dr. Flint's attorney threatened suit because of the information given respondent by the service to the effect that there was a question about the license. On July 21, 1943, respondent received a letter from Attorney Browne stating that he had been asked by Dr. Flint to advise respondent of his views concerning the mandate proceeding then pending in the superior court. Browne stated that for many years he had been the deputy attorney general assigned to represent the Board of Medical Examiners of California; that now he was engaged in private practice specializing in medical legal matters; that under the terms of the alternative writ Dr. Flint was entitled to practice up to the time the writ was heard, which would not be until September. Browne assured respondent that if he retained the services of Dr. Flint, Browne would notify him of any change in Flint's status, so that respondent's "organization would [not] in any way be jeopardized by continuing to employ him." Respondent then went to see Dr. Dolman, who was the President of the Board of Medical Examiners. Dr. Dolman talked to the board office in San Francisco and then stated that the case was on appeal and that Dr. Flint could practice. Respondent then re-employed Dr. Flint. Respondent checked many times with Flint's attorney, with Flint himself, and with the Board of Medical Examiners. In October, 1944, respondent's secretary called the office of the attorney general and was told that they could not advise on the case as it was still pending and had not been decided by the court. On October 1, 1945, respondent directed a letter to the board stating that he had not been able to get a definite ruling regarding Flint's present status as a physician and asking to have it clarified. Respondent received no answer. Respondent talked to Flint many times and was told that the action was still pending and his status was the same. In May, 1946 (the remittitur was filed in April) Flint notified respondent that he had just learned that the case had been decided against him and he would have to quit, which he did.

The evidence is clear that respondent employed Flint in the practice of medicine and surgery for about three years after Flint's license had been revoked by the board and after respondent was aware of that fact. Respondent's whole defense is based upon his contention that he thought that during the pendency of the court proceedings, Flint had the right to practice, and hence he had no intent to violate the act, that he did not have guilty, wilful knowledge. In this count respondent is charged with aiding and abetting the unlicensed Flint to practice medicine and surgery. Respondent contends that intent is a necessary element of aiding and abetting.

[9] *Is guilty, wilful knowledge a requisite of the charge here?*

Respondent cites two cases as supporting its contention. Osborne v. Baughman, 85 Cal.App. 224, 259 P. 70, affirmed a judgment of the superior court annulling upon writ of review an order of the State Board of Dental Examiners whereby the license to practice dentistry of Dr. Osborne was revoked. The grounds of the revocation were that he had aided and abetted an unlicensed employee in practicing dentistry. While the situation there was different from that here, in that there there was no evidence that Dr. Osborne knew that the employee was practicing dentistry, the language of the court concerning the necessity for *guilty* knowledge in a case charging aiding and abetting is applicable here. The court said, 85 Cal.App. at page 227, 259 P. at page 71, that "aid and abet in this character of a proceeding necessarily implies knowledge. The expression is a familiar one in the domain of criminal law, and as there used it means that one has, with guilty knowledge and intent aided the actual perpetrator to commit the offense. 7 Cal.Jur. 889; People v. Yee, 37 Cal.App. 579, 174 Pac. 343." In Bley v. Board of Dental Examiners, 120 Cal.App. 426, at page 430, 7 P.2d 1053, 1055, the court, referring to the decision in the Osborne case, said: "What the court obviously meant, and it was the main question decided, was that the very essence of the charge of aiding and abetting was a guilty knowledge.

"It is well to remember that in these proceedings the charge is unprofessional conduct, not that the accused had knowledge of some other person's default."

Appellants cite Webster v. Board of Dental Examiners, 17 Cal.2d 534, at page 538, 110 P.2d 992, 995, where the court said: "Many California cases have expressly rejected the contention that administrative proceedings for the revocation of a professional license are to be governed by criminal law theories on matters of evidence. [Citations.]" Mantzoros v. State Board of Equalization, 87 Cal.App.2d 140, 196 P.2d 657, and Murphy v. Board of Medical Examiners, 75 Cal.App.2d 161, 170 P.2d 510, are to the same effect.

While these cases hold that criminal law theories on matters of evidence do not obtain in administrative proceedings, it must be borne in mind that section 2392 of the Business and Professions Code uses the words taken from the criminal law, "aiding or abetting." The Osborne and Bley cases directly construe the words "aiding and abetting" as used by the Legislature in connection with the charge of unprofessional conduct by a licensed person to require guilty knowledge.

Appellants contend that the Osborne and Bley cases are adequately distinguished in Stuck v. Board of Medical Examiners, 94 Cal.App.2d 751, 211 P.2d 389. However, the case does not bear out appellant's theory. There the court was discussing the petitioner's contention that the accusation should have alleged that he knew that Stern, whom he was charged with aiding and abetting, was an unlicensed person, and also that it should have alleged that Stern owned, controlled or directed others in the conduct of the office where abortions were performed. The court said, 94 Cal.App.2d at page 756, 211 P.2d at page 392: "Such allegation would have been surplusage, as under the facts set forth it was not pertinent whether Stern owned the premises or the paraphernalia contained therein. The facts of Bley v. Board of Dental Examiners, 120 Cal.App. 426, 7 P.2d 1053, on account of a different background are not in point on this particular issue. See 1 Cal. Jur. [10-yr.] Supp. [1942, Pocket Part], Administrative Law, § 13, p. 34, and cited cases. The word 'abet' not only means assistance or aid but 'includes knowledge of the wrongful purpose of the perpetrator.' 7 Cal.Jur. 889, 1 C.J.S., [abet], page 306, n. 6." Thus the Stuck case in no wise disapproves of, but actually approves, the interpretation by the Osborne and Bley cases of "aiding and abetting" as requiring guilty knowledge.

[10] In view of the letter of Browne stating that the pendency of the mandate proceedings entitled Flint to continue to practice, the steps taken by respondent to ascertain if he could so continue, his inability to get any information on the subject from the attorney general's office, and the office of the Board of Medical Examiners, and the statement of the president of the board that Dr. Flint could practice, see People v. Ferguson, 134 Cal.App. 41, at page 50, 24 P.2d 965, for effect of erroneous advice from an administrative officer, there

is substantial evidence to support the court's finding that respondent did not have the guilty knowledge required in a charge of aiding and abetting. Hence, the action of the trial court as to the second count should be sustained.

Judgment Against Individual Members of Board.

Moran v. Board of Medical Examiners, supra, 32 Cal.2d 301, 196 P.2d 20, holds that incumbent members are proper but not necessary parties to a mandamus proceeding. The record fails to show service of process on board members French, Fleming and Nelson, or on former members Otto and Scatena. Respondent concedes that the judgment against these unserved members is improper.

Conclusion.

[11] While there is substantial evidence to support the court's findings that the doctors, other than Keene, Flint and Murphy, were interns, there is no evidence that they were registered with the board. For that reason, and for the reason that the evidence shows conclusively that Doctors Keene, Flint and Murphy were not interns, the action of the trial court in finding (under count I) that respondent was not guilty of unprofessional conduct, was erroneous.

[12] There is substantial evidence to support the court's finding that the allegations of count II were not sustained. The board made a single order of revocation based on its findings and conclusions that both counts had been violated. Inasmuch as we hold that the findings do not support the conclusion of unprofessional conduct as to count II; since license revocation is a drastic penalty, even though, by the probationary order, its effect has been considerably lessened, and moreover, as we have no way of knowing what penalty the board would have imposed for violation of count I alone, the judgment will have to be reversed and the matter sent back to the board for reconsideration of the penalty. See Cooper v. State Board of Medical Examiners, 35 Cal. 2d 242, 217 P.2d 630.

The judgment is reversed and the trial court is directed to enter judgment commanding respondent board to set aside its order of revocation and further directing the board to reconsider the case and redetermine its order in the light of this court's opinion and judgment.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.

---

98 Cal.App.2d 333

PEOPLE v. ONE 1938 FORD SEDAN, ENGINE NO. ID 66852GG (BANK OF AMERICA, Intervenor).

Civ. 17395.

District Court of Appeal, Second District, Division 3, California.

July 7, 1950.

The People of the State of California sued for forfeiture of one 1938 Ford Sedan, seized by the Division of Narcotic Enforcement while being used for transportation of marijuana. The Bank of America filed an intervening claim to the automobile as mortgagee. From a judgment of the Superior Court of Los Angeles County, Leroy Dawson, J., forfeiting the title to the automobile, subject to intervening claimant's lien, plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the trial court should have forfeited the bank's, as well as the mortgagor's interest in the automobile because of the bank's failure to make reasonable investigation of the mortgagor's moral responsibility, character and reputation before acquiring its mortgage interest.

Judgment reversed with instructions.

Forfeitures 🔑3

A mortgage interest, acquired by bank in automobile without reasonably investigating mortgagor's moral responsibility, character and reputation, should have been forfeited, along with mortgagor's interest as automobile owner, for use thereof in transportation of marijuana with his knowledge. Health and Safety Code, §§ 11620, 11622.

Fred N. Howser, Attorney General, Stanford D. Herlick, Deputy Attorney General, for appellant.

John E. Walter, Los Angeles, for respondent.

SHINN, Presiding Justice.

The question on this appeal is whether the trial court made a $199.88 mistake. The respondent, a bank, exercised good judgment in not filing a brief, inasmuch as it clearly appears from the record that the judgment is not in accordance with law.

The action is for the forfeiture of an automobile which was seized by the Division of Narcotic Enforcement while it was being knowingly used for the transportation of marijuana. The registered owner did not defend. The bank, holding a chattel mortgage upon which there was unpaid the sum of $199.88 answered, but failed to allege or prove at the trial facts which would have protected its lien, namely, that its mortgage interest was acquired after a reasonable investigation of the moral responsibility, character and reputation of the purchaser (mortgagor). Health & Safety Code, §§ 11620, 11622. The court found that the bank had made no such investigation, but nevertheless adjudged its lien to be valid and forfeited the title subject to the lien. The interest of the bank also should have been declared forfeited because of its failure to bring itself within the exception, stated in said code sections, under which the holder of a lien upon a vehicle which is subject to forfeiture may preserve his lien right. People v. One 1941 Buick Club Coupe, 72 Cal.App.2d 593, 165 P.2d 44.

The judgment is reversed with instructions to enter another judgment forfeiting the title to said vehicle unconditionally.

VALLÉE, J., concurs.

WOOD, J., did not participate.

ROY v. MISSION TAXI CO., Inc., et al.*

(two cases).

Nos. 14034, 14207.

District Court of Appeal, First District, Division 1, California.

June 26, 1950.

Rehearing Granted July 26, 1950.

Action by Elsie I. Roy against the Mission Taxi Company, Incorporated, and the Pacific Gas and Electric Company, Incorporated, and others, for injuries received by plaintiff in a collision between a taxi of the Mission Taxi Company, Incorporated, in which plaintiff was a passenger and truck of the Pacific Gas and Electric Company, Incorporated, operated by one of its employees. The Superior Court, in and for the County of Santa Clara, M. G. Del Mutolo, J., entered judgments against the defendants in total amount of $25,000 and each defendant appealed. The District Court of Appeal, Schottky, J., pro tem, held that evidence sustained findings that both defendants were negligent and that their negligence concurred in proximately causing injuries to plaintiff.

Judgments affirmed.

1. Appeal and error ⚷930(1)

Before an appellate tribunal is justified in reversing a judgment on ground of insufficiency of evidence, it must appear from record that, accepting full force of evidence adduced, together with every inference favorable to prevailing party which may reasonably be drawn therefrom, it still appears that law precludes the prevailing party from recovering a judgment.

2. Appeal and error ⚷930(1)

Evidence must be construed most strongly against party against whom judgment is rendered and every favorable inference which may fairly be deduced from evidence should be resolved in favor of prevailing party, and prevailing party's evidence must ordinarily be accepted as true and evidence which contradicts it must be disregarded.

---

* Subsequent opinion 225 P.2d 920.

3. Automobiles ⟹244(36)
Carriers ⟹318(12)

In action for injuries sustained by taxi cab passenger in intersectional collision between taxi cab and truck, evidence sustained finding that drivers of both vehicles were negligent and their negligence concurred in proximately causing injuries to passenger.

4. Trial ⟹234(4), 240

In action for injuries sustained by taxi cab passenger in intersectional collision between taxi cab and truck, refusal to give instruction on imminent peril, requested by truck driver's employer, which was clearly calculated to inform jury that imminent peril was created by taxi cab driver was properly refused as argumentative and a formula instruction.

5. Trial ⟹228(3)

A jury should be instructed in concise and understandable language as to principles of law applicable under evidence to case on trial.

6. Trial ⟹261

In action for injuries sustained by taxi cab passenger in intersectional collision between taxicab and truck, where instruction on imminent peril requested by employer of truck driver was properly refused as argumentative and as formula instruction, failure of trial court to modify or rephrase proposed instruction and give it was not reversible error.

7. Trial ⟹261

Where instructions are offered which cannot properly be given without modification, court may refuse to give them.

8. Automobiles ⟹246(9)
Carriers ⟹321(12)

In action for injuries sustained by taxicab passenger in intersectional collision between taxicab and truck, instruction relating to duty of vehicle approaching intersection and instructions to effect that ordinarily driver of automobile entering intersection first has right of way, but before entering arterial intersection must yield right of way to any approaching vehicle thereon which constitutes an immediate hazard, were not misleading or confusing. Vehicle Code, §§ 550, 552, 577.

Robert H. Gerdes, John J. Briare, Frederick T. Searls, all of San Francisco, Campbell, Hayes & Custer, San Jose, for appellant Pacific Gas & Electric Co.

Hoge, Pelton & Gunther, San Francisco (Leo V. Killion, Reginald M. Watt, San Francisco, of counsel), for appellant Mission Taxi Company.

James F. Boccardo, San Jose, for respondent.

SCOTTKY, Justice pro tem.

Elsie I. Roy brought an action to recover damages for personal injuries received by her in a collision between a taxi of the Mission Taxi Company, Inc., in which she was a passenger, and a truck of the Pacific Gas and Electric Company, Inc. (hereinafter referred to as P. G. & E.), operated by one of its employees. The jury before whom the case was tried rendered a verdict for $25,000 for plaintiff against both defendants. Each defendant made a motion for a new trial, which motions were denied by the court. Each defendant has appealed from the judgment against it in accordance with said verdict. The appeal in No. 14,034 contains the entire record on appeal, including a full reporter's transcript. Appeal No. 14,207 is taken on a settled statement. In accordance with settled practice, on both appeals we will take the facts from the reporter's transcript, and not from the settled statement.

Each defendant questions the sufficiency of the evidence to show that any negligence on the part of its employee was a proximate cause of the injuries to plaintiff, each defendant contending that the negligence of the other was the sole proximate cause of the collision.

[1, 2] Before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference fav-

orable to the prevailing party which may reasonably be drawn therefrom, it still appears that the law precludes the prevailing party from recovering a judgment. The evidence must be construed most strongly against the party against whom the judgment is rendered. Every favorable inference which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true and evidence which contradicts it must be disregarded. Bearing in mind this familiar rule, we shall give a brief summary of the evidence as shown by the reporter's transcript.

At about 4:30 p. m. on March 26, 1947, the plaintiff, Elsie I. Roy, was riding as a fare-paying passenger on the right-hand side of the rear seat of a taxi owned by the Mission Taxi Company and being driven by its employee in an easterly direction on Santa Clara Street (also called The Alameda) in San Jose. This street has a center dividing line with three lanes in addition to the parking lane on the south half and is protected by arterial stop signs at cross streets. One of such cross streets is Montgomery Street, which runs approximately north and south and at right angles with Santa Clara Street. As the taxi approached the intersection with Montgomery Street, a truck belonging to the P. G. & E. was being driven north along Montgomery Street by a P. G. & E. employee. There is a conflict in the evidence as to whether the truck stopped at the arterial stop sign before entering this intersection, but after it did enter there is evidence to show that it proceeded very slowly—three or four miles per hour,—hesitated, and then started to make a left turn in order to go west on Santa Clara Street. The streets were dry and level and the day was clear. The taxi struck the left rear wheel of the truck with the left front side of the taxi, and the plaintiff was injured when the sudden stop of the taxi threw her forward over the front seat and through the windshield.

Evidence from which a jury might find the P. G. & E. truck driver negligent and such negligence a proximate cause of the accident is found in the testimony of the taxi driver. He testified that he was approximately 150 feet west of the intersection when he first saw the truck; that at that time the truck was just cruising (one to two miles per hour) over the stop sign line on Montgomery Street; that he at no time saw the truck stop (but he had not seen the truck at the time it was behind the stop sign line); that the truck almost came to a stop just across the pedestrian line, and that he put on his brakes when he first saw the truck, but when he saw that the truck was about to stop, "I stepped on [it], increased my speed * * * And in the meantime is when he come to almost a stop, he gassed it, in other words he stepped on it, and made a left-hand turn right into me." The truck driver made no turning signal that the taxi driver saw. The taxi driver testified that he was going 25 to 30 miles an hour when he first saw the truck and applied his brakes. Such erratic behavior of the truck driver at an intersection with an arterial street with traffic which was testified to as being heavy and the making of a left-hand turn without signaling would be some evidence from which negligence could be found by the jury. The defendant taxi company calls attention to section 552 of the Vehicle Code which provides that one entering a through highway "shall yield the right of way to other vehicles * * * which are approaching so closely on the through highway as to constitute an immediate hazard," and contends that the taxi driver had a right to believe that the truck would obey the law and yield the right of way, particularly if the truck driver thought, as he testified, that the taxi was going from 45 to 50 miles per hour.

Evidence from which a jury could find the taxi driver negligent is found in the testimony of a bystander, Mr. Deutsch, as to the speed of the taxi before the collision. He stated that at the time just before the accident he gained the opinion that it was going at least 50 miles per hour. Also, since the truck had already entered the intersection at the time the taxi was 150 feet from it and was well able to stop within such distance, there is evidence that the taxi driver was negligent in violating a right of way.

[3] Each defendant argues to this court that the evidence is insufficient, as a matter of law, to justify a judgment against such defendant. However, we are not impressed with these arguments because, as we view the record, we are convinced that there was ample evidence to justify the jury in impliedly finding, as it did, that both defendants were negligent and that their negligence concurred in proximately causing the injuries to plaintiff. We believe there was ample evidence to justify the conclusion that the driver of the taxicab in traveling at a speed of 45 to 50 miles an hour at said time and place was not exercising the degree of care that a carrier of passengers for hire should exercise. We believe also that there was ample evidence to justify the conclusion that the driver of the northbound truck was negligent in proceeding into a through highway, when, according to his own testimony, he observed the taxicab 200 feet away traveling at a speed of 45 to 50 miles an hour. We deem it unnecessary to discuss further the contentions of defendants as to the insufficiency of the evidence, because, although they might well be urged in arguing the case to the jury in the first instance, and then to the trial court upon a motion for new trial, they have little merit before an appellate tribunal upon the record in the instant case. The argument of each defendant pointing out evidence to show that the negligence of the other defendant proximately caused plaintiff's injuries serves to show the conflict in the testimony, which it was the duty of the jury to resolve.

Defendant P. G. & E. contends that the court committed reversible error in refusing to give instruction No. 67 offered by it, which reads as follows: "You are instructed that a person, who in driving on a roadway with ordinary care, suddenly and unexpectedly is confronted with imminent peril brought about by the negligence of another, is not bound to use that degree of care which a person of ordinary prudence in calmer moments would use; and under such circumstances if Mr. Liles, the driver of the P. G. & E. truck attempted to speed up and get out of the way of the Mission Cab, or took the wrong course solely by reason of the imminent peril created by the driver of the Mission Cab, the P. G. & E. could not be held responsible in so doing, if a person of ordinary prudence, under the pressure of the same emergency, might have done the same thing. In other words, the law in this respect is simply plain common sense. You must judge the driver of the P. G. & E. truck in the light of what would be reasonable and proper under the particular circumstances of this case. Any person can determine how an accident might have been avoided after it has happened. The law does not require the driver of the P. G. & E. truck to anticipate that there is going to be an accident or to act with the utmost wisdom upon being confronted with an imminent peril. He is charged with his foresight rather than his hindsight and he cannot be held responsible for failure to take precautions against the unexpected negligence of Butler, the driver of the Mission Cab, nor is he required to act in an emergency, or in the excitement of an imminent peril created by the driver of the cab, with the same judgment that would be expected of him in the absence of such peril so created."

[4, 5] No other instruction was given on the subject and we agree with said defendant that a party is entitled to proper instructions as to the law applicable to every material issue of fact when there is some evidence to support his theory of the case. Under the evidence in the case, defendant P. G. & E. was entitled to a proper instruction on the subject of imminent peril, and had a proper instruction been offered we would be inclined to hold that it would be error to refuse to give it. However, the offered instruction is objectionable for many reasons and was properly refused by the court. In at least two places it is clearly calculated to inform the jury that imminent peril was created by the driver of the taxicab and thus invades the province of the jury. It is a type of argumentative and formula instruction which often has been criticised by our appellate courts. A jury should be instructed

in concise and understandable language as to the principles of law applicable under the evidence to the case on trial. Argumentative and formula instructions are objectionable because they emphasize certain portions of the testimony, and coming from the court may serve to confuse and mislead the jury. As was said in Estate of Clark, 180 Cal. 395, at pages 398-399, 181 P. 639, at page 641: "But it is not the province of the court to make an argument to the jury, and though the giving of an instruction argumentative in form may not always be cause for reversal, it is also true that the court is not bound to give such an instruction even if the argument be a legitimate one, and the refusal thereof is not error. [Citing cases.]" And as this court said in Taha v. Finegold, 81 Cal.App.2d 536, at page 543, 184 P.2d 533, at page 536: "Formula instructions should not be given. As said in Tice v. Pacific Elec. Ry. Co., 36 Cal.App.2d 66, 71, 96 P.2d 1022, 1024, 97 P.2d 844, formula instructions 'are not calculated best to serve most successfully [the] administration of justice. Their final disappearance will improve the conduct of court trials.' While the giving of formula instructions is not in itself prejudicial error, the giving of them here added to the other circumstances of the case, combined to deny the plaintiff a fair trial." The prevalent practice of seeking to argue a case in instructions should be discouraged and we have no doubt that if said defendant had offered an instruction giving the law as to imminent peril, as approved by the decisions of our courts, it would have been given by the trial court.

[6, 7] Nor was it reversible error for the trial court to fail to modify or reframe the proposed instruction, for the reason as stated by our Supreme Court in Nelson v. Southern Pacific Co., 8 Cal.2d 648, at page 653, 67 P.2d 682, at page 685: "It is next complained that the court did not instruct the jury at all upon the duty of the defendant company to give warning as the train approached the crossing. It is conceded that the instruction offered by the plaintiff was incorrect, but it is insisted that this did not relieve the court of the duty to give a proper instruction upon a relevant issue thus called to its attention. Undoubtedly it would have been proper for the court to instruct the jury on the duty of the defendant to give warning as it approached the intersection (Bruce v. Western Pipe & Steel Co., 177 Cal. 25, 169 P. 660; People v. Frey, 165 Cal. 140, 131 P. 127), but it has been frequently held that where instructions are offered which cannot properly be given without modification the court may refuse to give them (Wiley v. Young, 178 Cal. 681, 174 P. 316; Dover v. Archambeault, 57 Cal.App. 659, 664, 208 P. 178, and cases cited)."

[8] Defendant Mission Taxi Company contends that the court erred in giving instruction No. 58 proposed by defendant P. G. & E. Said instruction is as follows: "You are instructed that Section 550 of the Vehicle Code provides as follows: '550. Vehicle Approaching or Entering Intersection. (a) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway. (b) When two vehicles enter an intersection from different highways at the same time the driver of the vehicle on the left shall yield the right of way to the driver of the vehicle on the right.'" Instructions were given as to what constituted an "intersection," what was a "right of way" and that vehicles must stop at through highways (Vehicle Code, § 577) and in addition section 552 of the Vehicle Code was given as an instruction, as follows: "The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway." Since it is an undisputed fact that the accident here involved occurred at an intersection with a through highway,

the defendant taxi company claims that the giving of the instruction on section 550 of the Vehicle Code was prejudicial error and this in spite of the fact that the court also gave the law under section 552, defendant citing and quoting from Elmore v. Lassen County, 10 Cal.App.2d 229, 232-233, 51 P.2d 481. That case, however, was overruled on the point for which it is here cited, by Pattisson v. Cavanagh, 18 Cal.App.2d 123, 63 P.2d 868, 64 P.2d 945, decided by this court in 1936. The Supreme Court in denying a hearing in the latter case said, "The application is based in part on a conflict between this decision and the decision rendered by the Second Division of the First District Court of Appeal in the case of Elmore v. County of Lassen, 10 Cal.App.2d 229, 51 P.2d 481. In so far as that case is inconsistent with the decision in the above-entitled case, we disapprove of the decision in the case of Elmore v. County of Lassen, supra." 18 Cal.App. 2d at page 130, 64 P.2d at page 945.

The facts in the Pattisson case were similar to those in this case, except that the car proceeding down the arterial highway and driven by the plaintiff ran off the left-hand side of the road to plaintiff's damage when the defendant came in from the right. The same two instructions were given there as here, and the plaintiff argued on appeal from a decision for the defendant that they were conflicting and that the one dealing with the right of way at intersections in general took from the jury the question as to whether the presence of plaintiff's car constituted an immediate hazard. The court, in the Pattisson case, saying that the question of the negligence of each party was one for the jury, stated: "We are of the opinion that when all instructions upon the subject of right of way are read and considered together it cannot be said that they are conflicting or that the jury was misled thereby. The plain import thereof was that ordinarily the driver of an automobile entering an intersection first is entitled to the right of way thereover, but that before entering an arterial intersection he must stop and yield the right of way to any approaching vehicle thereon which constitutes an immediate hazard." 18 Cal.App.2d at page 127, 63 P.2d at page 870.

Defendant taxi company has cited numerous cases from this and other jurisdictions which appear to support its contention that it was error to give said instruction No. 58, but the latest expression of our Supreme Court upon the subject was its above-quoted language in denying a hearing in Pattisson v. Cavanagh, supra. Therefore, as an intermediate appellate court we feel that we are bound by that decision and must hold that the giving of said instruction was not error.

In view of the foregoing, we conclude that the evidence was sufficient to support the judgment against both defendants, that no prejudicial error was committed and that the judgments should be and they are hereby affirmed.

PETERS, P. J. and BRAY, J., concur.

STOTT v. JOHNSTON.*

Civ. 14306.

District Court of Appeal, First District,
Division 1, California.
June 26, 1950.

Rehearing Denied July 26, 1950.
Hearing Granted Aug. 24, 1950.*

Action by Reo D. Stott against Thomas Johnston, Pervo Johnston Company, Johnston Paint Company, Pervo Paint Company and Jack Hendricks and others, to recover damages arising out of the use of defective paint sold to the plaintiff. At trial a nonsuit was granted as to Pervo Paint Company and Pervo Johnston Company, and the action was dismissed by plaintiff as to Jack Hendricks. The action was continued with Thomas Johnston, doing business as Johnston Paint Company, as the only defendant. The Superior Court, Alameda County, James

---

* Subsequent opinion 229 P.2d 348.

R. Agee, J., rendered a judgment for the plaintiff, and the defendant appealed. The District Court of Appeal, Schottky, J. pro tem., held that plaintiff failed to introduce sufficient evidence on loss of good will, to support the verdict and judgment.

Judgment reversed, and a retrial ordered.

1. Sales ⚷261(6)

Where paint salesman gave assurances as to high quality of paint and promised that manufacturer would reimburse buyer 100% for labor and materials for any paint that went bad, and promised that if anything went wrong, they would stand behind buyer 100%, and buyer bought upon those assurances statements of manufacturer and salesman amounted to express warranty as to quality. Civ.Code, § 1732.

2. Sales ⚷445(4)

In buyer's action against manufacturer of paint, whether manufacturer was guilty of breach of implied warranty of merchantable quality was a question for the jury. Civ.Code, § 1735(1, 2).

3. Sales ⚷434

In buyer's action against manufacturer of paint, complaint sufficiently showed that manufacturer was aware of purpose for which paint was to be used and that buyer relied upon representations made. Civ. Code, § 1735(1).

4. Appeal and error ⚷197(4)

Where no special or general demurrer was filed to complaint and point was not raised during trial, seller's claim that complaint failed to allege that seller was informed of particular purpose for which buyer intended to use paint and that buyer relied upon seller's skill or judgment and hence could not recover for breach of implied warranty would not be considered on appeal. Civ.Code, § 1735(1).

5. Sales ⚷442(5)

In buyer's action against manufacturer of paints for damages arising out of sale of defective paint, buyer was entitled to recover damages for loss of good will. Civ. Code, § 1789(6, 7).

6. Sales ⚷441(4)

In buyer's action against manufacturer of paint for loss of good will arising out of defective paint, buyer was required to establish loss of good will by satisfactory evidence.

7. Sales ⚷441(4)

In buyer's action against manufacturer for loss of good will arising out of sale of defective paint, evidence as to loss of good will was insufficient to support verdict and judgment for buyer.

8. Sales ⚷442(1)

In buyer's action against manufacturer for damages arising out of sale of defective paint, buyer was entitled to recover amount paid for paint less credit allowed for paint returned. Civ.Code, § 1789(6, 7).

9. Sales ⚷442(6)

In buyer's action against manufacturer for damages arising out of sale of defective paint, if buyer could prove that he repainted all or some buildings covered with defective paint without cost to customers or at less than buyer's cost, buyer was entitled to recover for all losses suffered as a result. Civ.Code, § 1789(6, 7).

◆

Hill, Morgan & Farrer, Elliott H. Pentz, David A. Thomas, Los Angeles, for appellant.

Frederick L. Hewitt, Edward E. Heavey, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff and respondent Reo D. Stott, a painting contractor, brought an action against Thomas Johnston, Pervo Johnston Company, Johnston Paint Company, Pervo Paint Company and Jack Hendricks (and three Does) to recover damages alleged to have resulted to plaintiff by reason of the use by him in his business of some paint alleged to have been sold to him by said defendants. By his complaint plaintiff sought to recover $5,468.15, the money paid for the paint; damages in the amount of $50,000 as the cost necessary to repaint the buildings on which the paint was used; and $40,000 damages for loss of business and customers. At the trial a nonsuit was granted as to Pervo Paint Company and Pervo

Johnston Company, and dismissed by plaintiff as to Hendricks, and the action then continued with Johnston, doing business as Johnston Paint Company, as the only defendant. The trial court instructed the jury that "The only basis upon which damages can be awarded in this case is upon this claim of loss or damage to said good will." The jury returned a verdict awarding damages in the sum of $10,000, and this appeal is from the judgment entered in accordance with said verdict.

As grounds for a reversal of the judgment appellant makes two major contentions: (1) That respondent failed to establish liability against appellant; (2) that respondent failed to establish any legal damages. Before discussing these contentions we shall summarize briefly the factual situation as shown by the record.

Some time in February, 1946, Hendricks introduced himself to Stott as a representative of the Pervo Company. They discussed paints and Stott told Hendricks that he was using "Rich paint." Hendricks told Stott, "We have got as good a paint, if not better." Stott testified as follows: "I asked him, I says, 'In case of any paint going bad at any time, what is your company policy?' He says, 'We would reimburse you a hundred percent for labor and materials for any paint that goes bad.' And I wanted an assurance and that was the assurance he give me.

"Mr. Hewitt [attorney for plaintiff]:

"Q. Did he say anything alse at that time about the paint, if anything went wrong with it? A. If anything went wrong with it, they would stand behind me one hundred percent." Stott purchased paint from Hendricks and during the following months painted about 56 residences and buildings with the Pervo "Fume Proof" paint. Stott prepared and applied the paint as he was instructed by Hendricks. In June, 1946, Stott told Hendricks that the paint did not cover as well as it should. Hendricks examined one of the jobs which had been painted and said that the paint seemed to be lacking sufficient pigment. The company added more pigment to the paint and Stott continued to use it; also more pigment was added to the paint purchased by him after that time.

In about October, 1946, Stott began receiving complaints from customers whose buildings had been painted. He took Hendricks and Johnston to one of the buildings, and after examining the job Hendricks stated that there was "definitely something wrong with the paint." Johnston also said that there was "something wrong with it," and proceeded to explain to Stott and the owners of the building that it was not Stott's fault that the paint was peeling off the walls, but that he had received a bad batch of paint. Johnston told the owners (McGinnis) that his company would stand behind the job, and told Stott to do the job over, giving him instructions as to how and when it should be done.

Stott received complaints from his customers from the latter part of 1946 until April, 1947. Stott testified that he saw Hendricks in about March, 1947; told Hendricks that he was receiving many complaints from his customers because the paint was peeling off the jobs, and that Hendricks said, "I know the paint is no good, but I would appreciate it, Reo, if you wouldn't go telling it around town that our paint is no good, because it would hurt my sales terrible." About two weeks later, Hendricks told Stott that Johnston had gone to Los Angeles to talk to the Pervo company people, and that they had told Johnston to have Stott do the jobs over again as the complaints came in. However, Stott was told to "get in touch" with Hendricks or Johnston before redoing any job, so that Hendricks and Johnston could first "verify each and every job." Hendricks and Stott agreed that Johnston would pay him $3.50 an hour for the labor to clean and paint the jobs, and Stott would furnish the materials, equipment and men.

On about April 5, 1947, Stott returned to the Johnston Paint Company all the Pervo paint that he had in stock, about 276 gallons. At about the same time he told Hendricks that he had received complaints on about 20 jobs. Hendricks said that he did not know whether the company would make good for that many, and Stott would have to discuss the matter with Johnston.

Stott testified that Johnston told him in August, 1947, that the company would stand behind the paint "one hundred per cent." In October, 1947, Stott called Johnston and told him that he then had about 40 complaints and wanted something done about it. Johnston told Stott that the company "can't stand for that," and declared, "I don't intend to maintain your jobs." On November 4, 1947, Johnston went with Stott to inspect the jobs. They looked at the first house and Johnston admitted that the paint was "definitely over-pigmented." Stott told him that he had painted a number of houses with that same paint and that they would all start peeling and his reputation would be ruined. Johnston told Stott that he would take care of the people that sued, and not to worry about the rest, as people forget very easily and Stott's reputation would not be hurt in any way. Stott threatened to sue Johnston. They proceeded to look at some more of Stott's jobs. At the next stop Johnston again agreed and stated to the owner that the paint was "a poor batch" and that Stott was not liable. From then until the tour was completed, however, Johnston changed his attitude; upon their inspection of each job, he thereafter told Stott that the trouble lay in "surface condition" and that the houses Stott was painting were so old that they were not worth painting and "should be burned down."

Stott told Johnston that he wanted the jobs done over and $20,000 damages, and Johnston said, "We might give you $5,000 and pacify these people, but we sure wouldn't give you twenty." Stott then threatened to sue, and Johnston said, "Now, we don't have to go into that. We will call in the license inspector and if the license inspector says we are wrong, we will stand good for the jobs." Stott immediately agreed to this proposal. About two weeks later, Johnston told Stott over the telephone that the state license inspector had inspected several of the jobs and said that the trouble was "surface condition." Upon making inquiry, Stott discovered that Johnston had never contacted the state license board. Stott then asked the board to have the jobs checked. He telephoned Johnston after he had received the board's report, told Johnston that the report was that Stott was in no way responsible for the paint failures, and asked Johnston to make good on his promise. Johnston refused and told Stott to "go ahead and sue."

Additional facts will be set forth as this opinion progresses.

[1] Appellant first argues that the alleged statements of Hendricks and Johnston were not express warranties but only amounted to "puffing talk." In support of his argument he cites Steen v. Southern California Supply Co., 74 Cal.App. 265, 239 P. 1098, 1099. In that case, Steen bought caramel coloring matter from defendant. The defendant's salesman had previously told Steen that the coloring matter was "just as good or perhaps better than any," that "it would stand up with any coloring matter as far as quality was concerned" and was "as good as anything * * * [Steen] had used." The court held that this was "puffing talk" and not an express warranty. However, the opinion in the Steen case states that the so-called "puffing talk" was made by the salesman a number of days before Steen went to defendant's store and purchased the coloring matter, and that at the time the purchase was actually made no words were said which constituted a warranty. In the instant case, the facts are much stronger and show that defendant's salesman not only gave assurances as to the high quality of the paint but promised that defendant would reimburse plaintiff "a hundred per cent for labor and materials for any paint that goes bad" and that "If anything went wrong with it, they would stand behind me one hundred percent." Plaintiff testified that he wanted an assurance before changing from the paint he was using to defendant's paint, and that it was upon this assurance being given to him that he decided to try the Pervo paint.

Section 1732 of the Civil Code reads: "Any affirmation of fact *or any promise* by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." (Emphasis added.)

We are convinced that the statements of appellant and his salesman, Hendricks, constituted an express warranty. Indeed it would be difficult to find a clearer case of a buyer being induced to buy upon the representations of the seller as to quality.

[2] Appellant next argues that the evidence failed to establish a breach of implied warranty of merchantability, and, although the evidence indicated that the paint sold to respondent was not of first quality, there was no evidence that the paint was not salable as goods of that general kind. In this connection, appellant argues that although the paint was perhaps not of first grade quality it could not be concluded from the evidence "that the paint was unsalable as such, or that it was worse than average or that it was unsuitable for all painting purposes, and thus Stott failed to predicate a breach of implied warranty of merchantability."

Section 1735 of the Civil Code provides: "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

As to subdivision (1) there is ample evidence that Stott relied on Hendricks' knowledge of the paint and upon the latter's judgment before he purchased the paint, and particularly so after the first purchase. There is also ample and substantial evidence to support the conclusion that Hendricks knew exactly the purpose for which the paint was being purchased. In June, 1946, at Stott's suggestion, Hendricks examined some CAA shacks which Stott had painted, and Hendricks agreed that the paint did not cover the way it should. In August, 1946, Hendricks watched Stott paint the outside of Stott's own building; Hendricks even told Stott exactly how to apply the paint. A reading of the transcript leaves absolutely no doubt in one's mind about Hendricks' knowledge of the purpose for which the paint was bought.

In support of his argument that the evidence failed to establish a breach of implied warranty of merchantability as provided by subdivision (2) of said section 1735, appellant relies solely upon the case of Kenney v. Grogan, 17 Cal.App. 527, 120 P. 433. That case held that olives were not unmerchantable when they were capable of being used to make olive oil, even though the olive oil was of an inferior quality, when the oil could be sold at $1 a gallon (good quality olive oil sold at $1.75). The court said that the olives were not useless and unsalable, and as "There was nothing in the contract of purchase to show that any special grade or quality was expected to be furnished", 17 Cal.App. p. 533, 120 P. at page 436, the olives could not be held unmerchantable.

In the instant case, not only did the evidence show that the paint peeled off the houses within a short period of time after being applied, thereby making it a question of fact for the jury as to whether the paint was merchantable and usable or not, but there also were many admissions by Johnston and Hendricks that the paint was defective and useless for the purpose for which it was sold. Not only did Johnston (usually through Hendricks) admit that the paint was defective, but Johnston offered to, and did in fact, take back the stock of paint unused and gave Stott credit for it.

We are convinced that there was ample evidence upon which a finding of a breach of implied warranty could be based.

Appellant next contends that the complaint failed to allege that Stott (a) informed the seller as to the particular purpose for which the paint was intended to be used, and (b) relied upon the seller's skill or judgment, and that, therefore, Stott cannot recover for breach of an implied warranty under section 1735(1) of the Civil Code.

[3, 4] This contention deserves scant attention. In the first place, we believe the complaint shows that appellant was well aware of the purpose for which the paint was to be used and also that respondent relied upon the representations made. Secondly, no demurrer, either special or general, was filed, and the point does not appear to have been raised during the trial. As was said in Drullinger v. Erskine, 71 Cal.App.2d 492, at page 499, 163 P.2d 48, at page 52: "It is apparent that if the defendants had suggested those defects of pleading, in the course of the trial, the plaintiff, upon application therefor, would have been granted leave to amend the complaint. Article VI, Section 4½, of the Constitution, provides that: 'No judgment shall be set aside, * * * in any case, on the ground * * * of the improper admission or rejection of evidence, or for any error as to any matter of pleading, * * * unless * * * the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'" See, also, Wiltsee v. Utley, 79 Cal.App.2d 71, 179 P.2d 13; Gerstner v. Scheuer, 91 Cal.App.2d 123, 204 P.2d 937.

The final and most serious contention of appellant is that the evidence as to damages is insufficient to support the judgment.

In his complaint plaintiff asked for the following damages: (1) $5,468.15—representing $6,185, the amount he paid for the paint less a credit of $716.85 for the return of paint to the defendant, which amount was credited to him; (2) 50,000—as the cost necessary to repaint the buildings he had painted with defendant's paint, and (3) $40,000—for the loss of business and customers.

On the trial, at the conclusion of plaintiff's case there was a discussion between the court and counsel in chambers outside of the presence of the jury. The court stated that in its opinion there was no basis for recovery under prayer 1, and counsel for plaintiff apparently agreed. A discussion then was had concerning prayer 2, and the court stated that in its opinion Stott was not legally liable to his customers to repaint the houses. The court stated that under the contract Stott had made with his customers he was bound only to do his work in a workmanlike manner, and if the court gave instructions allowing recovery under this part of the prayer it might amount to reversible error. Counsel for plaintiff did not agree with the court's view as to this, but apparently did not press the point further. The court then stated that it intended to submit to the jury only the issue of loss of or damage to good will, and the jury was so instructed.

[5] Appellant argues first that there can be no recovery for loss of good will in the instant case, but we entertain no doubt but that under the authorities and our codes damages may be recovered for loss of good will, if such damages are shown by the evidence. It requires no stretch of the imagination to believe that the sale of defective paint to a successful painting contractor, which results in his painting 50 or more houses and buildings with the paint and it begins to peel off in six months or less, can virtually ruin his reputation as a painting contractor in that particular community.

We believe that we need go no further than to quote from section 1789 of the Civil Code, as follows: "(6) The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty. (7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

The record shows that plaintiff was using the "Rich" paint and was satisfied with it; that defendant's salesman told him defendant's paint was the best money could buy, that it was as good or better than the paint plaintiff was using, and that they would stand behind him 100 per cent if anything went wrong with it. The record also shows that defendant's paint was admittedly defective, as has already been set forth. Under such circumstances, we are convinced that plaintiff and respondent is entitled to recover for loss of good will.

[6, 7] However, damages for loss of good will must be established by satisfactory evidence, and in the instant case plaintiff failed to introduce sufficient evidence to support the verdict and judgment.

Plaintiff's accountant testified that the following figures accurately represented his income and profits for 1946–1948:

	Gross Income	Net Profit
1946	$65,317.83	$2,865.92
1947	78,514.31	4,428.88
1948	76,258.66	4,920.17

On cross-examination, Stott testified that he suffered business losses in 1947 and 1948 because of trouble or differences he was having with the unions.

The difficulty in this connection is in finding, with any degree of certainty, the losses to Stott's business caused by loss of good will. Certainly the above figures reveal no loss, and the failure to develop increased business may be attributed to the union trouble or to many other factors. Stott testified that during 1946 and up to March 1, 1947, he spent over $3,000 in advertising, and in 1947 he spent approximately $5,000 for advertising. Perhaps the jury may be regarded as having determined that because of the paint failure this money was completely wasted ($8,000, that is, assuming there is no overlap between the $5,000 and the $3,000 above-mentioned) and that, in addition, plaintiff suffered a $2,000 falling off in gross income due to the defective paint. It would seem that plaintiff must in some manner show the damages resulting from loss of good will even though it may not be possible to show it with the same particularity as is possible in other types of damage. Plaintiff should have introduced some evidence as to the general volume of painting performed in the territory in which he operated and also some evidence tending to show that his volume of business in the years following the use of defendant's paint would have been much larger than it was but for the damage to his reputation as a painting contractor caused by using defendant's paint. The difficulty with plaintiff's proof is that it does not connect up the various elements of damage and is in such form that it does not show clearly that damage to good will actually resulted. The net profit appears to be greater in 1948 than in 1946.

We feel, therefore, that notwithstanding the fact that plaintiff's good will may have been substantially damaged, we must reverse the judgment because of the unsatisfactory state of the record as to proof of damages. This will require a retrial.

[8, 9] In view of such retrial, something should be said about the items of damage other than the claimed loss of good will. It is quite clear that the trial court was in error in holding, as a matter of law, that plaintiff could not recover for the amount paid for the paint, less the credit allowed for the paint returned, as set forth in prayer 1. This is clearly a "loss directly and naturally resulting in the ordinary course of events from the breach of warranty" within the meaning of section 1789 of the Civil Code. It also is too clear to require extended comment that under prayer 2, if plaintiff can prove that he did in fact repaint all or some of the buildings painted with defendant's paint, without cost to the customers or at less than plaintiff's cost, he may recover for all losses suffered as a result thereof. Of course, plaintiff cannot recover if, in fact, he did not or does not repaint such buildings, because in such event he has not suffered this item of loss.

It may be that the three items of damage in some respects overlap. Of course, plaintiff cannot recover for the same item, in whole or in part, more than once. Any such possible duplication may be taken care of by proper instructions to the jury.

Inasmuch as we are of the opinion the cause must be retried, it is our view that, in the interests of justice, all of the issues should be retried in the light of what has been said in this opinion. Before such retrial plaintiff should be permitted to make such amendments to his complaint as he may be advised.

The judgment is reversed, and a retrial on all issues is ordered.

PETERS, P. J., and BRAY, J., concur.

---

98 Cal.App.2d 267

WANDERS et al. v. NELSON et al.

Civ. 3967.

District Court of Appeal, Fourth District, California.

June 28, 1950.

Action by John Wanders and another against Elma M. Nelson and others to enjoin defendants from interfering with the natural flow of surface waters from plaintiffs' land over contiguous land of defendants, require defendants to remove obstructions and to recover damages. The Superior Court of San Diego County, Joe L. Shell, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that the evidence sustained findings that plaintiffs had not acquired the right by prescription to discharge surface waters on defendants' land and that elevation of part of defendants' land did not change the natural flow of surface waters from plaintiffs' land or cause any damage to plaintiffs.

Judgment affirmed.

1. Waters and water courses 🔑126(2)

In action to enjoin defendants from interfering with natural flow of surface water from plaintiffs' land over contiguous land of defendants, require defendants to remove obstructions allegedly constructed by them and to recover damages, evidence sustained finding that, though raising elevation of part of defendants' land two inches in process of leveling and cultivation did obstruct the flow of excess irrigation water from plaintiffs' land, it did not cause any flooding to detriment of plaintiffs.

2. Waters and water courses 🔑116, 118

Upper riparian owner is entitled to have a lower riparian owner receive surface water falling on upper owner's land and lower owner may not dam up a channel so as to obstruct the flow of water across upper owner's land.

3. Appeal and error 🔑1010(1)

Findings of trial court must be sustained if supported by substantial evidence and all legitimate and reasonable inferences must be indulged toward upholding such findings.

4. Waters and water courses 🔑152(8)

Evidence that plaintiffs in leveling their land had recently changed the natural drainage of surface water across it and had not regularly maintained the natural drainage way and ditch to contiguous land of defendants sustained finding that plaintiffs had not acquired the right by prescription to discharge surface waters on defendants' land.

5. Easements 🔑36(3)

Party claiming a right by prescription has the burden of proving all of the elements essential to acquisition of such right by the clearest and most satisfactory proof.

6. Easements 🔑5

Actual, open and notorious use, hostile and adverse to the title of party against whom the adverse claim is made, continuous and uninterrupted for the statutory period under claim of right is necessary to acquire a right by "prescription."

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Prescription".

7. Easements 🔑47

The location of an easement may not be changed.

8. Waters and water courses 🔑126(3), 152(11)

In action to enjoin defendants from interfering with natural flow of surface waters from plaintiffs' land over contiguous land of defendants, require defendants to remove obstructions and to recover damages, a judgment for defendants was supported by findings sustained by the evidence that plaintiffs had not acquired the right by prescription to discharge surface waters on defendants' land and that raising the elevation of part of defendants' land did not change the natural flow of surface waters from plaintiffs' land across it or cause any damage to plaintiffs.

◆

Robert B. Burch, Jr. of Davies, Burch & Conyers, San Diego, for appellants.

Edwin M. Campbell, National City, for respondents.

MUSSELL, Justice.

Plaintiffs appeal from the judgment in this action to enjoin defendants from interfering with the natural flow of surface waters from plaintiffs' land over that owned by the defendants, for damages, and to require the defendants to remove obstructions and levees alleged to have been constructed by them. The sole question involved is the sufficiency of the evidence to support the findings and judgment.

Plaintiffs and defendant Nelson own contiguous acreage in Chula Vista. The lands owned by Nelson lie west and south of plaintiffs' property. The natural drainage of surface water is westerly across lots 9A and 8, owned by plaintiffs, and thence in a westerly and northerly direction across lot 7, owned by defendant Nelson.

For many years prior to 1945, the properties involved consisted of lemon orchards. In that year, plaintiffs removed the orchards from their property and leveled all of their land for the purpose of planting and raising vegetables, more particularly celery. In the process of such leveling, plaintiffs changed and altered the natural drainage across their property. In 1948, defendants Black and Date, lessees of defendant Nelson, removed a lemon orchard from lot 7, owned by Nelson, and cultivated, leveled, planted and raised celery on said lot. In the leveling, cultivating and normal farming operations thereon, said defendants caused some dirt to be moved from a low spot, running through lot 7, and raised the level of the north line about two inches for a distance of approximately 75 feet, thereby, to some extent, obstructing the flow of excess irrigation water from plaintiffs' land over that of the defendants. This is the obstruction which plaintiffs claim interfered with the natural flow of surface waters and which they assert will cause such waters to be dammed up and flood plaintiffs' land, causing injury to their crops.

The trial court found that the cultivation and leveling of lot 7 by the defendants did obstruct the flow of the excess irrigation water, but that the acts of the defendants did not cause such waters to flow back and stand upon plaintiffs' land; that the acts of the defendants did not cause any injury whatsoever to plaintiffs' land and celery crop, kill any plants of plaintiff, make the soil unfit for cultivation, or cause damage to the plaintiffs.

[1] The findings of the court in this respect are sufficiently supported by the testimony, particularly that of plaintiffs' witness Hatz, who testified, in substance, that he was an orchard operator and familiar with the natural drainage across the properties involved; that the obstruction did hold back a small amount of drain water but that flood waters would go straight through and follow the channel because the obstruction was not high enough to hold them back; that the change in elevation of two inches on defendant Nelson's property would cause no flooding to the detriment of plaintiffs because the present ditches would handle the irrigation waters satisfactorily.

It is apparent from the testimony that the surface waters will still flow through the Nelson property and escape, as they always did, in spite of the two inch elevation, which is apparently in a small area. The claim of plaintiffs that in the case of heavy rains, the flood waters would be backed up on their property by reason of the two inch elevation is not supported by the evidence.

[2, 3] An upper riparian owner has the right to have a lower riparian owner receive the surface water falling on the upper

owner's land and a lower owner may not dam up a channel so as to obstruct the flow of waters across the upper owner's land. LeBrun v. Richards, 210 Cal. 308, 313, 291 P. 825, 72 A.L.R. 336; Heier v. Krull, 160 Cal. 441, 444, 117 P. 530. However, in the instant case, the court found that the slight elevation of the land level described herein was not sufficient to cause any backing up of the surface waters on plaintiffs' land or any damage to their land or crops. The findings of the trial court must be sustained if they are supported by substantial evidence and all legitimate and reasonable inferences must be indulged toward upholding the findings. Fackrell v. City of San Diego, 26 Cal.2d 196, 207, 157 P.2d 625, 158 A.L.R. 773; Estate of Bristol, 23 Cal. 2d 221, 223, 143 P.2d 689.

[4] Plaintiffs allege in their amendment to the complaint that they had, by prescription, acquired the right to discharge surface waters on defendant Nelson's land and now contend that the trial court erred in failing to find that they had acquired such a right. We find no merit in this contention.

The court found the allegations of the amendment to the complaint, alleging a prescriptive right to discharge surface waters on defendants' land, to be untrue. There was testimony that the natural drainage way and ditch to defendant Nelson's property (lot 7) was put in by plaintiffs in 1945, and that the ditch was not maintained regularly; "some years it was open and others it wasn't". In 1945 plaintiffs changed the contour of their land and filled the old drainage ditch, changing the direction of the natural flow of surface waters.

[5, 6] The burden of proving the acquisition of a right by prescription is upon the one claiming the right. The prescriptive right must be established by the clearest and most satisfactory proof, including all of the elements essential to such title. These elements are actual, open and notorious use, hostile and adverse to the title of the party against whom the adverse claim is made, continuous and uninterrupted for the statutory period under claim of right. Hahn v. Curtis, 73 Cal.App.2d 382, 389, 166 P.2d 611.

[7, 8] The location of an easement may not be changed. Hannah v. Pogue, 23 Cal. 2d 849, 855, 147 P.2d 572. The court found that plaintiffs failed to prove all of the elements essential to establish a prescriptive right or title. The judgment does not restrict plaintiffs in their right to require the defendants to receive surface waters falling on plaintiffs' lands. The record shows that the natural flow of surface waters will not be changed by the acts of defendants, and no damage has been suffered by plaintiffs. The evidence is sufficient to support the findings and judgment of the trial court.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

---

98 Cal.App.2d 202

ARNOLD v. HOWELL et al.

No. 14462.

District Court of Appeal, First District,
Division 1, California.

June 26, 1950.

Sid W. Arnold sued Harry Edward Howell, his wife, and others to set aside an order of adoption of plaintiff's minor daughter by defendants Howell. From a judgment of the Superior Court in and for the City and County of San Francisco, Herbert C. Kaufman, J., for defendants, plaintiff appealed. The District Court of Appeal, Bray, J., held that plaintiff's first amended complaint stated a cause of action as against general demurrer and that the trial court abused his discretion in sustaining a special demurrer thereto without leave to amend.

Judgment reversed.

1. Adoption 🔑16

An amended complaint stated cause of action, as against general demurrer, to set aside order of adoption of plaintiff's minor daughter by her maternal aunt after her mother's death on ground of extrinsic fraud in obtaining plaintiff's consent to such order by misrepresentations that adoption was necessary to protect daughter and that she would be returned to plaintiff after his overseas service in navy, without understanding by plaintiff of his act in giving consent because of mental stress as result of his wife's death and his anxiety over daughter's welfare.

2. Judgment 🔑375

Fraud, to justify equity court in setting aside final judgment, must be such as prevents trial of issues presented to court for determination.

3. Adoption 🔑7

Parents' consent to minor children's adoption lies at foundation of adoption statutes.

4. Judgment 🔑375

The court's determination of matter which parties to action have submitted or had opportunity to submit to court is final, in absence of showing that court's jurisdiction was imposed on or that prevailing party, by some extrinsic or collateral fraud, prevented fair submission of controversy.

5. Judgment 🔑375

Fraud or mistake is "extrinsic," so as to justify setting aside of final judgment of equity court, when it deprives unsuccessful party of opportunity to present his case to court.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Extrinsic Fraud" and "Extrinsic Mistake".

6. Adoption 🔑7

Parent's consent to minor child's adoption is ordinarily essential requisite to court's jurisdiction to make order of adoption, in absence of special statutory conditions or exceptions rendering such consent unnecessary.

7. Adoption 🔑7

Parent's consent to minor child's adoption must be free and voluntary and include consent to all legal consequences of adoption.

8. Adoption 🔑14, 16

Where parent's consent to minor child's adoption is obtained through fraud, duress, or other overreaching practices of adopting parents or others, jurisdictional prerequisite to valid adoption is lacking, and adoption decree is open to collateral, as well as direct, attack.

9. Adoption 🔑16

A natural parent, whose consent to minor child's adoption is obtained through fraud, duress or mistake, is entitled to have adoption decree set aside on such grounds.

10. Adoption 🔑16

The making of specific promises to minor child's father, for purpose of obtaining his consent to child's adoption, that he would regain child's custody after he returned from overseas service in Navy, without intent to carry out such promises, is type of fraud, which court with equitable powers may consider in father's suit to set aside adoption order.

11. Fraud 🔑1

"Fraud" includes all surprise, trick, cunning, dissembling, and unfair ways by which another than person guilty thereof is deceived.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Fraud".

12. Appeal and error 🔑854(3)
Pleading 🔑225(2), 236(1)

Denial of right to amend complaint is abuse of discretion, if only sound basis of order is defect challenged by special demurrer, in which case judgment for defendant will be reversed, though one or more grounds of such demurrer may have been good.

13. Pleading 🔑225(2), 236(6)

In father's suit to set aside order of adoption of his minor daughter on ground of defendants' extrinsic fraud in making promises, relied on by plaintiff, without intent to perform them, trial court abused his discretion in sustaining special demurrer to first amended complaint without leave to amend it so as to remedy uncertainties listed in demurrer, but trial court, in its discretion, may require clarification of uncertainties or ambiguities in complaint.

Doyle & Clecak, San Francisco, attorneys for appellant.

Arthur J. Healy, San Francisco, attorney for respondents.

BRAY, Justice.

In an action by plaintiff to set aside an order of adoption, a general and special demurrer to the first amended complaint was sustained without leave to amend. Plaintiff appeals from the judgment.[1]

Question Presented.

Does a complaint charging that a father's consent to the adoption of his minor child was obtained by misrepresentation, and given while he was unable to realize the consequences of his act, set forth a cause of action?

Amended Complaint.

The allegations of the amended complaint follow:

Diana Grace Arnold, born February 13, 1942, is the child of plaintiff and Janet Riede Arnold. Janet died in 1943. Defendants Frank I. Williams and Edith M. Williams are the child's maternal grandparents. Defendant Alethea Anne Howell is the daughter of Frank and Edith Williams and resides with them, and is the maternal aunt of the child. Defendant Harry Edward Howell is her husband.

In February, 1944, plaintiff was called to active duty in the United States Navy, and left the child in the care of said grandparents. Edith Williams stated to plaintiff that she had obtained legal advice and that the only way to protect Diana adequately in the event that plaintiff did not return from his overseas assignment in the United States Navy was to permit her to adopt Diana before plaintiff was shipped out of this country; that Diana would always be his child and that in the event plaintiff returned from overseas the child would be returned to his custody. Plaintiff relied upon the promises of the said defendant, Edith, and consented to the adoption of Diana by the said Frank and Edith. In August, 1944, Edith and her daughter, defendant Alethea, advised plaintiff that the State Department of Social Welfare would not permit the said Frank and Edith to adopt Diana because of their advanced age. Alethea urged plaintiff to consent to the adoption of Diana by Alethea and Harry, stating that an adoption was the only way to protect the best interest of the child during the time plaintiff was overseas and if he were killed during the war; that if he returned from overseas service she and her husband would return the custody of the child to plaintiff. Alethea, at the time she made said statements, did not intend to return custody of the child to plaintiff when he returned from overseas service but made said statements knowing that plaintiff would rely on such statements and for the purpose of securing plaintiff's consent to the adoption.

"That in August, 1944, the organization to which plaintiff was assigned in the United States Navy was alerted which meant that plaintiff was subject to overseas shipment with no more than forty-eight hours notice; that extremely heavy casualties were being sustained in the Pacific island area where plaintiff was scheduled for overseas assignment; that plaintiff was laboring under a tremendous emotional strain due to his imminent overseas shipment and the attempts of the said Alethea * * * and Edith * * * to convince him that the welfare of his daughter required him to consent to the adoption; that the said Alethea * * * and the said Edith * * * knew of the emotional condition of the plaintiff and unduly influenced and coerced plaintiff to sign the consent to said adoption by planting in plaintiff's mind the fixed idea that he would not return from his overseas assignment and by fraudulently representing that if plaintiff returned he could regain custody of his child;"

---

[1] An appeal from the order sustaining the demurrer was denied by this court, Division Two, in Arnold v. Howell, 88 Cal. App.2d 526, 199 P.2d 16, on the ground that such an order is not appealable.

"That plaintiff, as a result of the death of his wife, anxiety over the welfare of his daughter, the insinuations of Alethea * * * and Edith * * * concerning his probable death, and his imminent shipment overseas became mentally unbalanced and while mentally unbalanced and unable to realize what he was doing or the consequences thereof, the plaintiff signed his consent to the adoption of the said Diana * * * by the said Alethea * * * and Harry * * * on the 30th day of August, 1944; that the plaintiff remained mentally unbalanced until his shipment overseas in the latter part of May, 1945;"

"That the said Edith * * * in making the hereinabove statements to plaintiff concerning the adoption of the said Diana * * * was acting for and on behalf of the said Alethea * * * and Harry * * * and with their consent and approval; * * *."

On May 10, 1945, an order providing for the adoption of said child by Alethea and Harry was signed by Judge Robert McWilliams. Said order was based upon the fraudulent representation by Alethea and Harry that plaintiff had fully and freely consented to said adoption.

All during plaintiff's service in the armed forces Diana received allotment checks from plaintiff which were used to defray her expenses. She was the sole beneficiary of a $10,000 insurance policy carried by plaintiff. By such action plaintiff indicated that he had not relinquished or attempted to relinquish his duty towards his daughter. Alethea and Harry, by accepting said allotment checks for Diana's use and benefit, indicated that they had not assumed a parental relationship towards her.

Plaintiff returned from overseas service and was discharged from the armed forces on January 10, 1946, and since that time has been attempting to secure consent to return Diana's custody and control to him. At first the reluctance of Alethea and Harry was alleged to be the necessity for plaintiff to re-establish himself in civilian life. He has now so re-established himself and has now discovered that they had no intention at any time of returning the custody of said child. Plaintiff prays for an order setting aside the order of adoption and returning the custody and control of the child to him.

Defendants demurred to the complaint generally and specially.

Cause of Action.

[1] While the complaint is not a model of pleading and perhaps is subject to special demurrer, it does state the basis of a cause of action to have the order of adoption set aside on the ground that plaintiff's consent to such order (which, of course, could not be obtained without his consent) was based on misrepresentation and lack of understanding, due to mental stress, of his act in giving consent.

While, perhaps, some of the allegations should be amplified and made clearer, still the complaint alleges that his consent was obtained through the representation of the adopters and the maternal grandmother acting for them, that the adoption was necessary to protect the child and was only a temporary measure, the child to be returned to him after his overseas service. The latter representation was made without intent to carry it out. He alleges that due to the insinuations of defendants, his own state of mind, as a result of the death of his wife and his anxiety over the welfare of his daughter, he was mentally unbalanced and unable to realize what he was doing or its consequences. If these allegations are true, the order of adoption was made without the consent of plaintiff.

Extrinsic or Intrinsic Fraud.

[2] Defendants contend the matters alleged in the complaint, if true, constitute intrinsic fraud, and cite Gale v. Witt, 31 Cal.2d 362, 188 P.2d 755, to the effect that a judgment of a court of equity can only be set aside for extrinsic fraud. However, the definition given in that case

shows that the fraud complained of here is extrinsic fraud. "The fraud which will justify the setting aside of a final judgment by a court of equity must be of such character as prevents a trial of the issues presented to the court for determination." 31 Cal.2d at page 365, 188 P.2d at page 757.

[3-5] A consent which is required before a court can act, and which is based upon misrepresentation or given by a person who is unable to comprehend its meaning, prevents a fair and full hearing of the issues which the court is required to determine. As said in Matter of Cozza, 163 Cal. 514, at page 522, 126 P. 161, at page 164, Ann.Cas.1914A, 214, "Consent lies at the foundation of statutes of adoption * * *." In Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159, cited by defendants, the court, after stating the general rule that where parties have submitted a matter to a court for determination, or have had an opportunity to submit it, the court's determination must be final, gives the exception to that rule: "* * * unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy." 91 Cal. at page 133, 25 P. at page 971. Here the allegations of the complaint bring the case within the exception, first, that the court has been imposed upon, because it acted upon a consent obtained by misrepresentation and upon what was not a true consent, and secondly, because, for the same reasons, the prevailing party prevented a fair submission of the matter. See Rogers v. Mulkey, 63 Cal.App.2d 567, at page 575, 147 P.2d 62, at page 66, where the court says: "Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. (Citations.)"

[6, 7] With certain statutory exceptions, consent to an adoption is considered a jurisdictional prerequisite. (1 Cal.Jur. 436.) "Where required, consent is ordinarily held an essential requisite to jurisdiction on the part of the court to make an order of adoption unless conditions or exceptions exist, specially provided by the statute itself, which render consent unnecessary. * * * Consent must be free and voluntary and include consent to all the legal consequences of adoption * * *." (1 Am.Jur. p. 639, § 36.)

[8] "It seems clear that legal consent to an adoption actually does not exist where it is obtained through the fraud, duress, or other overreaching practices of the adopting parents or others, and that where it is so obtained, the jurisdictional prerequisite to a valid adoption is lacking. If considered as a jurisdictional defect, the decree would be open to a collateral, as well as a direct, attack.

[9] "But aside from the question whether a fraudulently obtained consent is jurisdictional, it may be said that the courts uniformly recognize that where a natural parent's consent to an adoption has been obtained through fraud, duress, mistake, etc., such parent is entitled to have the decree of adoption set aside on such grounds." (2 A.L.R.2d 887, annotation: "Annulment or vacation of adoption decree by adopting parent or natural parent consenting to adoption," at p. 897.)

No California case has been found which considered whether extrinsic fraud is necessary in order to set aside an adoption. In 2 C.J.S., Adoption of Children, § 45b, p. 434, it is pointed out that some jurisdictions apply the usual equity rule of extrinsic fraud, but in other jurisdictions "this rule does not apply to adoption proceedings, since the power to enter such an order is special and is not exercised according to the course of the common law." 2 C.J.S., Adoption of Children, § 45b, p. 435. In 1 Am.Jur. 671-2, § 72, on vacation or annulment of adoption, it is said: "* * * but the better view seems to be that such a decree may be vacated upon such grounds as would entitle the court to vacate any other order or decree. Following this principle, a decree of adoption may be vacated by a petition to the court which entered it, or by a suit in equity, for fraud in obtaining it, as where, at the time the decree was sought and entered, the adopting parent was of weak and unsound mind, and subjected to undue influence."

In the 1949 pocket part to note 20, p. 672, it is said: "And the power of a court of general equitable jurisdiction to annul, vacate, or set aside an order of adoption under proper circumstances seems to be generally conceded [citing 2 A.L.R. 2d 890]. The welfare of the child is the paramount consideration in all courts of record in proceedings involving the custody of children. * * * So also, while a decree will be set aside or annulled, where it is shown that the consent of the natural parent was obtained through fraud or duress, * * * the courts carefully examine allegations of this nature by the natural parents, and have not hesitated to deny an annulment where they were not fully substantiated."

[10] Appellant alleges specific promises on the part of Alethea and Edith that he would regain the custody of his daughter after his return from overseas. This is a type of fraud which a court with equitable powers may consider. (31 Am.Jur. 241.)

[11] As said in Wells v. Zenz, 83 Cal. App. 137, at page 140, 256 P. 484, at page 485, where the court set aside an order of adoption for false statements in the affidavit for publication of the citation: "No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and unfair ways by which another is deceived. Armstrong v. Wasson, 93 Okl. 262, 220 P. 643."

Special Demurrer.

[12] The uncertainties listed in the special demurrer are such that can be remedied by amendment. As said in Veterans' Welfare Board v. City of Oakland, 74 Cal.App.2d 818, 822, 169 P.2d 1000, 1004, "it is an abuse of discretion to deny the right to amend if the only sound basis of the order is a defect challenged by special demurrer. In such a case the judgment will be reversed even though one or more grounds of special demurrer may have been good." See Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358.

In Bell v. Krauss, 169 Cal. 387, 146 P. 874, it was held, in effect, that in an action in equity to set aside an order of adoption, a complaint which sets forth facts which would have been sufficient to justify the setting aside of the order if a timely application had been made under section 473 of the Code of Civil Procedure, states a cause of action against general demurrer.

[13] As said in Wennerholm v. Stanford Univ. Sch. of Med., supra, 20 Cal. 2d 713, at page 720, 128 P.2d at page 525: "We therefore hold that it was an abuse of discretion for the trial court to sustain the demurrer without leave to amend. We do not decide, however, that the complaint was not subject to special demurrer, and the trial court may in its discretion require the clarification of uncertainties or ambiguities in the complaint. Guilliams v. Hollywood Hospital, supra, 18 Cal.2d 97 at page 104, 114 P.2d 1."

The judgment is reversed.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.

---

98 Cal.App.2d 276

SEELEY v. COOK.

Civ. 17304.

District Court of Appeal, Second District,
Division 1, California.
June 30, 1950.

Action by Ralph B. Seeley against Lou S. Cook, also known as Lu S. Cook, to secure the return of money paid the defendant on account of the purchase price of an airplane. The Superior Court, Los Angeles County, Charles S. Burnell, J., entered judgment for the plaintiff and the defendant appealed. The District Court of Appeals, Doran, J., held that evidence sustained finding that things required to be done by seller prior to delivery of airplane were not done prior to destruction of plane and title never passed to the plaintiff and he was entitled to recover the portion of the purchase price paid by him.

Judgment affirmed.

1. Sales 🔑397

In action to recover purchase price of airplane which was destroyed in accident prior to delivery to buyer, evidence sustained finding that contract of sale was conditioned on doing of certain things by seller and those things were not done prior to destruction of airplane.

2. Sales 🔑200(1), 391(1)

Where sale of airplane was conditional on certain things being done by seller prior to delivery, but such things were not done prior to destruction of airplane, title never passed to buyer and he was entitled to recover portion of purchase price paid.

Manuel Ruiz, Jr., Los Angeles, for appellant.

Oliver O. Clark, Jack R. Mills, Los Angeles, for respondent.

DORAN, Justice.

The respondent herein and plaintiff below, as the purchaser of an airplane which was destroyed in an accident, instituted the present action to secure the return of money paid the appellant on account of the purchase price. The record discloses the execution of a written memorandum in the following language:

" Los Angeles, California
2/28/47

"I hereby purchase Howard NC-67495 aircraft from Lu Cook.

"Purchase price	$5647.50
"Deposit, 2/8/1947	650.00
	$4997.50
"Add. 2/28/1947	1500.00
"Balance to be paid 2/15/47	$3497.50

"Ralph B. Seeley."

According to the appellant's brief, "After the plane was inspected by respondent Seeley, there were eight things only to be done on the seller's part, i. e., furnish new tires, have it painted, put a new propeller on it, a cover for the motor, a clock, provide for an additional passenger, put on a good radio". Respondent testified that "he (Cook) said he could have the plane completed by April 8th * * * so I gave him a check (post-dated) dated April 8, 1947 for $2498.00", which was the balance then due on the purchase price. After the giving of such check and about March 30, 1947 "he (Cook) crashed the plane out near Saugus and wrecked it". Seeley thereafter stopped payment on the check, and instituted the present action. The trial court gave judgment for the plaintiff, respondent herein.

The appellant's contention is that title to the airplane had passed to the buyer although formal delivery had not taken place; that therefore, the risk of accident was in the buyer rather than in the seller. It is also argued that appellant was "an intermediate party, not a principal", a Mr. Jorgensen being the actual owner, and that "respondent sued the wrong party". In reference to the title, it may be noted that during the negotiations appellant secured a bill of sale from Jorgensen, in order, according to appellant's explanation, "that appellant could borrow on said ostensible title the balance * * * owed to Mr. Jorgensen by the respondent * * * who was in the hospital and could not manage his own affairs".

Appellant also complains that the trial court found that "each of the allegations contained in the answer of Ralph B. Seeley, the crossdefendant herein, * * * is true", although no such answer had been filed. To this contention respondent replies that "This case was tried without objection upon the theory that the allegations of Cook's crosscomplaint had been denied by Seeley's answer", and that "In these circumstances appellant cannot now complain". Respondent also notes that appellant failed to raise this objection to the proposed findings, or by way of motion for a new trial.

[1, 2] A survey of the record herein fails to show any merit in the appellant's contentions. In regard to the transaction between buyer and seller and the passing of title to the airplane, respondent's brief correctly sums up the matter as follows: "The contract of sale as shown by the pleadings and the evidences was conditioned upon the doing of certain things by the seller. These things were not done prior to the destruction of the plane. Consequently, the title never passed to the buyer and he is entitled to recover the portion of the purchase price paid by him". Had the seller reconditioned the plane in accordance with the agreement, a different situation might have been presented, but such is not the case. The contention that Jorgensen rather than Cook, was the seller, is untenable;—the contract of sale was between Seeley and Cook.

The findings are supported by the evidence and no reversible error appears in the record.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

---

98 Cal.App.2d 304

MITCHELL v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR COUNTY OF LOS ANGELES.

Civ. 17929.

District Court of Appeal, Second District, Division 1, California.

July 6, 1950.

Hearing Denied Aug. 31, 1950.

Proceeding by Althea V. Mitchell against the Superior Court of the State of California, in and for the City and County of Los Angeles, for writs of mandate, prohibition and certiorari to compel the court to partition certain realty which was the community property of petitioner and former husband. The District Court of Appeal held that petitioner's remedy was by appeal and as the most petitioner could show was that appeal would take time and cost money that was insufficient to warrant the issuance of the writs requested.

Petition denied.

1. Mandamus 🔑4(1)

Where there is a right to an immediate review by appeal, that remedy is almost as speedy as a writ proceeding, and should be considered adequate unless petitioner can show some special reason why it is rendered inadequate by particular circumstances of his case.

2. Mandamus 🔑4(3)

Where petitioner had pending in trial court an action for partition of realty, and court made a minute order finding that at time realty was acquired by petitioner and former husband petitioner's equity was $500, and petitioner contended that realty should have been partitioned either in kind or by sale and division of proceeds, and petitioned for a writ of mandate, showing that an appeal would take time and cost money was insufficient to justify issuance of writ and remedy was by appeal.

◆

William C. Ring, Los Angeles, for petitioner.

PER CURIAM.

Petitioner has pending in the Superior Court an action for the partition of real property. Trial was had for two days.

While plaintiff was married to defendant, the property was acquired as community property. In 1931 petitioner was granted a divorce from defendant in the State of Texas. Texas, of course, could not adjudicate title to California real property. Defendant as minister of a church uses the property, which is improved with a church building, without paying anything to petitioner.

Petitioner contends that the court should have partitioned the property, either in kind, or by sale and division of the proceeds.

The court made a minute order, finding that at the time the property was acquired petitioner's equity in it was $500. Apparently no judgment has yet been rendered.

[1] While petitioner presents a convincing argument, we think her remedy is by appeal. The rules respecting high prerogative writs have been recently reviewed and restated in Phelan v. Superior Court, 35 Cal. 2d 363, 217 P.2d 951, 955. There it is said: "Where * * * there is a right to an immediate review by appeal, that remedy is almost as speedy as a writ proceeding, under present practice, and should be considered adequate unless petitioner can show some special reason why it is rendered inadequate by the particular circumstances of his case."

[2] The most petitioner shows in this regard is that an appeal will take time and cost money. This is insufficient.

For the reasons given in Phelan v. Superior Court, supra, and in Robinson v. Superior Court, 35 Cal.2d 379, 218 P.2d 10, the petition is denied.

---

98 Cal.App.2d 300

CARTWRIGHT v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 17692.

District Court of Appeal, Second District, Division 1, California.

July 6, 1950.

Hearing Denied Aug. 31, 1950.

James L. Cartwright instituted proceedings in mandamus to compel the Superior Court of Los Angeles County to order a refund of $108.10 deposited by petitioner with the county clerk as payment for the copies of the clerk's and the reporter's transcript on appeal, required to be filed with clerk for use of parties to appeal, and to restrain and enjoin disbursement of said deposit. The District Court of Appeal, White, P. J., held that since the trial court had properly followed the judicial counsel rules relating to appeals from Superior Courts, petitioner was not entitled to recover his deposit.

Petition denied.

Costs 🔑**254(1)**

Appellant must pay costs of original and one copy of clerk's and of reporter's transcript as provided by Judicial Council Rules relating to Appeals from Superior Courts, notwithstanding fact that copies required to be filed with clerk of Superior Court may be used by respondent as well as by appellant. Code Civ.Proc. § 274.

William C. Ring, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

WHITE, Presiding Justice.

From the petition it appears that petitioner, individually and as special administrator of the Estate of Benjamin B. Cartwright, Deceased, was the plaintiff in a Superior Court action against Alexander Benjamin Cartwright, Sr., et al., in which case judgment was rendered in favor of the defendants. Plaintiff thereafter, on July 20, 1949, filed a notice of appeal from such judgment, which appeal is now pending, being numbered Civil No. 17426 in the District Court of Appeal. 216 P.2d 545.

It further appears that petitioner made the usual request to the County Clerk to prepare the reporter's and clerk's transcripts on appeal. On August 9, 1949, the clerk notified petitioner in writing "that the cost of a clerk's transcript on appeal, with one copy, is $28.54, and that an extra copy for appellant's use would cost appellant an additional $8.10; * * * and on August 18, 1949, petitioner deposited with said clerk in response to said demand and not otherwise the sum of $36.64, and protested said demand and deposit to the extent of

* * * $8.10 for a copy of said transcript to be retained by said clerk".

The petition further sets forth that a similar notice from the clerk stated that the reporter's estimate for the reporter's transcript, "including one copy to remain on file with the clerk", was $450.00, "and that arrangements for an additional copy for appellant's office use would have to be made with respondent court reporter". Petitioner thereafter made the required deposit "under protest in so far as the same included a charge by said reporter for preparing more than one carbon copy to be delivered to appellant for his office use * * * and that appellant be not charged or required to pay for a copy * * * to remain on file with the clerk."

It is further averred "That notwithstanding the foregoing protest and objection, and without any notice or hearing afforded petitioner, * * * respondent court made, rendered and entered an order *ex parte,* directing said clerk to pay said reporter * * * $450.00 upon the latter's unverified petition for said sum without any itemization of the number of folios * * * or the number of copies". Petitioner filed objections to various items in the reporter's transcript and at a hearing thereon certain of the objections were allowed so that the transcript as finally settled contained 1,000 folios, according to the petition which at the legal rate of $25¢ per folio for the original and 10¢ per folio for a copy thereof, amounted to $350.00 in all, in place of petitioner's deposit of $450.00 hereinbefore mentioned. The court reporter refused to make any refund to petitioner, whereupon petitioner moved the court for an order vacating the previous ex parte order for distribution of the deposit, which motion was denied on February 15, 1950.

The theory of the petitioner is that the practice of the courts "to require appellants in civil actions to deposit with said clerk and pay the cost of transcribing an original and one copy of each the clerk's and reporter's transcript on appeal, and also for an additional copy if appellant desires the same for his office use, and to require the other copy of said transcripts to be retained by the clerk * * * imposes an unnecessary and oppressive burden upon litigants * * * thereby in many cases effecting a denial of justice", and is contrary to law. Petitioner also assails "the Star-Chamber *ex parte* practice of denying the security-depositor a hearing upon the disbursement of his fund", which practice, it is alleged, constitutes a denial of due process of law.

In denying petitioners motions to vacate the previous order to pay the reporter the amount deposited and to order the clerk to refund to petitioner the sum deposited for one copy of the clerk's and reporter's transcripts, the trial judge called attention to Rule 4 of the Judicial Council Rules relating to Appeals from Superior Courts. Section 4d of such rules requires the original and one copy to be filed with the clerk and Rule 10c provides in part: "* * * The additional copy of the record required by these Rules shall be made available for the use of the parties to the appeal in such manner as the Judge, or the Clerk under his direction, shall prescribe; provided that the parties may stipulate to its use, and in such event only the original need be filed with the clerk of the Superior Court."

The trial judge then held that "to compel the appellant to pay for a copy of the transcript which may be used by the respondent" is not "an unjust burden of the expense of the appeal", since the appellant likewise had the privilege of using such clerk's copy or of buying an extra copy for office use. An analogy was suggested between the present contention and that of "taxpayers who object to paying public school taxes because they have no children or who send their children to private schools". The Memorandum Opinion also stated that the settlement of the transcript was not a prerequisite to the making of payment to the reporter, and that petitioner had no right to notice before the making of the order authorizing such payment.

In the return to the Alternative Writ of Mandate, respondent superior court filed a demurrer, in which it is pointed out that

"No duty is enjoined by law upon respondent court or a judge thereof to take any action in relation to payment of reporter's fee", hence that "the order by Judge Jeffery had no force and effect and there was no need that it be vacated"; that "No duty is cast upon the clerk to hold the fees deposited until settlement of the transcript"; and that "The money deposited with the clerk was not *in custodia legis*", since it was not deposited under an order of court.

It is also argued by respondent that "The promulgation of rules of practice on appeal is lodged in the sound discretion of the Judicial Council"; that Rules 4, 5 and 10, complained of herein, requiring appellant to furnish an original and one copy of the transcripts, so prescribed by the Judicial Council, have the force of positive law and do not conflict with Section 274 of the Code of Civil Procedure providing for the fees of reporters and the taxation of such fees as costs. "Petitioner's contention that the rule is unreasonable", avers the respondent's return, "should properly be addressed to the Judicial Council".

It is therefore apparent that the trial court properly followed the rule. The rule permits the parties appellant and respondent access to, and use of one copy of the reporter's transcript on appeal. It required the appealing party to pay for the original and one copy. If he is successful on his appeal, of course, the expense may be taxed as costs.

In effect this is a saving to litigants, because otherwise both parties would ordinarily have to have and to pay for a copy of the transcript. Thus one copy serves the place of two.

The petition is denied.

DRAPEAU, J., concurs.

DORAN, Justice.

I concur, with the qualification, however, that I do not wish to be understood as approving any act of the Judicial Council which amounts to legislation.

Hearing denied; CARTER, J., dissenting.

---

98 Cal.App.2d 320

FICKEISEN v. PEEBLER et al.

Civ. 17174.

District Court of Appeal, Second District,
Division 3, California
July 7, 1950.

Rehearing Denied July 25, 1950.

Hearing Denied Aug. 31, 1950.

Action by H. C. Fickeisen, trustee in bankruptcy, against Byron Peebler, Edith W. Danziger, and others, to quiet his title as trustee and that of corporation to five acres of land devoted to cemetery use. The Superior Court of Los Angeles County, Eugene P. Fay, J., entered judgment for defendants except defendant Edith W. Danziger and plaintiff appealed and defendant Danziger cross-appealed. The District Court of Appeal, Shinn, P. J., held that where plaintiff corporation had failed for 18 years to question validity of its deed to defendants, trial court properly held plaintiff to have lost its rights to assert title to land against defendants.

Affirmed.

1. Limitation of actions ⚷70(1)

Where corporation conveyed property by quitclaim deed, fact that at time of deed license of corporation to do business had been suspended for failure to pay its franchise tax would not interrupt running of statute of limitations against an action to quiet title or to recover possession by corporation.

2. Limitation of actions ⚷197(1)

In quiet title action, evidence supported finding that neither plaintiff corporation nor its trustee in bankruptcy was seized or possessed of property in question within five years immediately preceding commencement of action. Code Civ.Proc. § 318.

3. Quieting title ⚷29

In quiet title action, where during the 18 years preceding action, several defendants had acquired interest in property for a valuable consideration and had caused property to be improved and operated as a cemetery in reliance upon sufficiency of their title, plaintiff was guilty of unreasonable delay and should be barred from asserting title to property.

4. Corporations 🔑**432(4)**

A deed bearing seal of vendor corporation is presumptive evidence of authority of officers to execute deed.

5. Corporations 🔑**432(12)**

Evidence supported implied finding that officers of vendor corporation had authority to execute deed in question, even though minutes of corporation did not contain a resolution of board of directors authorizing execution of deed.

6. Cemeteries 🔑**13**

In absence of evidence that interments had been made in property prior to date of deed, or that cemetery corporation intended to withdraw property from use as a cemetery deed by cemetery corporation of property was not void by reason that sale was not authorized by Superior Court.

7. New trial 🔑**13**

In quiet title action, where movant, claiming title to part of land in question, did not claim to have taken deed for property in question for value and without knowledge of rights of other defendants, trial court did not abuse its discretion in denying motion of movant for a new trial.

◆

A. Brigham Rose, Los Angeles, for appellant.

Edith W. Danziger, in pro. per.

Roland Maxwell and Paul H. Marston, Pasadena, for respondents.

SHINN, Presiding Justice.

H. C. Fickeisen, as trustee in bankruptcy of Graceland, a corporation, by his amended complaint sought to quiet his title as trustee and that of the corporation to five acres of land in the county of Los Angeles which, with other land, is devoted to cemetery use. Defendants Byron Peebler, Ethel M. Peebler, James Danziger, Edith W. Danziger, George W. Archer and A. F. Hutchinson, filed their answers denying plaintiff's allegation of title and asserting their own title to, or interests in, the land. The cemetery project was undertaken some time prior to 1923 and certain of the parties who were interested in it have carried on litigation, arising out of their association, which has been before the District Courts of Appeal and the Supreme Court upon eight previous occasions.

The following facts were established by the evidence: On November 9, 1926, Graceland conveyed the property in question by quitclaim deed to Wake Development Company, a corporation; on August 6, 1929, Wake Development Company by quitclaim deed conveyed the land to B. C. Olds; on February 14, 1938, Olds entered into a partnership agreement with Byron Peebler and Ethel M. Peebler for the improvement of the property and operation of a cemetery business thereon, it being agreed that the Peeblers were acquiring a half interest in the property from Olds. The partnership having been dissolved, the Peeblers, through purchase at a judicial sale, acquired all the interest of the partnership in said property and have continued to own the same; the property, together with adjoining property owned by Edith Wake Danziger, has been operated as a cemetery under the management of defendant, A. F. Hutchinson who claims title to certain burial lots by conveyances from Graceland on August 11, 1924. The present action was instituted January 17, 1945. Edith W. Danziger by her answer claims title to an office building located on the premises and approximately 3000 burial lots within the cemetery, presumably included within the land described in her answer as "all that portion of Section 'A' of Graceland and Graceland Mausoleum Park, recorded in file #474, Records of Los Angeles County, lying southerly of a line produced through the south line of lots 38, 103, 154, 203, 244, 285 and 341 to its intersection with the easterly and westerly boundary of said section 'A'." Her answer alleged that she became the owner of this parcel by deed from Mary Belle Utterback, dated January 9, 1948, and filed for record with the County Recorder of Los Angeles County on January 9, 1948. In addition to denying the title of plaintiff, the answer of the Peeblers set up nine separate affirmative defenses. Among these was a plea of the statute of limitations; another was a plea of laches; and still another, a plea of another action pending which involved the same subject matter. The court found, among other things, that Graceland was not seized or possessed of the property in question within five years before the commencement of the action, that plaintiff's asserted cause of action was barred by unreasonable delay in asserting Graceland's rights, and that the issues in the case had been determined and adjudicated against Graceland in another action. There were numerous other findings adverse to plaintiff which need not be recited or discussed. The findings and judgment declared that neither plaintiff, as trustee, nor Graceland, nor Edith W. Danziger, had any right, title or interest in the property, and that defendant Danziger did not own the office building. The judgment is not questioned insofar as it declares the rights of George W. Archer and A. F. Hutchinson.

The action was tried August 31, 1945, findings and conclusions were signed September 30, 1948; on June 24, 1948, Edith W. Danziger, in pro. per., gave notice of a motion for a new trial and for relief under section 473, Code of Civil Procedure, upon the ground of surprise, supporting her motion by her own affidavit; plaintiff moved for a new trial and his motion was denied. Presumably the motion of Edith W. Danziger was denied, although the record does not show that the court ruled on it. She gave notice of appeal from the judgment, as well as from an order denying her motion for a new trial, and plaintiff filed a similar notice of appeal.

The court found that the license of Graceland to do business as a corporation was suspended, by operation of law, in 1926, for failure to pay its franchise tax. It appears from the statement of respondents' attorney that the date of the suspension was the 27th of February of that year. More than 18 years elapsed between the deed of Graceland to Wake Development Company, under which defendants derived title, and the institution of the present action. There was no evidence that after conveying the property, Graceland ever had possession of it, or that Fickeisen as trustee has ever been in possession. To the contrary, the partnership of Olds and the Peeblers, and later on the Peeblers themselves, had carried on the cemetery business, had sold burial plots, and to the time of trial there had been something like 1600 interments in the grounds. No facts were alleged in the amended complaint to excuse the delay in bringing suit to quiet title. It is contended however, that the statute of limitations did not run against Graceland for the reason that its deed to Wake Development Company was void, having been executed after the powers of the corporation had been suspended because of its failure to pay its State license tax. It is also claimed to have been void because of the want of authority of the president and secretary of the corporation to make a conveyance, and the additional contention is made that the conveyance of cemetery property without authorization from the superior court was unlawful.

[1] At the time the property was conveyed to Wake Development Company all contracts made by corporations whose powers had been suspended were void. Stats. 1915, p. 422, as amended by Stats.1917, p. 371; Sec. 3669c, Political Code, as amended by Stats.1919, p. 181. However, under the 1917 amendment, failure to pay the annual license tax did not result in the forfeiture of the corporate charter, but only suspended the powers of the corporation, which could be restored upon proper application and the payment of delinquent license fees and penalties. The corporate powers were not restored, but this fact would not interrupt the running of the statute of limitations against an action to quiet title, or to recover possession. The right to resume business could have been regained at any time and the corporation may not gain advantage from its own neglect.

[2] The finding that the action was barred under section 318, Code of Civil Procedure, is supported by evidence that Fickeisen, as trustee, or Graceland, was not seized or possessed of the property within five years immediately preceding the commencement of the action. Cocking v. Fulwider, 95 Cal.App. 745, 273 P. 142; Morrow v. Coast Land Co., 29 Cal.App.2d 92, 111, 84 P.2d 301; Earl v. Lofquist, 135 Cal. App. 373, 379, 27 P.2d 416.

[3] The defense of laches was established. J. M. Danziger was president of Graceland and as such signed the deed to Wake Development Company. He has been an active participant in the subsequent litigation and was a party defendant in the present action. He is the husband of Edith W. Danziger, who claims an interest in the property, and who owns adjoining property. During the 18 years that immediately preceded the commencement of the present action the several defendants have acquired interests in the property for a valuable consideration, and have caused it to be improved and operated as a cemetery in reliance upon the sufficiency of their title. The mere statement of these facts is sufficient justification for the finding that plaintiff has been guilty of unreasonable delay and should be barred from asserting title to the property. Ackley v. Bassett, 189 Cal. 625, 647, 209 P. 576; Morrow v. Coast Land Co., supra, 29 Cal.App.2d 92, 107, 84 P.2d 301; G. R. Holcomb Estate Co. v. Burke, 4 Cal.2d 289, 48 P.2d 669.

[4, 5] The contention that the president and assistant secretary of Graceland were proven to have had no authority to execute the deed in question is not sustainable. The deed bore the seal of the corporation, which was presumptive evidence of the authority of the officers. Landis Brothers Co. v. Lawrence, 104 Cal.App. 499, 286 P. 177, and authorities there cited. This presumption was not overcome as a matter of law by evidence that the minutes of the corporation which were produced in court did not contain a resolution of the board of directors authorizing the president and assistant secretary to execute the deed. There was sufficient evidence to support the implied finding that the officers had authority to execute it.

[6] Likewise untenable is the contention that the deed of Graceland to Wake Development Company was void for the reason that it was not authorized by the superior court, which would have been required under section 615 of the Civil Code as it then existed if it had been the intention of Graceland to withdraw the property from use as a cemetery. See Civ. Code, sec. 608, as amended, Stats.1891, p. 180, and sec. 615, as amended, Stats.1889, p. 61. Nor was there evidence that interments had been made in the property prior to the date of the deed. See Peebler v. Olds, 56 Cal.App.2d 8, 132 P.2d 233. As to all of the contentions based upon the alleged void character of the deed it may be said that Graceland, having presumably received a valuable consideration for the deed, and having failed for 18 years to question its validity, was properly held to have lost its right to assert title to the land against the defendants. Bradley v. Butchart, 217 Cal. 731, 744, 20 P.2d 693.

[7] No abuse of discretion was shown in the order denying the motion of Edith W. Danziger for a new trial. Her affidavit on motion for new trial was filed long after the action was tried, but before judgment was entered. She claimed to have acquired title by deed dated January 7, 1948, from Newton W. and Mary A. Utterback, who were alleged to have acquired the property from B. C. Olds and Effie M. Olds, August 28, 1928, said grantors' title having been derived by a deed from Graceland in January, 1927. There are several reasons which support the denial of her motion. A sufficient one is that she did not claim to have taken the deed from the Utterbacks for value or without knowledge of the rights of the defendants. Her claim of title to the office building had previously been decided against her. Danziger v. Peebler, 88 Cal.App.2d 307, 198 P.2d 719.

The judgment is affirmed. The attempted appeals from orders denying motions for new trial are dismissed.

WOOD and VALLÉE, JJ., concur.

98 Cal.App.2d 327

ENGLEMAN v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 17297.

District Court of Appeal, Second District, Division 3, California.

July 7, 1950.

M. W. Engleman, assignee for the benefit of creditors of W. B. Stoddard, doing business as Pacific Pilot's Plan, Inc., sued Bank of America National Trust & Savings Association and others, to recover from defendant a sum of money owing plaintiff's assignor. The Superior Court of Los Angeles County, Thomas J. Cunningham, J., held that defendant bank could not set off monies owed by bank to plaintiff's assignor at one branch of defendant bank against debt owed to bank by plaintiff's assignor in other branch of defendant bank.

Judgment affirmed.

1. Banks and banking 🔑134(1)

The right of offset exists in favor of a bank with which a customer makes a general deposit.

2. Banks and banking 🔑134(4)

Where business took contracts and notes in payment for course of instructions sold by business, and entered into contracts with two branches of bank whereunder notes signed by students were sold to branch and collections made by branch were to be held as reserve account for use only to cure default on note brought under particular contract, or, if no default existed, fund was to be paid annually to business, trial court, in view of intention disclosed by contract and practice followed by bank in handling deposit, properly held that fund was a deposit for a special purpose, and bank could not set off monies owed by bank to business at one branch against debt owed to bank by business at other branch. Civ. Code, § 2891.

3. Banks and banking 🔑153

The nature of a deposit in bank is determined by mutual intent and understanding of parties.

4. Banks and banking 🔑134(4)

A bank impliedly binds itself, by accepting a special deposit, not to set off against such deposit a debt due it from depositor.

5. Banks and banking 🔑134(4)

A bank which accepts a deposit of money for a special purpose, under an agreement that it will pay the amount, when needed, for that purpose, cannot legally appropriate such deposit to discharge depositor's indebtedness to bank. Civ.Code, § 2891.

6. Banks and banking 🔑153

Deposits of funds in bank for a special purpose, such as for purpose of paying such funds to a third person upon presentation of certain papers or instruments of title, paying bonds, paying a mortgage indebtedness, meeting checks or classes of checks, taking up depositor's note that has been endorsed to another bank, paying a contractor for work being performed by contractor, have all attributes of "special deposits", and are generally termed and construed as such.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Special Deposits".

7. Banks and banking 🔑153

Bank has fiduciary duty of an agent to apply a special deposit to particular purpose for which it was delivered to bank. Civ. Code, § 2891.

8. Banks and banking 🔑153

Where bank misapplies special deposit, deposit may be followed on the trust fund theory. Civ.Code, § 2891.

9. Banks and banking 🔑179

Where property is pledged to a bank to secure specific indebtedness of customer, bank cannot hold such property as security for any other obligation. Civ.Code, § 2891.

10. Banks and banking 🔑136

Statute giving a banker a general lien upon all property in his hands belonging to a customer does not extend the banker's lien which was known before enactment of statute. Civ.Code, § 3054.

Samuel B. Stewart, Jr., San Francisco, Hugo A. Steinmeyer, Robert H. Fabian, Los Angeles, for appellants.

Hindin, Girard, Lewis & Green, Los Angeles, for respondent.

SHINN, Presiding Justice.

Action for declaratory relief instituted by plaintiff, assignee for the benefit of creditors of W. B. Stoddard, doing business as Pacific Pilot's Plan, Inc. (hereinafter called "Pacific"), for a judicial declaration that he is entitled to recover from the (Gardena Branch) Bank of America National Trust and Savings Association (hereinafter referred to as the "Bank") a sum of money allegedly owing his assignor. The case was tried under a stipulation of facts and the court gave judgment for plaintiff in the sum of $3,449.68; defendant Bank appeals.

Pacific was engaged in selling courses in flight instruction with the actual ground and flight instruction being handled by other organizations. The students would sign contracts and notes in payment for this course, and Pacific would sell the contracts and notes to the Bank. The sales were made pursuant to two contracts entered into between the Bank and Pacific—one of these contracts was made with the Bank at its Gardena Branch, and the other at its Five Points Branch at San Diego.

The contract entered into by Pacific with the Gardena Branch on August 27, 1946, provided that all notes signed by the students were to be accepted by Gardena at its sole discretion. The purchase price of "any paper discounted pursuant to this agreement shall be 39 per cent of the face amount thereof, and I, [W. B. Stoddard] agree that upon said purchase price being paid or credited to me, full title to the paper shall pass to you. If an amount in excess of the purchase price plus a discount of 6 per cent of the face amount (minimum charge $2.50) of any discounted note is realized by you, the amount so realized shall be applied as follows:

"1. To satisfy my obligation, if any, under this contract, and I agree that you are authorized from such proceeds to cure any default as to any note purchased by the application of such excess; and

"2. Any remaining balance of such excess above 50 per cent of the unpaid balance on all notes sold to you by me and outstanding shall be paid or credited to me annually."

Pacific guaranteed payment of all sums of principal and interest due under the terms of the notes and agreed that Gardena should be under no obligation to sue or proceed against the makers of the notes.

The record shows that the parties to the contract subsequently agreed orally that the 50 per cent reserve provided for was to be increased to 100 per cent.

On September 15, 1947, Pacific entered into a substantially similar contract with the Five Points Branch of the Bank wherein its was provided that the purchase price of any paper discounted "pursuant to this agreement shall be 65% of the face amount thereof, and I [W. B. Stoddard] agree that upon said purchase price being paid or credited to me, full title to the paper shall pass to you. If an amount in excess of the puchase price plus a discount of 6 per cent of the face amount (minimum charge $2.50) of any discounted note is realized by you, the amount so realized shall be applied as follows:

"1. To satisfy my obligation, if any, under this contract, and I agree that you are authorized from such proceeds to cure any default as to any note purchased by the application of any such excess; and

"2. Any remaining balance of such excess above 35 per cent of the unpaid balance on all notes sold to you by me and outstanding shall be paid or credited to me annually."

This contract also provided that Pacific guaranteed all sums of principal and interest due under the notes so discounted.

On March 17, 1948, Pacific wrote to the Gardena Branch stating, in substance, that it understood that Gardena carried in its reserve account for Pacific approximately $6,200. This letter notified Gardena that Pacific had also been discounting notes with the Five Points Branch at San Diego, and authorized it, on the 25th of each month, to transfer any surplus reserve held at Gardena to the Five Points Branch. On April 2, 1948, Pacific wrote to the Gardena Branch informing it that several of its creditors had threatened action and that it had been informed that the authorization of March 17th could be construed as a preference and could be voided. The letter rescinded the instructions and authority to transfer funds contained in the letter of March 17th.

On April 14, 1948, Pacific made an assignment for benefit of creditors and notice thereof was given to the Gardena Branch on April 15, 1948, by the plaintiff herein.

It is stipulated that between the 14th of April, 1948, and November 8, 1948, the date the stipulation of facts was entered into, the Gardena Branch transferred to the Five Points Branch of the Bank, the sum of $3,268.16. It is this sum which is the subject of the controversy; no dispute exists as to the balance of $181.52. It appears that after the 14th of April, 1948, various defaulted notes at Gardena were charged to the balance there, and at the date of the stipulation, the sum of $181.52 remained in the reserve account and that there were no outstanding discounted notes of the plaintiff's assignor at that Branch. At that time, after the transfer of funds, the Five Points Branch held a balance of discounted notes in the sum of $224 and a balance in the reserve account in the sum of $111.30. It is further stipulated that subsequent to April 14, 1948, no notes were discounted at either branch of the Bank.

[1, 2] The question presented for determination is whether appellant Bank was entitled to offset the monies owed by it to Pacific at the Gardena Branch against the debt owed to it by Pacific at the Five Points Branch. We are of the opinion that the Bank was not entitled to such an offset. Appellant contends that it had the right of offset by reason of section 440 of the Code of Civil Procedure, and that it also had that right because of its well recognized banker's lien. Civ.Code, sec. 3054. The right of offset exists in favor of a bank with which a customer makes a general deposit but we are of the opinion that in view of the intention of the parties, as disclosed by the terms of the contract and the practice followed by the bank in handling the account, the trial court properly concluded that the reserve account was not a general deposit, but one which was to be used for a specific purpose.

[3] There is no particular formula prescribed for the contract involved in making a special deposit or a deposit for a specific purpose. The nature of the deposit is determined by the mutual intent and understanding of the parties. American Surety Co. v. Bank of Italy, 63 Cal.App. 149, 159, 218 P. 466. Each contract involved here provided that the collections made by the branch bank were to be held as a reserve account which could be used only in either one of two specified ways: The primary use to which the fund was to be put was to cure the default in any note purchased under that particular contract, or, if no such default existed, the fund was to be paid or credited annually to plaintiff's assignor. The fund with which we are here concerned had accumulated as the result of payments made on notes bought and sold under the Gardena contract, and had been neither paid, nor credited, to plaintiff's assignor. In other words, the funds remained in the reserve account provided for in the contract.

[4–8] The reserve fund here involved would seem to be equivalent to the deposit of money for a special purpose. A bank impliedly binds itself, by accepting a special deposit, not to set off against such deposit a debt due it from the depositor. Nor can a bank which accepts a deposit of money for a special purpose, under an agreement that it will pay the amount, when needed, for that purpose, legally appropriate such deposit to discharge the depositor's indebtedness to it. Stone v. Harris, 146 Cal. 555, 560, 80 P. 711; Civ.Code, sec. 2891; 7 Am. Jur., Banks, sec. 424, p. 298; Morton v. Woolery, 48 N.D. 1132, 189 N.W. 232, 24 A.L.R. 1111; 39 A.L.R. 1138; In re Warren's Bank, 209 Wis. 121, 244 N.W. 594, 86 A.L.R. 375, and numerous cases cited there. Deposits of funds for a special purpose, such as for the purpose of paying such funds to a third person upon the presentation of certain papers or instruments of title, Bassett v. City Bank & Trust Co., 115 Conn. 1, 160 A. 60, 81 A.L.R. 1488; paying bonds, In re Interborough Consol. Corp., 2 Cir., 288 F. 334, 32 A.L.R. 932; paying a mortgage indebtedness; meeting certain checks or classes of checks, Ballard v. Home Nat. Bank, 91 Kan. 91, 136 P. 935, L.R.A.1916C, 161; Payne Bros. v. Burnett, 151 Tenn. 496, 269 S.W. 27, 39 A.L.R. 1125; taking up the depositor's note that has been indorsed to another bank; paying a contractor for work being performed by him, Sawyer v. Conner, 114 Miss. 363, 75 So. 131, L.R.A.1918A, 61, Ann.Cas.1918B, 388, have all the attributes of special deposits and are generally termed and construed as such. In addition, the bank has the fiduciary duty of an agent to apply the deposit to the particular purpose for which it was delivered to the bank, and in case of the misapplication of the deposit, it may be followed on the trust fund theory. In Hing v. Lee, 37 Cal.App. 313, 174 P. 356, mortgages and other instruments were deposited for collection and were given over with specific instructions to collect and remit. The court held that this was a trust transaction, and that the money, if collected, was affected with the trust. See, 8 So.Cal. Law Rev. 122, discussing deposits for specific purposes.

[9, 10] Where property is pledged to a bank to secure specific indebtedness of the customer, the bank has no right to hold such property as security for any other obligation. If under the contract of the parties, the reserve fund was to be used to satisfy the obligation of plaintiff's assignor or to be paid or credited to him annually, the appellant was not entitled to hold it, under its alleged banker's lien, to secure another obligation. "The banker's lien referred to in section 3054 of the Civil Code was familiar, as a part of the law, long before the enactment of the Codes. Section 3054 does not extend its scope. It has always been the rule that a banker holding securities pledged for the payment of a particular debt has no lien upon them for the payment of other claims." Berry v. Bank of Bakersfield, 177 Cal. 206, 209, 170 P. 415, 417, and authorities there cited; Farmers' & Merchants' Nat. Bank v. Stowell, 6 Cal.App.2d 373, 44 P.2d 392; Bell v. Bank of California, 153 Cal. 234, 94 P. 889. It was shown by the testimony of an assistant cashier of the Gardena branch that the bank considered the reserve fund as a deposit for a specific purpose: The money was to be used to "offset" the contingent liability of Pacific—it could not be drawn upon or charged against by Pacific; it was not available for open credit or to meet overdrafts. The account was handled in this manner. The practical construction of the agreement by the parties, in treating the reserve fund as one to be used for a specific purpose, tends to support the construction placed upon it by the trial court.

Inasmuch as each contract made specific provision for the purpose to which the reserve account was to be put, we are of the opinion that the surplus funds which accrued under one contract could not be used to offset the debt owing by Pacific under the other. For this reason, we find it unnecessary to decide whether the two branches of appellant Bank constitute separate entities or whether, as claimed by appellant, there is but one Bank, a national banking corporation.

The judgment is affirmed.

VALLÉE, J., concurs.

---

98 Cal.App.2d 339

LA JOLLA CASA DE MANANA v. HOPKINS (two cases).

Civ. 3953, 3972.

District Court of Appeal, Fourth District, California.

July 7, 1950.

Rehearing Denied Aug. 1, 1950.

Hearing Denied Aug. 31, 1950.

La Jolla Casa deManana, a corporation, brought action against Isabel Morrison Hopkins for a declaratory judgment construing a contract of sale of resort hotel by defendant reserving to the defendant the right to occupy a cottage for the duration of the war and until defendant could reasonably build a home for herself, and for damages. The Superior Court of San Diego County, William A. Glen, J., rendered two judgments in favor of the plaintiff, and the defendant appealed, and the plaintiff moved to dismiss the appeal. The District Court of Appeal, Griffin, J., held that reference in contract to duration of war referred to duration of shooting war and that when plaintiff constructed herself a home after termination of shooting war she was no longer entitled to occupy the cottage.

Motion to dismiss appeal denied and judgment affirmed.

1. Appeal and error 🔑80(6)

Where so-called interlocutory judgment in declaratory judgment action was final as to all its provisions except portion thereof which was reserved for further determination in reference to claim of damages, motion to dismiss appeal on ground that the judgment was not a final judgment, would be denied. Code of Civ. Proc. § 963.

2. Evidence 🔑588

Generally, uncontradicted and unimpeached testimony which is not inherently improbable, cannot be arbitrarily disregarded and should be accepted as true by the trier of facts where it is not found that the testimony is false, but such general rule is subject to many exceptions.

3. Appeal and error 🔑994(3)

An appellate court cannot control a finding or conclusion denying credence of a witness, unless it appears that there are no matters or circumstances which at all impair the accuracy of the testimony.

4. Evidence 🔑588

A trial judge, as trier of the facts, has an inherent right to disregard the testimony of any witness or the effect of any prima facie showing based thereon, when he is satisfied that the witness is not telling the truth or that his testimony is inherently improbable due to its inaccuracy, uncertainty, lapse of time, or interest or bias of the witness.

5. Trial 🔑140(1)

The trial judge is the arbiter of the credibility of witnesses.

6. Evidence 🔑588

A witness may be contradicted by the facts he states, as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story, and his manner of testifying may give rise to doubts of his sincerity and create impression that he is giving a wrong coloring to material facts.

7. Appeal and error 🔑996

Where conflicting inferences may be drawn from testimony, District Court of Appeal is bound by the findings of the trial court as conclusively as in other cases of conflict.

8. Evidence 🔑589

The interest of the defendant in the outcome of the action could be considered in determining the truth of her testimony.

9. Evidence 🔑588

The great lapse of time between date of conversation concerning which defendant and her witness testified, and the time of trial was a factor to be considered in determining the truth of the testimony.

10. Vendor and purchaser 🔑80

In action for a declaratory judgment with respect to contract of sale of resort hotel, trial court was not bound to accept as true the uncontradicted testimony of the vendor as to the intention of the parties to the contract, where vendor was represented in negotiations leading up to the contract by counsel who drew the contract, and purchaser was dead at the time of the trial and could not refute the testimony of the vendor.

11. Contracts 🔑155

If there is in a contract any ambiguity that may reasonably bear one of two constructions, then the construction most favorable to the parties who did not prepare the contract and were not responsible for the ambiguity should be adopted.

12. Contracts 🔑152

Courts should attempt to give words and phrases used in contracts the natural meaning or that meaning most commonly understood when considered in reference to the subject matter and the circumstances.

13. Appeal and error ⚷1008(3)

Where trial court's interpretation of the intention of the parties to contract of sale, as gleaned from evidence and contract, was reasonable and did not do violence to the contract, District Court of Appeal could not substitute another interpretation, should it be so inclined.

14. Vendor and purchaser ⚷68

Where contract of sale of resort hotel provided that vendor reserved right to continue to occupy a cottage for "duration of the war" and until she could reasonably build a home for herself at "termination of the war," and after end of hostilities vendor constructed a home for herself, trial court did not err under evidence in holding that vendor was no longer entitled to occupy cottage, on ground that contract referred to the end of the shooting war.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Duration of the War" and "Termination of the War".

15. Declaratory judgment ⚷329

Where petition for declaratory relief asked for such relief as might be proper and alleged damages in certain sum, and defendant in her answer denied any such damage and alleged that it did not exceed a certain smaller amount, issue of damages was within the pleadings.

16. Equity ⚷39(1)

When a court of equity once obtains jurisdiction of a case, it will decide the whole case between the parties and not leave any part of it for future litigation.

17. Appeal and error ⚷1013

Where there was sufficient competent evidence to justify a finding that plaintiff's damages were greatly in excess of amount actually allowed by trial court, trial court's finding as to amount of damages could not be disturbed on appeal by defendant.

◆

Philip Storer Thacher, Donald A. Stewart, El Cajon, for appellant.

W. I. Titus, Los Angeles, for respondent.

GRIFFIN, Justice.

Action for declaratory relief. The appeal from the interlocutory judgment and the appeal from the final judgment in this action were consolidated for the purpose of filing briefs and will be jointly considered. Defendant, since 1924, owned and operated the Casa deManana Hotel, a resort hotel of approximately 100 rooms located on a tract of 5-1/2 acres in La Jolla, in the City of San Diego. The property consists of the main hotel building, adjoining which are a number of cottages which are used for the accommodation of hotel guests. Defendant lived in a seven-room cottage centrally located on the hotel grounds and designated as "Cottage C".

On June 1, 1944, defendant sold the hotel property to Gerald L. White and wife under a contract of sale, and since that date the hotel property has been operated by them or their successors in interest. In July, 1946, all of the White's interest was transferred to plaintiff corporation by written consent of defendant. The contract of sale provides generally that the consideration was $450,000, payable in certain described installments and contained a special provision that all furnishings and personal property located in Cottage C would be reserved, and defendant reserved the right under paragraph 3, to continue to personally occupy that cottage "as at present for the 'duration' and until she can reasonably build a home for herself. If first party (defendant) is unable to build within a year and a half of the termination of the present war because of restrictions or unreasonable prices, first party will pay a monthly rental for such year and a half of $150 a month." On March 24, 1947, Mr. White, who was the owner of one-fourth of the stock of the plaintiff corporation, died. Two months after his death demand was made for possession of the premises occupied by defendant. Upon her refusal this petition was filed seeking declaratory relief. Therein, it is contended by plaintiff that under paragraph 3 as above quoted, at the time the contract was entered into, it was the intention and understanding of the parties to that contract that the term "duration" and the phrase "the termination of the present war" means and referred to and should be construed as, the end of armed hostilities between the United States of America and Japan, ordinarily referred to as "V J Day", which said event occurred on September 2, 1945; that the term "restrictions" refers to governmental restrictions on the purchase and use of building materials suitable for a dwelling "and that all such restrictions were removed and became ineffective June 30, 1947, and that ever since said date no governmental restrictions have prevented defendant from building a home nor has such building been restricted because of 'unreasonable prices' inasmuch as prices of building and building materials for homes since V J Day have not been and are not now unreasonable but to the contrary are the accepted standard of prices for the construction of homes." It is then alleged that all of the time since June 30, 1947, defendant has not been prevented from building a home by reason of any restrictions or any unreasonable prices; that despite this fact defendant failed and refused to build and continues to occupy "Cottage C" and "has at all of the times mentioned refused to give up her personal occupancy against the wishes and demands of plaintiff"; that plaintiff immediately required such space for housing hotel guests and that by reason of defendant's refusal to deliver possession of the cottage to plaintiff, plaintiff will, during the hotel season, from February first until October first, 1948, be deprived of hotel revenue in the sum of $25,000, and will suffer damage in that amount; that plaintiff and defendant cannot agree upon the true construction and meaning of paragraph 3 of the contract and that a real controversy exists. It then prays that the court declare the rights and duties of the respective parties in reference to paragraph 3, as prayed; that it be declared that plaintiff is entitled to the immediate possession of Cottage C; and finally that the court grant such further relief to the plaintiff as may be proper under all the circumstances.

By answer defendant admits many of the allegations contained within the petition but specifically alleges that building has been and still is restricted by reason of "unreasonable prices", and alleges that she was prevented from building by reason thereof. She denied that Cottage C would produce a gross revenue to plaintiff in excess of $5,000 from February 1, 1948, until October 1, 1948. She denied generally that paragraph 3 of the contract should be construed as contended by plaintiff corporation; alleged that she had expended over $2500 in constructing an additional room on Cottage C and prayed that the words and phrases "duration" and "termination of the present war" should be declared to mean exactly what they said, namely, the duration or termination of the present war (not hostilities) between the United States of America and Japan, Germany, Italy and others.

On stipulation of counsel it was agreed that paragraph V of plaintiff's complaint be stricken and that there be substituted in place thereof other allegations, namely, that the defendant did commence the construction of a home for herself on or about May 15, 1947, which was completed on or about February 15, 1948, and is now available to the defendant as her home; and that the defendant continues to occupy the said "Cottage C" and does now refuse to give up the personal occupancy of said "Cottage C" and continues to occupy the same against the wishes and express demand of the plaintiff. These allegations were denied generally by the defendant.

The first phase of the case was tried on April 7, 1948, and ordered submitted. On June 22, the judge filed his memorandum opinion and on July 20, findings of fact, conclusions of law, and an interlocutory judgment were signed and filed by the court.

The court found generally in favor of the plaintiff in accordance with the contentions set forth in the complaint, declared that it was the intention of the parties to the contract that the term "restriction" or "restrictions" as used in paragraph 3 of the contract should mean and refer to governmental restrictions on the purchase and use of building materials suitable for a dwelling, and that such restrictions terminated and became ineffective June 30, 1947, and that ever since that date defendant was not prevented from building a home for herself by reason of governmental restrictions or by reason of any restrictions or any unreasonable prices; that prior to February 15, 1948, defendant built and completed a home for herself in San Diego County; that ever since June 1, 1944, defendant kept Cottage C; that plaintiff made demand for possession and defendant refused it; that it was the intention of the parties that the terms "duration" and "termination of the present war", as used in paragraph 3 mean the end of the shooting war, generally known as "V J Day", which was on September 2, 1945; that defendant's contention that Cottage C would only produce a gross revenue in an amount not to exceed $5000 between the dates alleged, was untrue; that under the contract defendant was entitled to occupy the cottage for 18 months after September 2, 1945, without rental, and that after said 18 months' period defendant agreed to pay plaintiff the sum of $150 per month until defendant could reasonably build a home for herself, which said 18 months' period ended March 2, 1947; that defendant made no payment therefor and is indebted to plaintiff in the sum of $1715.00 as rental in the sum of $150 a month from March 2, 1947, to February 15, 1948, being the date she completed the construction of the home for herself. It then determined that plaintiff was entitled to the immediate possession of Cottage C and specifically found that the amount of damages suffered by plaintiff by reason of being deprived of the use and occupancy of the cottage from February 15, 1948, until delivery of possession thereof to plaintiff should be determined by the court at a subsequent hearing for that purpose. Defendant appealed from the so-called interlocutory judgment that followed.

[1] On June 14, 1949, in this court, plaintiff moved to dismiss this appeal on the grounds that the so-called interlocutory judgment was not a final judgment. This motion was submitted for decision to be determined at this time. It appears that the so-called interlocutory judgment became final as to all its provisions except the portion thereof which was reserved for further determination in reference to the claim of damages. Therefore, the motion to dismiss should be denied. Sec. 963, Code Civ.Proc.; People's Ditch Co. v. Foothill Irr. Dist., 103 Cal.App. 321, 284 P. 514; Orton v. Daigler, 120 Cal. App. 448, 8 P.2d 161.

On October 18, 1948, the trial was resumed for the purpose of ascertaining such damages, if any. Testimony was had and after several continuances, that issue was submitted and the court found, in addition to the findings heretofore mentioned, that on February 15, 1948, plaintiff became entitled to the exclusive possession and use of the cottage until July 27, 1948; that until that date defendant wrongfully occupied and withheld the possession of it from plaintiff; that the value of the use and occupation thereof for that period was $5,474.38; and rendered judgment for damages accordingly. From this judgment defendant also appeals.

The first complaint is that the evidence is insufficient, as a matter of law, to support the finding of the court, particularly as to its interpretation of the intent of the parties as expressed in paragraph 3 of the agreement. The main claim is that the uncontradicted evidence as to the interpretation given the original contract by the parties thereto does not support the findings.

The attorney who assisted defendant in drawing the agreement testified that he represented the defendant at the time; that in the original agreement objection was made by Mr. White to any provision in the agreement for the perpetual right of occupancy for Mrs. Hopkins, and that the parties agreed that she was to be protected in its use in case the war continued; that the last war continued for over two years after actual cessation of hostilities, and that they could not tell how long this war was to last or when hostilities would cease; that she appreciated Mr. White's objection and his position and would be willing to pay a reasonable rent if it continued indefinitely and she continued to occupy it; that Mr. White said that was not unreasonable and he suggested that the contract be worded as it now reads.

Defendant testified that they discussed the meaning of the words "duration" and "termination of war"; that she said "duration" did not mean the end of hostilities; that she remembered the "duration" after the last war and that it lasted until congress declared the war over, which was more than two years after hostilities ceased; that they discussed the fact that the "duration" might continue indefinitely and that she agreed, in that case, to pay sufficient rent to cover utilities and upkeep, and Mr. White did not dissent but said he understood; that there was conversation between them as to building costs; that she was to occupy the cottage until she could reasonably build a home; that they discussed the original cost of the building of "Cottage C"; that she stated it was built at $4.50 per square foot; that she could not then build at less than $9 per square foot and that Mr. White said that that price was unreasonable and would not be expected.

In this connection it is also argued by defendant that since Mr. White never made demand on her for possession of Cottage C during his lifetime, that fact clearly indicated that he never intended the construction placed upon the agreement by the trial court.

Counsel for plaintiff announced that since Mr. White was dead, he was unable to directly contradict this testimony but relied upon the contract as worded and the surrounding circumstances, as developed, to maintain his position as to the intention of the parties at the time of the making of the agreement, as claimed in the complaint.

[2-7] In support of her contention defendant cites such cases as Fidelity and Casualty Company v. Abraham, 70 Cal. App.2d 776, 161 P.2d 689; Gomez v. Cecena, 15 Cal.2d 363, 101 P.2d 477; and Jewett v. Albin, 90 Cal.App. 535, 543, 266 P. 329, which are to the effect that uncontradicted and unimpeached testimony of a witness which is not inherently improbable, cannot be arbitrarily disregarded and should be accepted as true by the trier of facts where it is not found that the testimony was false, in which case the appellate courts must presume it was true. There is no argument about this general rule. However, this general rule is subject to many exceptions and limitations. An appellate court cannot control a finding or conclusion denying credence, unless it appears that there are no matters or circumstances which at all impair the accuracy of the testimony, and a trial judge has an inherent right to disregard the testimony of any witness, or the effect of any prima facie showing based thereon, when he is satisfied that the witness is not telling the truth or his testimony is inherently improbable due to its inaccuracy, due to uncertainty, lapse of time, or interest or bias of the witness. All of these things may be properly considered in determining the weight to be given the testimony of a witness although there be no adverse testimony adduced. The trial judge is the arbiter of the credibility of the witnesses. A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner of testifying may give rise to doubts of his sincerity and create the impression that he is giving a wrong coloring to material facts. People v. Frankenthal, 91 Cal.App. 2d 189, 204 P.2d 614, 617; Burns v. Radoicich, 77 Cal.App.2d 697, 176 P.2d 77. Where conflicting inferences may be drawn from testimony, this court is bound by the findings of the trial court as conclusively as in other cases of conflict. Garcia & Maggini Co. v. Sanfilippo, 56 Cal.App. 348, 205 P. 74.

[8-11] The parol testimony of the two witnesses in aid of the construction of the intention of the parties was somewhat at variance in and of itself. Mrs. Hopkins' remembrances of the conversation went considerably farther than that of her counsel in stating the claimed conversation. Her interest in the outcome of the proceedings could be considered in determining the truth of her testimony. The great lapse of time between the date of the conversation and the time of trial was likewise a factor to be considered. If all these matters were so thoroughly discussed, as contended by defendant, it seems peculiar they were not put into the agreement in definite form, particularly when defendant was represented by counsel who drew the agreement. Since Mr. White was dead and could not refute that testimony, we are not prepared to hold that the trial court was bound to accept their testimony as true. Here, too, a strong presumption arose under the holding in George Herz Co. v. Solt, 23 Cal.App.2d 178, 72 P.2d 251, where it is held that if there is any ambiguity in a contract that may reasonably bear one of two constructions, then the construction most favorable to the parties who did not prepare the contract and were not responsible for the ambiguity should be adopted. See, also, Southern California Finance Company v. Davis, 120 Cal.App. 79, 7 P.2d 744.

We conclude that the trial court was authorized to consider this presumption, the conflicts in the testimony, the surrounding circumstances and the actual wording used in the agreement in determining the intent of the parties. Accordingly, the trial court was not bound to accept as true the testimony of the defendant and her counsel as to the conversation which they claimed ensued at the time of the execution of the agreement.

[12] Defendant cites Silva v. Mercier, 33 Cal.2d 704, 204 P.2d 609, in support of her contention that the trial court erred in its construction of the terms used in paragraph 3 of the agreement. That case involved a collective bargaining contract and involved the term "cessation of the present war". The Supreme Court, in effect, there held that the construction of that term, as contemplated by the parties, should be decided by the trial court after considering any competent evidence that would throw light upon it. To the same effect is Malbone Garage, Inc. v. Minkin, 272 App.Div. 109, 72 N.Y.S.2d 327, affirmed in 297 N.Y. 677, 76 N.E.2d 331, cited by defendant and quoted at length. Defendant relies upon other cases therein cited, as well as Citizens Protective League v. Byrnes, D.C., 64 F.Supp. 233, 234; Bowles v. Soverinsky, D.C., 65 F.Supp. 808, 813; and Dubuisson v. Simmons, 157 Fla. 473, 26 So.2d 438. Many of the cases cited involve wartime statutes, war regulations and different contracts or agreements from the one here under consideration. The underlying principle of the authorities that we have examined, as applied to such agreements as here involved, is that courts should attempt to give words and phrases used in contracts the natural meaning or that meaning most commonly understood when considered in reference to the subject matter and circumstances. See Rupp Hotel Operating Co. v. Donn, 158 Fla. 541, 29 So.2d 441; New York Life Insurance Co. v. Durham, 10 Cir., 166 F.2d 874; Stinson v. New York Life Ins. Co., 83 U.S.App.D.C. 115, 167 F.2d 233; New York Life Insurance Co. v. Bennion, 10 Cir., 158 F.2d 260, 265; Arroyo v. Puerto Rico Transportation Authority, 1 Cir., 164 F.2d 748, 752.

In Samuels v. United Seamen's Service, D.C., 68 F.Supp. 461, 462, also cited in 9 Cir., 165 F.2d 409, it was stated that it would be a very simple matter to indicate if the terms "duration" or "termination of the war" were to be by Presidential or Congressional action and, not having done so, said terms should be given the meaning of "the end * * * of hostilities". See, also, Lincoln v. Harvey, Tex.Civ.App., 191 S.W.2d 764.

The statement in paragraph 3 that defendant reserves the cottage "until she can reasonably build a home for herself", and if she is "unable" to build within a year and a half from the termination of the present war, because of restrictive or unreasonable prices, she should pay a monthly rental thereafter of $150 a month, is subject to interpretation by the trial court under the same rule above discussed. The question before the court was, what was the intent of the parties in this respect?

[13, 14] It is conceded that defendant did build a home for herself at Warner's Hot Springs which was completed on February 15, 1948. She argues that since she expected to use it only for a summer cottage and since it cost her $30,000 instead of the $10,500 which she anticipated, that it could not be considered that that was the home that was contemplated in the agreement, nor could it be considered that she was *able* to build *at reasonable prices,* and, accordingly, that she was entitled to occupy "Cottage C" at $150 a month under the agreement until such time as she could reasonably build in La Jolla. The court's interpretation of the intention of the parties, as gleaned from the evidence and the paragraph under consideration, is reasonable and does not do violence to the agreement as worded. Accordingly, this court may not substitute another interpretation should it be so inclined. Tide Water Associated Oil Co. v. Curtin, 41 Cal.App.2d 884, 107 P.2d 945.

[15] The last issue involves the appeal from the judgment awarding damages. The first complaint in this respect is that the issue of damages was not within the pleadings. We see no merit to this contention. Paragraph 6 of plaintiff's petition for declaratory relief asks for "such relief as may be proper", and alleges damages in the sum of $25,000 by reason of deprivation of hotel revenue during the period defendant wrongfully and unlawfully retained possession of the cottage. Defendant, in her answer, denied any such damage, and alleged that it did not exceed $5,000. The trial court proceeded to hear evidence on the subject and the case was tried on the theory that damages were involved under the pleadings.

[16] When a court of equity once obtains jurisdiction of a case it will decide the whole case between the parties and not leave any part of it for future litigation. Bettencourt v. Bank of Italy, etc., Ass'n, 216 Cal. 174, 13 P.2d 659; Zimmer v. Gorelnik, 42 Cal.App.2d 440, 109 P.2d 34; American Telephone and Telegraph Company v. California Bank, 59 Cal.App.2d 46, 138 P.2d 49; Martin v. Durand, 63 Cal. 39.

The second complaint is that the evidence was insufficient to support the judgment for damages. A judgment was entered for the agreed rental up to March 2, 1947, at $150 per month, totaling $1715, as provided for in the contract. This portion of the judgment must be sustained under the findings.

The damages allowed, under the reservation order, covered the period beginning February 15, 1948, the date when defendant completed building her home at Warner's Hot Springs, and the time the court fixed as being the time when defendant should have relinquished possession under the agreement. That period ended on July 27, 1948, the time when defendant moved out of and surrendered possession of Cottage C. The value of that wrongful use and occupation was fixed at $5474.38. The evidence establishing the basis for this award is predicated upon the testimony of the hotel manager, who testified that by a change in the suite set up, by locking off certain rooms, renting them individually, and refurnishing them, he could make them available for hotel occupation; that under this set up he could and did later receive a total gross rental of $84 per day for the premises during winter and summer seasons and $70 per day during off-season; that this amount would not include the associated income that the plaintiff would naturally have from the sale of beverages, meals and other services in connection with the hotel if the rooms had guests occupying them. Volumes of evidence were then produced, under sec. 3334 of the Civil Code, in an endeavor to show the cost of operation of the several units of the hotel and what the net rental value or net return to the corporation would be for the rental of the rooms for the period in question. Defendant produced testimony of one witness that in his opinion the rental value of the particular cottage in question, *as an unfurnished residence,* would be approximately $300 per month.

[17] While some of the evidence produced by plaintiff and received by the court

showing loss and gain in the several departments of the hotel was difficult of analysis and appeared to be somewhat remote, immaterial or incompetent, there was sufficient competent evidence to justify the finding that the value of the reasonable occupation and use of the premises was greatly in excess of the amount actually allowed. This finding cannot be disturbed on appeal. Shook v. Beals, 96 Cal.App.2d 963, 217 P.2d 56; Calidino Hotel Co. v. Bank of America etc., 31 Cal.App.2d 295, 311, 87 P.2d 923; Landon v. Hill, 136 Cal.App. 560, 29 P.2d 281.

Motion to dismiss appeal denied. Judgments affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

JACKSON et al. v. SUPERIOR COURT IN AND FOR MERCED COUNTY.

Civ. 7897.

District Court of Appeal, Third District, California.

June 23, 1950.

John Jackson and wife applied for a writ of prohibition restraining the Superior Court in and for the County of Merced from proceeding further under an information charging petitioners with unlawful delay or obstruction of a public officer in attempted discharge of his duty to make an arrest. The District Court of Appeal, Van Dyke, J., held that the officer's attempt to arrest petitioners' minor son without a warrant for a misdemeanor committed in the officer's presence more than a day before such attempt was unlawful, so that petitioners' reasonable resistance thereof did not constitute the offense charged and prohibition was a proper remedy.

Peremptory writ granted.

1. Arrest 🔑63(4)

A deputy sheriff had no lawful right to arrest a boy without warrant for misdemeanor on mere information from another such officer, in whose presence misdemeanor was committed some 28 hours before attempted arrest. Pen.Code, § 834 et seq.

2. Arrest 🔑63(3), 64

Peace officers and private citizens have equal powers to make arrest without warrant for public offense committed or attempted in their presence, but arrest must be made when offense or part thereof is being committed, within reasonable time thereafter, or on fresh and immediate pursuit of offender. Pen.Code, § 834 et seq.

3. Arrest 🔑63(3)

An arrest without warrant for misdemeanor is not justified, if made after occasion therefor has passed, though misdemeanor was committed in arresting officer's presence. Pen.Code, § 834 et seq.

4. Arrest 🔑63(3)

To make arrest without warrant for misdemeanor committed in police officer's presence, he must act promptly, as soon as possible under circumstances, and before transacting other business. Pen.Code, § 834 et seq.

5. Prohibition 🔑27

In prohibition proceeding to restrain proceedings under information charging unlawful delay or obstruction of public officer in attempted discharge of duty to make arrest, evidence was insufficient to show that two officers' attempt to arrest petitioners' minor son without warrant was made for his commission of misdemeanor observed by one of such officers several hours before attempted arrest. Pen.Code, §§ 148, 834 et seq.

6. Arrest 🔑62

To justify arrest without warrant, arrestor must proceed as soon as possible to make arrest, and if he first goes about other matters unconnected with arrest, his right to make such arrest ceases and he must obtain warrant in order to make valid arrest. Pen.Code, § 834 et seq.

7. Arrest ⚷63(3)

A deputy sheriff, failing to arrest boy immediately on observing his commission of misdemeanor in officer's presence, but departing after telling boy not to do what he had been doing, had no right to arrest boy without warrant more than a day after commission of such offense. Pen.Code, § 834 et seq.

8. Obstructing justice ⚷3

A public officer's attempt to make unlawful arrest may be reasonably resisted either by person whom officer attempts to arrest or by others coming to such person's aid. Pen.Code, § 148.

9. Obstructing justice ⚷3
Prohibition ⚷5(4)

The superior court was not authorized to proceed under information charging unlawful delay or obstruction of public officer in attempted discharge of duty to make lawful arrest, where officers unlawfully attempted to arrest defendants' minor son without warrant for misdemeanor committed by him in presence of one of officers more than one day before such attempt, in absence of showing that defendants' resistance of attempt was unreasonable, as they committed no public offense, and prohibition was appropriate means to test People's right to proceed with prosecution under such information. Pen.Code, §§ 148, 834 et seq., 872.

◆

Don C. Mayes, Merced, for petitioners.

Fred N. Howser, Attorney General, Doris H. Maier, Deputy, for respondent.

VAN DYKE, Justice.

Petitioners John Jackson and Evelyn Jackson have applied for a writ of prohibition to be directed to the Superior Court of this State in and for the County of Merced, restraining that court from proceeding further under an information filed therein by the district attorney of that county, charging a public offense against petitioners. The information charged that petitioners on March 27, 1950 did wilfully and unlawfully delay or obstruct a public officer in the discharge or attempted discharge of a duty of his office, to wit, lawful arrest of a person. The information is drawn in the language of Section 148 of the Penal Code.

It appears from the petition and the answer thereto as follows: On March 26th at about 1:30 P. M. John Borth, a special deputy sheriff who resides at Winton in Merced County, observed one Harvey Jackson, with some other boys, shooting with BB guns at a light bulb affixed to a public building in Winton. Borth knew the boy, who likewise lived in Winton with his parents, petitioners here, and knew his approximate age. He stopped and talked to the boys. When he got out of his car these boys ran away and then came back to talk to him, and he told them they shouldn't be playing around the building and doing what they did. On the following day and around five o'clock in the afternoon Officer Borth, in company with Officer Adcock, likewise a deputy sheriff, went to the home of Harvey Jackson to arrest him for the incident above stated. They had no warrant for his arrest. Adcock asked the boy to come to the car and told him he was under arrest and to get into the back seat. One of the petitioners, Evelyn Jackson, mother of the boy, was close by the car and she told her son not to get in the car, held out her arm to keep him from going in the car and called the boy's father, petitioner John Jackson. The officers told him what was wanted, whereupon Jackson slammed the car door shut, told the boy to go into the house and stay there and not to go with the officers. Thereupon Adcock said if the parents would not let the youngster go, he (Adcock) would take all three of them, and Jackson replied that would be fine, but they would have to have papers and they wouldn't go without them nor allow them to take the boy. Thereupon the officers left the scene and obtained a warrant from a magistrate for the parents as well as the boy and effected arrests pursuant to warrant. A preliminary examination of petitioners was held, transcript of which appears in the record here. The warrant, so far as petitioners be concerned, while a copy of it has not been made a part of the record, apparently charged petitioners with the crime of violation of Section 702 of the Welfare and Institutions Code, that is, contributing to the delinquency of a minor, and upon the magistrate's determination that probable cause had been shown in respect of this offense petitioners were held to answer. Thereafter the district attorney filed the information above set forth in substance, as an amended information, charging the offense commonly known as resisting an officer.

[1] It is without dispute that the attempted arrest charged to have been resisted was being made without a warrant and was for an offense committed by the boy Harvey Jackson some twenty-eight hours previously in the presence of Officer Borth. While it is not clear from the transcript that Officer Borth attempted to make any arrest and, indeed, it substantially appears that the arrest was being attempted by Officer Adcock upon information from Officer Borth, yet since both officers were present we have chosen to treat the matter as an arrest attempted by Officer Borth. It is of course obvious that Officer Adcock upon mere information from Officer Borth would have no lawful right, without a warrant, to arrest the boy for the commission of a public offense admittedly not rising above the quality of a misdemeanor. So treating the subject of the attempted arrest leaves the situation one where the right of Officer Borth to make the arrest without a warrant comes in question.

[2, 3] By the specific provisions of the Penal Code, § 834 et seq., peace officers and private citizens alike may make an arrest without a warrant for a public offense committed or attempted in the presence of the person making the arrest. On such an occasion the powers of arrest possessed by peace officers and by private citizens are equal. But to the right to arrest without warrant the law attaches the following conditions: The arrest must be made at the time the offense or any part of the offense is being committed or within a reasonable time thereafter or upon fresh and immediate pursuit of the offender. 6 C.J.S., Arrest, § 6, p. 590. As stated by the Supreme Court in People v. Craig, 152 Cal. 42, 47, 91 P. 997, 1000, "It seems to be generally held that an arrest for a misdemeanor without a warrant cannot be justified, if made after the occasion has passed, though committed in the presence of the arresting officer."

[4] It was said in Oleson v. Pincock, 68 Utah, 507, 251 P. 23, 26: "No hard and fast rule can, however, be laid down which will fit every case respecting what constitutes a reasonable time. What may be so in one case under particular circumstances may not be so in another case under different circumstances. All that can be affirmed with safety is that the officer must act promptly in making the arrest, and as soon as possible under the circumstances, and before he transacts other business."

In Wahl v. Walton, 30 Minn. 506, 16 N.W. 397, 398, wherein the statute under consideration was the same as our own and in a case where five hours had elapsed between the time when an officer observed an offense committed and the time he made an arrest without warrant therefor, the court said:

"* * * The power to arrest without warrant, while it may in some cases be useful to the public, is dangerous to the citizen, for it may be perverted to purposes of private malice or revenge, and it ought not, therefore, to be enlarged. When it is said that the arrests must be made at the time of or immediately after the offense, reference is had, not merely to time, but rather to sequence of events. The officer may not be able, at the exact time, to make the arrest; he may be opposed by friends of the offender; may find it necessary to procure assistance; considerable time may be employed in the pursuit. The officer must at once set about the arrest, and follow up the effort until the arrest is effected. In Regina v. Walker, supra [25 Eng. Law & Eq. 589], some two hours had elapsed between the offense and the arrest, and it was held that the authority to arrest was gone, because there was no continued pursuit; and the same was held in Meyer v.

Clark, supra [41 N.Y.Super.Ct. 107], because the officer had departed and afterwards returned, the court saying, 'The shortness of the interval does not affect the question.'

"In this case, some five hours having elapsed * * * during which the defendant was not about anything connected with the arrest, the court was right in its instruction that there was no authority to arrest for that occurrence."

In Meyer v. Clark, 41 N.Y.Super.Ct. 107, referred to above in the quotation from the opinion in Wahl v. Walton, the opinion contained the following:

"I do not regard the *shortness* of the intervening time, between the commission of the offense and the arrest, as affecting the question of the officer's right. If a short interval continues the right, a longer interval would also, and courts or juries would have to measure degrees of time in determining the rights of parties. And the protection of individuals from arbitrary arrest, will be better secured by requiring a complaint and a magistrate's warrant in all cases of arrest not literally within the letter of the law.

"In the case before us we can see no necessity for making the arrest in the manner it was done. The penalty is a money fine only, and there was no probable danger of an escape of the offender. If there was time to report the case to the captain of the precinct, there was time, or time should have been made, to obtain from a magistrate a warrant. * * * The liberty of the citizen is too sacred to be lightly or causelessly interfered with; and the officers of police, however necessary and valuable they may be as conservators of order and in the enforcement of law, must keep themselves within the limits of the law, and not assume functions unless given in the law.

"That the defendants acted under and in pursuance of the orders of the captain of the precinct, does not relieve them from responsibility for their act. Neither they nor the captain could make the arrest without a warrant."

The rule is thus stated in 4 Am.Jur., sec. 67, p. 46: "In making an arrest without a warrant for breach of the peace or a misdemeanor, an officer must act promptly at the time of the offense. If he does not act immediately after the offense has been committed, he can thereafter make arrests only by procuring a warrant and proceeding in accordance with its terms. The same rule applies to an arrest made by a private individual in cases in which, if he acts immediately, an arrest without a warrant is permitted. In order to justify a delay, there should be a continued attempt on the part of the officer or person apprehending the offender to make the arrest; he cannot delay for any purpose which is foreign to the accomplishment of the arrest. If an officer sees an affray and calls other officers to his assistance, the fact that the actual arrest is made after the affray is over does not make the arrest without a warrant illegal."

[5] It is contended by the respondent that Harvey Jackson also committed a public offense in the presence of Deputy Adcock in that several hours before the arrest the deputy had seen him shooting a BB gun around Front Street in Winton. A reading of the transcript demonstrates that the arrest attempted was not attempted for that offense, if offense it was. All that was said about that by any witness at the preliminary hearing was testified to by Officer Adcock in relation to two BB guns he said he had taken from Harvey Jackson on "Main Street, Winton Way and Walnut Avenue that afternoon," taken he said "from Harvey Jackson, him and another boy both had BB guns and shooting them around the Front Street." This incidental testimony is entirely inadequate to support a contention that the arrest attempted was in fact for that occurrence. On the other hand, it appears clearly that the arrest attempted was for the offense observed by Officer Borth. Thus Adcock testified that he told the boy's parents he was arresting the boy for "shooting his BB gun around the hall," the hall being the building to which the light bulb was affixed. Also Borth testified: "I went to his house

with Adcock to pick him up for his arrest. Q. And what was that arrest for? A. For destroying public property." He also said he was driving down the street toward Winton Hall from the north and saw Harvey and some other boys, "Harvey was standing directly in front of the hall with the BB gun, shooting at the light in front of the hall, that is the Winton Community Hall." Also petitioner Evelyn Jackson testified that when the officers came up they told her that Harvey was under arrest, that they were "taking him in for breaking lights in the school house with his BB gun."

There is no support for the claim that the arrest was being made for anything observed by Officer Adcock.

While the statute itself concerning arrest without warrant does not expressly place any limit of time within which such arrest must be made, if in fact the offense is committed in the presence of the person making the arrest, nevertheless by continuous current of authority such limitation has been read into such statutes and has for long been a part of the common law preceding the statutes in the various states.

[6] In line with the authorities cited above we hold that in order to justify an arrest without warrant the arrestor must proceed as soon as may be to make the arrest. And if instead of doing that he goes about other matters unconnected with the arrest, the right to make the arrest without a warrant ceases, and in order to make a valid arrest he must then obtain a warrant therefor.

[7] Applying the foregoing rules to the facts shown at the preliminary hearing, we see that there was no reason why Officer Borth should not have arrested Harvey Jackson at once. The offense was committed in his presence; he knew the boy, his age, and his parents; he lived in the same small community; no resistance was then offered; no aid was needed. Instead of arresting the boy the officer simply told him not to do what he had been doing, and having so acted he departed, and, for all that was shown, did nothing further until more than a day had passed. He had no right then to make an arrest without a warrant.

[8] Petitioners are charged with obstructing a public officer in the discharge or attempted discharge of a duty of his office, to wit, lawful arrest of a person. By the express terms of the charge, the obstruction must have been to the making of a lawful arrest, else the offense was not committed. An officer is under no duty to make an unlawful arrest. If he attempts to do so, reasonable resistance may be made, either by the person he attempts to arrest or by others who may come to his aid. People v. Perry, 79 Cal.App. 2d Supp. 906, 914, 180 P.2d 465; People v. Craig, supra, 152 Cal. at pages 45-50, 91 P. at page 997. No claim is made or could be made upon the record here that the resistance passed the bounds of reason.

[9] A defendant in a criminal action may be held to answer if it appears from the examination that a public offense has been committed and there is sufficient cause to believe the defendant guilty thereof. Pen.Code, sec. 872. Here it appears no public offense was committed. The information, therefore, lacks the support necessary to authorize further proceedings by the respondent court. Prohibition is an appropriate means to test the right of the People to proceed with this prosecution. Greenberg v. Superior Court, 19 Cal.2d 319, 121 P.2d 713.

Let the peremptory writ issue.

ADAMS, P. J., and PEEK, J., concur.

GURSEY v. CAMPUS CAMERA SHOP, Inc. (two cases).

Civ. 17655.

District Court of Appeal, Second District, Division 2, California.

June 27, 1950.

Actions by Al. J. Gursey against the Campus Camera Shop, Inc., on a promissory note which was endorsed by plaintiff as an accommodation and assigned to him after payment thereof. From an order granting a new trial on the motion of plaintiff in the Superior Court, Los Angeles County, LeRoy Dawson, J., under designation of chairman of the Judicial Council and from the judgment, defendant and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that while a minute entry of an order granting a new trial for the insufficiency of evidence was valid, neither it, nor formal order could be amended nunc pro tunc after the court had lost jurisdiction of the cause, and that where hearsay testimony was admitted, presumably a new trial was necessarily granted to avoid an injustice to plaintiff, and such an order was final in the absence of showing of an abuse of discretion.

Order affirmed. Appeal of plaintiff dismissed.

1. Appeal and error 🔑440
New trial 🔑163(1)

While a court under the statute has authority to correct clerical mistakes in its judgment or orders as entered so as to conform to the judgment or order directed, the statute does not authorize the correction of an order granting a new trial to the extent that a defective minute order can be rewritten after the time for entering the order has passed, and particularly after the case has been appealed. Code Civ.Proc. §§ 473, 657.

2. Appeal and error 🔑933(4)

A minute order alone is a sufficient memorial of the court's decision on a motion for new trial within the statute relating to the grant of new trial and providing that if certain conditions are not complied with, it will be conclusively presumed on appeal that the motion was not granted upon the insufficiency of evidence. Code Civ. Proc. § 657.

3. New trial 🔑155

The legislature intended to make it mandatory that a written order granting a new trial on the ground of insufficiency of evidence to sustain the decision be filed within ten days and such limitation applies to nunc pro tunc orders as well as to original orders. Code Civ.Proc. § 657.

4. Appeal and error 🔑440

Although a minute order of an order granting a new trial for insufficiency of evidence is valid neither such an order nor a formal order can be amended nunc pro tunc after the court has lost jurisdiction of the case. Code Civ.Proc. §§ 473, 657.

5. Appeal and error 🔑882(8)

A litigant who insists upon adducing evidence over the objection of his adversaries that it is immaterial, cannot when the ruling is assigned as error, claim on motion for new trial or upon appeal, that the evidence so introduced was immaterial since the ruling of the trial court in admitting the evidence is direct proof that court considered it material, and that court gave it weight in arriving at its decision.

6. Appeal and error 🔑1056(1)
Evidence 🔑155(10)

In action on a note endorsed by plaintiff as an accommodation where defendant offered testimony of witness to show that a certain person had knowledge of the conditional delivery of the note, denying plaintiff right to report his own conversation with such person was prejudicial error.

7. Evidence 🔑271(9), 317(4), 419(15)

In action on a note endorsed by plaintiff as an accommodation, testimony as to conversations among officers of defendant and payee outside of the presence of plaintiff wherein they discussed matters allegedly impairing the negotiability of trade acceptances constituting consideration for notes was hearsay and self-serving and ruling admitting them in evidence violated the parol evidence rule where they occurred subsequent to the execution and delivery of the instruments.

8. Trial 🔑84(1)

Where plaintiff at trial did not base his objection to the admissibility of testimony of conversations upon the parol evidence rule, the trial court was not for that reason forbidden to consider its violation in addition to the hearsay character of the conversations.

9. Evidence ⚿314(1), 317(1)

The hearsay rule excludes extrajudicial utterances only when offered as proof of the truth of the matter asserted and not merely to prove that a conversation occurred.

10. Appeal and error ⚿978(1)

Where hearsay testimony was admitted at trial and the trial court granted a new trial on the motion of plaintiff, in view of presumption that trial court did its duty, the new trial presumably was granted to avoid an injustice to plaintiff, and such an order was final in the absence of a showing of an abuse of discretion. Code Civ.Proc. § 1963, subd. 15.

11. Appeal and error ⚿790(3)

Where an affirmance of an order granting a new trial on the motion of plaintiff virtually disposed of the appeal of plaintiff from the judgment, the latter was dismissed.

◆

Butts & Grosenbaugh, Hollywood, for Campus Camera Shop.

Jones & Wiener, George M. Wiener, Los Angeles, for Al J. Gursey.

MOORE, Presiding Justice.

This is defendant's appeal from an order granting a new trial on plaintiff's motion. Also, plaintiff appealed from the judgment, but it will be dismissed.

The action is founded upon a promissory note for $5,974.00 which defendant executed in favor of Cycon, Inc., a corporation, on October 27, 1947, and which was endorsed thereafter by plaintiff as an accommodation. After payments had reduced the principal of the note to $2,986.94, on demand of its holder, plaintiff paid the amount then due and the note was assigned to him.

As affirmative defenses to the complaint defendant alleged that (1) in May, June and September, 1947 it executed certain trade acceptances in favor of Cycon in the total amount of $10,000 and also purchase orders for 400 Varicon Printers; (2) it was then orally agreed by defendant and Cycon that such trade acceptances would be honored and paid by defendant on condition that Cycon deliver the 400 Varicon Printers to defendant; (3) the trade acceptances would be paid only in the amount of the value of the Printers as they should be delivered. Such oral agreement was confirmed by a writing executed by Cycon. But that corporation failed to deliver the full amount of Varicon Printers contemplated by the trade acceptances, the purchase orders and the agreement. Prior to plaintiff's endorsement of the trade acceptances and of the promissory note, plaintiff had full knowledge of the agreement between defendant and Cycon and of the terms and conditions upon which the trade acceptances, purchase orders and the promissory note had been issued to Cycon. After those instruments had been executed by defendant, plaintiff endorsed the purchase orders as guarantor of Cycon's performance whereupon they were discounted to a bank and the proceeds were credited to Cycon's account. Thereafter, on demand of the bank, payments were made by defendant of certain trade acceptances to the extent that defendant had received the Varicon Printers from Cycon. After other trade acceptances had been dishonored by defendant for the reason that it had not received the merchandise promised, defendant informed Cycon of its refusal to pay, whereupon Cycon requested defendant to execute the note in the sum of $5,974, the amount unpaid on the trade acceptances and the value of the merchandise undelivered by Cycon. At the time of the execution of the note Cycon and defendant agreed that the Varicon Printers would be delivered to defendant which should pay installments on condition that the merchandise be delivered. Plaintiff knew the reason for defendant's execution of the note to Cycon and of the agreement between the two corporations. Despite such knowledge he endorsed and guaranteed payment of the note by Cycon and it was thereupon delivered to the bank in substitution for the unpaid trade acceptances which were delivered to defendant. Subsequently, defendant paid $2,987.06 to the bank and defendant received from Cycon Varicon Printers of value equal to the amount of such payment. Cycon thereafter refused to deliver any more merchandise and defendant having refused to make further payments, the note was paid by plaintiff who became holder of the note.

Having found such affirmative defense to be true, the court below declined to award judgment to plaintiff because the note was given on conditions which were known to plaintiff and which did not occur; hence, it concluded, there has been a "complete failure of consideration for the unpaid balance of said note."

The primary issue at the trial was whether plaintiff had notice of the conditional delivery of the note, that is to say, whether he was a holder in due course, and consequently whether the personal defenses were available against him.

Judgment having been entered June 15, 1949, plaintiff filed his Notice of Intention to Move for a New Trial on July 28 on the grounds of (1) insufficiency of the evidence to justify the judgment and that it is against law; (2) error in law, occurring at the trial and excepted to by plaintiff. On September 15 a minute order was made as follows: "Motion for a new trial is granted" and same was entered. Seven days later defendant filed its notice of appeal from the order. On November 29 an order was filed by the trial court granting *nunc pro tunc* the motion for a "new trial on all issues, and upon the ground of the insufficiency of the evidence to justify the decision and that it is against law." In making such order the court stated that a clerical error had been made in the prior minute order when the grounds had been inadvertently omitted.

[1] Defendant demands a reversal of the order on the ground that it is void as being in excess of jurisdiction. In support thereof it cites section 657, Code of Civil Procedure, which provides that when a new trial is granted upon the ground of insufficiency of the evidence the order must be in writing, must specify the ground and must be filed within 10 days after the motion is granted; if these conditions are not complied with, it will be conclusively presumed on appeal that the motion was not granted upon the insufficiency of the evidence, citing Thomas v. Driscoll, 42 Cal.App.2d 23, 108 P.2d 43, and Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449. In order to obviate the effect of prior decisions, plaintiff attempts to distinguish them in that the trial courts did not proceed under section 473, Code of Civil Procedure, did not require notice to the adversary party, and that at the time of the Thomas decision it had been held that a minute order did not comply with the requirements of section 657. While section 473 is authority for a court to "correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed," yet in view of the pronouncement of Thomas v. Driscoll it appears that the language of the section cannot be so construed as to authorize the correction of an order granting a new trial to the extent that a defective minute order can be rewritten after the time for entering the order has passed and particularly after the case has been appealed.

[2, 3] Neither section 473 nor failure to serve notice upon the adversary is important to the instant action. While it is true that at the time of the Thomas v. Driscoll decision it was believed that a minute order only did not comply with the requirements of section 657, subsequent decisions definitely hold that a minute order alone is a sufficient memorial of the court's decision on the motion for a new trial. Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 121 P.2d 829; Dempsey v. Market Street Railway Co., 23 Cal.2d 110, 142 P.2d 929; Gossman v. Gossman, 52 Cal.App.2d 184, 188, 126 P.2d 178. While much of the Whitley decision has been overruled, still it involved an order which was not made in pursuance of any of the prescribed methods defined by the Code of Civil Procedure, Howard v. Superior Court, 25 Cal.2d 784, 789, 154 P.2d 849, and its pronouncement has not been modified

wherein it held that "the legislature * * * intended to make it mandatory that a written order granting a new trial on the ground of the insufficiency of the evidence to sustain the verdict or decision be filed within ten days * * * or not at all, and that this * * * limitation applies to *nunc pro tunc* orders as well as to original orders." [18 Cal.2d 75, 113 P.2d 453.] As to the Thomas case, without regard to the manner in which the motion to correct the order, *nunc pro tunc,* reached the court, the holding of that decision has not been altered by the shifting scenes on the judicial stage. It was there definitely determined that a court cannot make a *nunc pro tunc* order, in cases where the grounds are the insufficiency of the evidence, after the lapse of ten days following the granting of the motion for a new trial. That holding was emphasized by Cox v. Tyrone Power Enterprises in a sweeping decision.

[4] Not only does the language of the Cox case dispose of the point here at issue, but nine months after its publication the Supreme Court made it unanimous that not only may a minute order deny a new trial on the ground of the insufficiency of the evidence but used language which although not wholly necessary to the decision declared that the 1939 amendments to section 657 "were undoubtedly adopted first, to stop the prior practice by appellate courts of assuming that insufficiency of the evidence was the ground for the order * * and second, *to place a limit on the time within which the record may be corrected by a nunc pro tunc order.*" Dempsey v. Market Street Railway Co., supra, 23 Cal. 2d at page 115, 142 P.2d 929, 931. In view of the present state of the law, it must be held that although a minute entry of the order granting a new trial for the insufficiency of the evidence is valid, yet neither such an order nor one formal in fashion can be amended *nunc pro tunc* after the court has lost jurisdiction of the case.

But all is not lost to plaintiff. The new trial was granted upon the further ground of "error in law, occurring at the trial and excepted to by the party making the application." A review of the proceedings reveals that the court was warranted in basing its order upon such errors. It was stipulated that the three trade acceptances executed by defendant on May 22, 1947, were negotiable. There was a conflict in the evidence as to whether payments on them were to be made as deliveries of the printers were made. But deliveries became delinquent notwithstanding defendant had made payments in amounts commensurate with receipts of merchandise. All parties agreed to the surrender of the trade acceptances to plaintiff upon his executing the guaranty of the promissory note. That having been done, Cycon continued its deliveries of the merchandise. But after defendant had made three installment payments on the note, it defaulted, February 25, 1948. Having paid the holder of the note the balance due, plaintiff brought suit upon it as holder in due course. In the course of the trial, rulings on the admissibility of evidence were made which plaintiff contends were prejudicial to his cause and on account of which the trial court granted a new trial. While the court had excluded as hearsay plaintiff's testimony of a conversation between himself and witness Arrousez, president of Cycon, yet when president Breen of defendant was called, the court permitted him over plaintiff's objection to relate a conversation between himself and Arrousez as to the reduced finances of defendant. Thus while plaintiff was precluded from testifying as to his own conversation with Arrousez, defendant was allowed to introduce testimony of a conversation between its president and the same Arrousez. Defendant says the testimony it adduced as to the Arrousez conversation was not hearsay because it did not tend to prove or disprove any of the issues at the trial, to wit, that plaintiff had notice of the fact that the trade acceptances had been conditionally issued. But after plaintiff had objected *defendant's counsel announced that the evidence was offered to show any conditions upon which the trade acceptances were issued.*

[5, 6] From the foregoing it is obvious that defendant offered Breen's testimony to show that Arrousez had knowledge of the conditional delivery. If so, it was prejudicial to plaintiff when he was denied the

right to report his own conversation with Arrousez. Moreover, the argument that Breen's testimony did not tend to prove that the trade acceptances had been conditionally issued did not change its character from that of hurtful hearsay to harmless chatter. No litigant who insists upon adducing evidence over the objection of his adversary that it is immaterial will, when the ruling is assigned as error, be heard to say on the motion for a new trial or on appeal that his evidence so introduced was immaterial. The solemn ruling of the trial court in admitting the evidence is direct proof that the court considered it material, and, of course, gave it weight in deriving its decision in the case. See Marsteller v. Leavitt, 130 Cal. 149, 152, 162 P. 384.

[7-9] Other hearsay testimony was prejudicial to plaintiff. Over plaintiff's objection the court received in evidence the conversations among the officers of defendant and Cycon, outside the presence of plaintiff. They discussed the terms and conditions of the issuance of the trade acceptances as well as the undisclosed provisions which allegedly impaired their negotiability. Plaintiff's motion to strike it as prejudicial hearsay was denied. Clearly, such testimony was both hearsay and self-serving. Such conversations were the genesis of the trade acceptances and constitute the basis of defendant's contention that their negotiability was restricted. Therefore, the ruling by which they were received in evidence violated the parol evidence rule since they occurred subsequent to the execution and delivery of the instruments. Ellington v. Pacific Coast Pulp & Paper Co., 135 Cal.App. 703, 706, 713, 28 P.2d 404; 9 Wigmore on Evidence, 3d Ed., p. 142. While at the trial plaintiff did not base his objection upon parol evidence rule, the court was not for that reason forbidden to consider its violation in addition to the hearsay character of the conversations. Defendant argues that the conversation was not hearsay because it was not offered to prove or disprove the facts therein asserted but merely to prove that the conversation occurred and to serve as a foundation. If that proposition were to be conceded, there would of course be no violation of the hearsay rule since it excludes extra-judicial utterances only when offered as proof of the truth of the matter asserted. Werner v. State Bar, 24 Cal.2d 611, 621, 150 P.2d 892; People v. Radley, 68 Cal.App.2d 607, 609, 157 P.2d 426. However, there is nothing in the record to indicate that the evidence of the conversations among the officers of the two corporations was so limited or that the court did not accept it as the truth of the facts asserted in the conversations.

[10] No one knew so well as the trial court the extent to which it had been influenced by the cited hearsay testimony. Since it is presumed to have done its duty, Code Civ.Proc. sec. 1963, subd. 15, the new trial was necessarily granted to avoid an injustice to the plaintiff. Such order is final in the absence of a showing of an abuse of discretion. Biaggi v. Ramont, 189 Cal. 675, 681, 209 P. 892; Beall v. Erickson, 113 Cal.App. 36, 39, 297 P. 960. No such showing has been made.

[11] The order is affirmed. Since an affirmance of the order virtually disposes of plaintiff's appeal from the judgment, the latter is dismissed.

McCOMB and WILSON, JJ., concur.

OWSLEY et ux. v. HAMNER et al.*

Civ. 17525.

District Court of Appeal, Second District, Division 2, California.

June 27, 1950.

Rehearing Denied July 18, 1950.

Hearing Granted Aug. 24, 1950.

Action by Don G. Owsley and wife against Jack Hamner, doing business under fictitious firm name of Hamner & Son, and others, for judicial declaration of their rights under a written lease. The Superior Court of Los Angeles County, A. K. Wylie, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that the evidence failed to sustain finding of trial court that closing of passageways and patio adjoining tenant's store would render store untenantable.

---

* Subsequent opinion 227 P.2d 263.

Judgment reversed with directions.

1. Landlord and tenant 🔑124(1)

Generally, everything which belongs to demised premises or is used with, and appurtenant to, them and which is reasonably essential to their enjoyment passes as an incident to them, unless specially reserved.

2. Easements 🔑44(1)

Ways of ingress and egress into and from a building do not contemplate spacious, decorated halls extending through the structure.

3. Contracts 🔑143

In construction of contracts, mere state of mind of parties is not essential object of inquiry, the terms of promised act being determinable by an objective rather than subjective test, and court is not at liberty to revise an agreement while professing to construe it nor does it have right to make a contract for parties different from that actually made by them.

4. Landlord and tenant 🔑124(1, 2)

Where lease contained no mention of inside patio and connecting passageways adjoining defendant's store, evidence failed to establish that conversations contemporaneous with execution of lease contemplated that lease include patio and passageways.

5. Easements 🔑8(2)
Frauds, statute of 🔑58(1), 60(1)
Landlord and tenant 🔑23

Upon neither a permissive use nor an oral contract alone can a thirty year lease or an easement be acquired.

6. Easements 🔑12(1)

Generally one who rests his claim to an easement upon conversation contemporaneous with a written lease, has no rights thereto which are enforceable unless perhaps where the licensee has made investments upon faith of his license and with knowledge of owner.

7. Evidence 🔑441(4)

Where tenant enjoyed use of an adjoining passageway and patio by virtue of an implied license, in absence of investment by tenant upon faith of his license, tenant could not claim an easement to patio and passageway upon conversation contemporaneous with execution of lease.

8. Easements 🔑12(1)

Any provision of a written instrument which is claimed to create a servitude must be strictly construed, but any doubt must be resolved against easement.

9. Evidence 🔑441(4)

The instrument which creates the relationship of landlord and tenant is the final and exclusive memorial of their mutual intent, and any understanding not incorporated in it is immaterial in absence of a reformation of writing.

10. Landlord and tenant 🔑124(2)

Where tenant by implied license enjoyed use of adjoining passageway to his store, but lease was silent as to any easement rights to passage, under the law of servitudes, tenant had no easement rights to passages.

11. Landlord and tenant 🔑124(1, 2)

Where lease expressly authorized landlord to enter, repair and alter leasehold, and tenant failed to establish any easement rights to adjoining passages and patio, landlord had right to close off passages and patio and alter area in any way. Civ.Code, § 820.

12. Landlord and tenant 🔑124(1, 2)

A tenant is not entitled to a continuance of an open patio and passageway adjoining his store, merely because it serves as a convenience. Civ.Code, § 820.

13. Landlord and tenant 🔑125(1)

Where tenant had a street entrance to his store and windows on the inside fronting on a patio and adjoining passageways, evidence failed to sustain finding of trial court that closing of passageways and patio would render tenant's store untenantable. Civ.Code, § 820.

14. Landlord and tenant 🔑124(1)

While there is no grant of a right to air and light from any length of continuous enjoyment, yet when relation of landlord and tenant exists, if it is the thing without which the demised premises would become so untenantable as to result in an eviction, actual or constructive, thing will pass to tenant by implication.

15. Easements 🔑**11**

Proprietor of land may not by use acquire an easement over adjoining land for passage of air and light, and no right of this character can be acquired without express grant of an interest in, or covenant relating to, the lands over which right is claimed.

George R. Maury and S. L. Kurland, Los Angeles, for appellants, and also Alden F. Houck, Los Angeles.

Murchison & Myers, Los Angeles, for respondents.

MOORE, Presiding Justice.

Appellants sued for a judicial declaration of their rights under a written lease executed to respondent in 1929 by their predecessor in interest, Harrison-Cordingly, Incorporated. The corporation was owner of a parcel of land at the intersection of Kinross and Broxton Avenues in University Village in Los Angeles County. The general area is the site of the University of California at Los Angeles and has developed into a wealthy and populous community. When the lease was executed, the building was in the course of construction. The portion selected by respondent was clearly defined upon the plans in use by the builder and it was described in the lease as follows: "That certain store space on the first floor of the University Professional Building, situated on the Northwest corner of the intersection of Broxton Ave. and Kinross Ave. in University Village, Westwood Hills, County of Los Angeles, State of California, said store premises hereby leased having a total square footage of approximately 3,000 sq. feet and a frontage of approximately thirty (30) feet on Broxton Ave. just North of the entrance to Building, store including mezzanine and basement and running through to the alley. Also room 17 x 18 to be used as shoe store. Also approximately 440 sq. feet on second floor to be used as tailoring shop or executive offices as long as the business shall warrant same in the judgment of lessee * * *." The rental was based on a percentage of sales and provided for quiet enjoyment, but is silent with respect to appurtenances, easements or incidents of the demised area.

The street floor of the building is divided into four stores. Store No. 1 occupies the southeast corner of the building. Store No. 2 is the area leased to respondent described in the above quoted lease and occupies the north side of the building. Between stores 1 and 2 lies a passageway from Broxton Avenue to the center of the building where it is enlarged into a patio open through the second floor to the top of the building. Store No. 3 opens on Kinross Avenue. A passageway from Kinross to the patio separates stores 1 and 3 giving a continuous passageway through to Broxton Avenue with the patio at the elbow. Store No. 4 is just west of store No. 3. Except for the center open area these passageways are arched over and the second floor is solid above them.

The title of the property passed to appellants in 1945. Their desire to improve and alter the unleased, open areas of patio and passageways being opposed by respondent, this action was instituted in May, 1946. After a trial, judgment was awarded plaintiffs but on appeal this court (Division I) reversed the judgment on the grounds that (1) in view of the absence from the lease of any mention of appurtenances, the lease passed as an incident "everything necessarily used with it or reasonably necessary to the enjoyment of the part demised"; (2) for the proper construction of an instrument, the circumstances under which it was made may also be shown so that the judge can be placed in the position of the authors of the writing, citing Code Civil Procedure, section 1860. Owsley v. Whelan Drug Co., 83 Cal.App.2d 454, 189 P.2d 50. Such holdings are the law of the case.

The Patio Was Not Leased.

This court is now to determine whether under the lease aided by the testimony of witnesses at the second trial respondent has an easement on the open area between stores 1 and 2, the patio and the passageway to Kinross Avenue.

Appellants allege that the patio is unimproved and that they intend immediately to permit the lessee of store No. 1 to make alterations and additions by extending its walls north and west to enclose the open spaces on the first floor. Respondent's answer and his present contentions are that he had a right to keep the patio open and to require the passageway from Broxton to Kinross to remain open and in the same condition as at the time of the completion of the building in 1929 and until the expiration of the lease. In other words, respondent claims an easement upon the passages and patio by virtue of his lease and of what the lessor told him at the time of its execution.

The futility of respondent's contention is readily disclosed by the statutory law. A tenant for years has no rights to the leasehold other than "such as are given to him by the * * * instrument by which his tenancy is acquired, or by the last[1] section." Civ.Code, sec. 820; Code Civ.Proc., sec. 1971. A leasehold on realty for a term exceeding a year "can be transferred only by operation of law, or by an instrument" subscribed by the transferor or his authorized agent. Civ.Code, sec. 1091. Such an instrument is necessary to the validity of a transfer. Code Civ.Proc., sec. 1967. A lease of real property or of an interest therein for longer than one year is invalid unless it is in writing signed by the lessor. Civ.Code, sec. 1624, subd. 4. The scope of the rights embraced within a servitude and the term of its duration are determined by the terms of the grant. Civ. Code, sec. 806.

[1-3] Such statutes have been uniformly followed in determining the extent of any servitudes included within a lease. In Wright v. Best, 19 Cal.2d 368, 121 P.2d 702, it was held that the lessee of a mining claim had no benefits other than those strictly defined by the lease and that to allow him to pollute the stream from mines operated by him would permit the burden of an easement to be increased beyond the scope of the grant contrary to established principles. In Owsley v. Whelan, supra, 83 Cal.App.2d, at page 457, 189 P.2d at page 52, Justice Doran declared the general rule to be that "everything which belongs to the demised premises or is used with, and appurtenant to, them and which is reasonably essential to their enjoyment passes as an incident to them, unless specially reserved. * * * 'A thing is appurtenant to something else when it stands in the relation of an incident to and is necessarily connected with the use and enjoyment of the principal * * * and agreeing in its nature and quality with the thing to which it is appendant or appurtenant.'" Because of the holding of Mayer v. Hazzard, 10 Cal.App.2d 1, 3, 51 P.2d 189, 190, that "rights of ingress and egress by the usual way pass to the tenant, although not specifically mentioned in the lease," respondent conceives that his claim of right to an easement on the patio is established. But ways of ingress and egress into and from a building do not contemplate spacious, decorated halls extending through the structure. In Zurich General Accident & Liability Assurance Co. Ltd. v. Industrial Accident-Commission, 132 Cal.App. 101, 22 P.2d 572, 573, it was held that the "mutual assent of the parties, essential to the formation of a contract, must be gathered from the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts." By the modern law of contract the mere state of mind of the parties, with reference to the meeting of the minds, is not the essential object of the inquiry, the terms of the promised act being determinable by an external and not by an internal standard, that is to say, by an objective rather than the subjective test. The court is not at liberty to revise an agreement while professing to construe it nor does it have the right to make a contract for the parties different from that ac-

---

[1] Section 819, Civil Code: "A tenant for years or at will, unless he is a wrongdoer, by holding over, may occupy the buildings, take the annual products of the soil, work mines and quarries open at the commencement of his tenancy."

tually made by them. 17 C.J.S., Contracts, § 328, pp. 778–781.

The writing of the parties contains no covenant to maintain the patio as an open space or as an unimproved area. There is not the vaguest reference in the lease to the passageway between stores No. 1 and No. 2. No claim is made by respondent that he was deceived by any word or act into signing the lease. No effort was ever made to reform the writing and no basis for its revision is suggested. In such state of the record, the rights of appellants should be protected by the statutes above cited and especially by section 820, Civil Code. However, by respondent's claim of an easement he insists not only upon the right to have the show windows abutting upon the patio kept open, but he demands also that the passageway leading from the patio to the Kinross entrance be retained and that such entrance remain open. There is no agreedent in the lease upon which such claim could possibly be made except that clause which provides that in the installation of the wiring and in the arrangement of the entrances, stairs, ventilators, plumbing and electrical fixtures the lessor's architect will cooperate with the architect of the lessee "so as to conform to the lessee's plan for the placing of store fixtures. Also to install oak plank flooring, window-backs, windows and lighting fixtures as per sketches to be supplied by lessee." Nothing in such clause can reasonably be construed into an enlargement of respondent's rights as lessee. It was a mere provision to make installations in lessee's incompleted store as he desired them.

But pursuant to the ruling made by the court on the former appeal, respondent attempted to enlarge his leasehold interest by parol proof. He produced a number of witnesses to testify concerning the value to his lease of an easement on the passageways and patio, but not one of them said that such space is essential to render the demised premises tenantable. As to the proof by which he aimed to place the judge in the "situation of the contracting parties" he had no evidence save his own testimony by which he undertook to prove a contemporaneous understanding with the lessor that the patio was to remain open during the term of the lease. But he himself testified that at no time during his negotiations with Mr. Cordingly, president of Harrison-Cordingly, Inc., was anything said by the latter respecting the closing of the patio; that when the lease was drawn it was submitted to respondent who in turn passed it on to his attorney who read it.

Mr. Cordingly contradicted every statement of respondent's testimony with respect to what the latter had said during the negotiations for the lease. He testified that nothing was said in reference to the construction of bay windows, such as were actually installed, or to their use for display purposes. In no conversation was a corner location or a secondary corner mentioned, or that the patio could or could not be closed, or whether the public would be able to view the windows in the patio. While several conversations were had concerning the rental, nothing was said about structures. Whether the Kinross archway entrance would remain open during the entire term of the lease and its extensions, nothing was said by either party. Hamner never said that he considered either the Kinross or the Broxton archway included within the leased area, or that he would receive light and air through the mezzanine windows during the term of the lease, nor did the witness tell Hamner that the Kinross passageway would be kept open always. The possibility of closing the entire open space was never discussed before the lease was signed. Mr. Hamner never said that he rented the premises because of the assistance of numerous display windows on the patio. Neither did the witness tell Hamner the building would never be remodeled or that it would remain in exactly the same condition during the lease term, or even think of any changes in the structure. Now, if the writing executed did not contain all that was intended, how can it be expanded to include rights to an additional 2000 square feet if the lessor never said a word to indicate that such area should be included? Can lessee's rights be enlarged merely because 17 years after the lease was executed he conceived that much of his conversation had been omitted from the written memorial of their agreement?

In support of his contention respondent cites two New York decisions: Doyle v. Lord, 64 N.Y. 432, 21 Am.Rep. 629, and Hamilton v. Grayhill, 19 Misc. 521, 43 N.Y.S. 1079. In each of them the space which the landlord would have closed was held to be an appurtenance of the demised premises because they were not tenantable without such space. Also, there is no value in Commonwealth v. Richardson, 312 Mass. 632, 48 N.E.2d 678, 146 A.L.R. 648. After the tenant-plaintiff had occupied his apartment on the second floor, the landlord constructed a building on the area 14 feet wide between the apartment and the sidewalk. The lease implied a promise that the tenant would not thus be "fenced in" and the character and value of the apartment so impaired.

[4] In the instant case it cannot be said that the use of the patio is necessary to the tenancy of store No. 2 or that conversations contemporaneous with the execution of the lease can be received to modify the written words. To vary the terms of a lease by parol is violative of the statute of frauds. Civ.Code, sec. 1624, subd. 4. A written agreement is considered as containing all the terms agreed upon except where a mistake or imperfection of the writing is put in issue. Code Civ.Proc., sec. 1856.

No Easement Gained By License.

[5–7] In view of the utter absence from the lease of any agreement to grant respondent a tenant's rights to the use of the patio and passageways and in view of the fact that the only man with whom respondent negotiated for the lease never by any utterance of his own promised respondent the right to use the patio throughout the term of his lease, he must establish his asserted easement on the patio and passage either by a license or by a favorable interpretation of the lease with the aid of parol proof. It is true that although respondent was not granted exclusive possession of the patio against all the world, he has to the present time enjoyed the use of it as a licensee. Kaiser Co. v. Reid, 30 Cal.2d 610, 619, 184 P.2d 879. But merely because of such enjoyment by virtue of an implied license he has gained no permanent right as lessee of the open space. He has used it merely because the lessor in the early years of the village saw no use for it, because such use did not harm the owners and because the latter made no objection, but not because respondent had a "right" thereto. Kennedy v. Burnap, 120 Cal. 488, 493, 52 P. 843, 40 L.R.A. 476. Upon neither a permissive use nor an oral contract alone can a 30-year lease or an easement be acquired. Stoner v. Zucker, 148 Cal. 516, 83 P. 808, 113 Am.St.Rep. 301, 7 Ann.Cas. 704. It is the general rule that one who rests his claim to an easement upon conversation contemporaneous with a written lease, has no rights thereto which are enforceable unless perhaps where the licensee has made investments upon the faith of his license and with knowledge of the owner. No such investment is shown here.

The Law Of Servitude Excludes The Easement.

[8–10] If respondent has no easement on the patio solely by virtue of the written terms or with the aid of parol evidence, whither shall he turn? The law of servitudes does not supply the deficiency. Not only must any provision of a written instrument which is claimed to create such a servitude be strictly construed, but any doubt must be resolved against the easement. The instrument which created the relationship of landlord and tenant is the final and exclusive memorial of their mutual intent. Any understanding not incorporated in it is immaterial in the absence of a reformation of the writing. Werner v. Graham, 181 Cal. 174, 180, 183 P. 945. This rule is supported by every consideration of sound public policy. Any other would make questions of titles to real property largely dependent upon the uncertain recollection or testimony of interested witnesses. McBride v. Freeman, 191 Cal. 152, 155, 215 P. 678. In the instant controversy the lease and all inferences favorable to respondent aided by all the testimony presented in proof of an agreement for an easement and "anything whatever which can be seized upon and given construction as an expression of such intent" fail to establish his claim. [181 Cal. 174, 183 P. 948] The Supreme Court refused to enforce a covenant which rested in parol with the announcement that equity would certainly withhold its hand if such a restriction "is not imposed by grant, but is sought to be created by parol." Long v. Cramer Meat & Packing Co., 155 Cal. 402, 101 P. 297, 298. In Berryman v. Hotel Savoy Co., 160 Cal. 559, 117 P. 677, 679, 37 L.R.A.N.S., 5, the court declared "the intention of the parties should be 'determined by a fair interpretation of the grant or reserve creating the easement' * * * in all these cases it is better to get at the intention of the grantor from the language of the deed, interpreted in the light of the attending circumstances." Therefore, it was not intended by the court in Owsley v. Whelan Drug Co. that the trial court should make a new lease or create new covenants for the old. Its duty under that decision was to determine "everything *necessarily* used with [it] or reasonably necessary to the enjoyment of the part demised." [83 Cal.App.2d 454, 189 P. 2d 52.] That the patio is not necessary to the enjoyment of the lease is demonstrated by the subsequent discussion.

The Lease Authorizes Alterations.

[11] Not only is there no covenant against the lessors' making reasonable repairs and alterations, but the lease specifically authorizes alterations to be made. The clauses of the lease prescribing the rights of the respective parties are in no sense abridged. Therefore, the clause which permits the lessors to make alterations and additions is unaffected by Owsley v. Whelan Drug Co. It reads as follows: "The lessor shall have the right to [sic] all reasonable times to enter into and upon the premises hereby leased for the purpose of inspecting the same and for the purpose of maintaining the building and making repairs, alterations or additions thereto without any rebate of rent to the lessee for any loss of occupancy or a quiet enjoyment of the premises thereby occasioned." In commenting upon the foregoing clause the opinion in Owsley v. Whelan Drug Co., while agreeing that the lessor has a duty as well as a right to enter the premises for the purpose of repairing dilapidations, implies that a reentry cannot be made for the purpose of making extensive alterations. But the purpose of that appeal was to establish the right of the defendant to introduce parol proof of the circumstances attending the execution of the lease. Now, since the evidence does not satisfactorily establish that respondent was granted an easement on the patio, and since appellants are authorized by the lease to make alterations upon the unleased portion of the building, there is neither reason nor authority for denying them the right to do so. In Spring Street Realty Co. v. Trask, 126 Cal.App. 765, 15 P.2d 195, the lease provided that the lessee had the right to make any alterations and improvements, provided it did not alter the general character of the building and it appeared from the lease that both parties contemplated such alterations and that lessee might sublet space in the building. It was held that the lessee was entitled to findings in the language of the lease and to a decree entitling it to make such alterations as provided by the lease and that the combining of such building with lessee's own, adjacent structure by cutting through the wall of the leased premises was not violative of any covenant. If it was right under that lease to award lessee the right to make alterations why should not the appellants in the instant action be allowed to make "alterations or additions" to their building as provided by the lease in effect when they acquired it, especially since the alterations contemplated are to be made upon a portion of the building not under lease to anyone? If they may not do so, of what value is a written reservation in a lease for the owner to enter, repair and alter his building? If they may not, of what virtue is the final, written, exclusive memorial of the agreement whereby respondent was enabled to house and maintain his business? Certainly by awarding such right to appellants there would be no invasion of the estate conveyed to respondent by the lease which is the sole means for measuring his rights. Civil Code, sec. 820.

The Patio Is Not Essential To Respondent's Enjoyment Of His Lease.

Respondent has sublet the greater portion of the floor space of store No. 2 to Ames and Walker who conduct therein a clothing store, respondent having reserved for his own tailoring shop an oblong space about 8′ x 24′ adjacent to the north wall of the patio. From actual tests made by Mr. Ames he discovered that the patio windows are of negligible value for display because they fade merchandise. The witness Tucker, an assistant of Mr. Ames who helps with the general sales and sales promotion work and plans, assembles and installs window displays, investigated the pulling power of windows for sales purposes and for six months he tested both the front windows on Broxton Avenue and those facing the patio. Such tests were made systematically "alternating the displays so as to keep them fresh." In every test he had made to the day he testified the patio windows proved of little or no value. He was of the opinion that they are constantly costing his firm money. The damage to the merchandise caused by the sunlight in those windows "far exceeds the returns." If the patio windows are useless for display they are not essential to the conduct of either a clothing or a tailoring business, and to close them would not even be calculated to render any part of store No. 2 untenantable which is the test of the value of an appurtenance. Clark v. Mountain States Life Insurance Co., 1 Cal.App. 2d 301, 36 P.2d 848. Close them and the Broxton street entrance would continue as the only entrance to the store and to the display windows.

[12] That respondent is not entitled to a continuance of the open patio and passageways merely because it serves as a convenience is determined not only by the language of the Civil Code, section 820, but by appellate decisions. In Harrison v. Zeigler, 51 Cal.App. 429, 196 P. 914, 916, the space leased was within a building and was used as a cafe. It extended back to a hallway which in turn connected with the rear part of the lobby of the hotel. From the hallway also access was had to a lavatory located in the rear of the building. At the time of the lease, a door opened from the east end of the hallway into the cafe. When defendants commenced remodeling they indicated their purpose to remove the lavatory and to close the hallway and door leading to the cafe. Plaintiffs sought to enjoin them. They contended that the hallway and door were appurtenant to the cafe, were covered by the lease, that the lavatory with toilet were essential to their enjoyment of the leased premises and that they had an oral understanding for their use. After observing that the lease made no mention of the door, the hall or the lavatory and toilet, the court held that the door, passageway and toilet facilities did not pass to appellants with the cafe space and said: "Rights and easements may and do pass to lessees by implication; 'but, where the express words of the grant are not sufficient, the implication which supplies those words flows either from a reasonable necessity, or, considering all the circumstances, from the manifest intention of the parties.' * * * 'Since the parties did not adjudge it important enough to contract respecting the use' 'of the doorway, passage, and toilet facilities 'in plain terms, is the necessity so strong as to make the demands of the appellants (lessees) appear reasonable'? It is very clear from the findings of the trial court, which * * * are amply supported by the evidence, that the use of the door, passageway, and toilet facilities in connection with appellants' business was merely a convenience, but is not necessary to the beneficial use of the property. The door, passageway, and toilet facilities are therefore not appurtenant to the restaurant premises, and there is no implied reason which will prevent the respondent from closing the same."

[13] Now respondent is not in the slightest degree in a more favorable position than were the lessees in the Harrison-Ziegler case. Whatever he may testify now as to what he said in 1929 it is beyond dispute that he did not adjudge the proposed patio and the inside windows fronting thereon of sufficient importance to request that his lease stipulate that they should never be closed. Clearly, then, basing a conclusion upon respondent's own

appraisal of the value of the patio and windows it cannot be said that they are necessary to his full enjoyment of his leasehold granted by the lease even though the windows and the patio might serve his convenience. It is true that the court found that the uninterrupted use of both the Kinross and Broxton entrances is "necessary to the full and beneficial use of the portion of the premises leased" and that the use of the windows for display purposes and for light and air are of substantial benefit to respondent. But there is not a word of proof to establish that the Kinross entrance is necessary to the full and beneficial use by respondent of the premises leased to him. He invokes the testimony of the witnesses Mann, Boone, Campbell, Crawford and Nollac as support of the quoted finding. But a careful inspection of the testimony of those witnesses discloses nothing more than that the continued use of the Kinross entrance, the patio and its adjacent windows would be of value to respondent and the latter closes his argument with the observation that appellants did not "offer disinterested expert witnesses in support of his contention that the patio windows and entrance were of no value to respondent." The *value* of the use of such portions of the building was immaterial. The issue was whether they were essential to respondent's tenancy. In order for respondent to establish that the windows, patio and entrances are appurtenances of the leased premises, he must prove that without them his store would be rendered untenantable. Harrison v. Ziegler, supra.

[14, 15] Respondent did not acquire an easement by user. It is the rule that while there is no grant of a right to air and light from any length of continuous enjoyment, yet when the relation of landlord and tenant exists between the parties, the rule is so qualified that if the thing claimed as appurtenance is an incident of the demised premises, that is to say, if it is the thing without which the demised premises would become so untenantable as to result in an eviction, actual or constructive, the thing will pass to the tenant by implication. If it is shown that a deprivation of the claimed appurtenance would not render the premises untenantable it was not included within the lease. Clark v. Mountain States Life Ins. Co., 1 Cal.App.2d 301, 303, 36 P.2d 848. From the Clark case it is clear that a tenant may not successfully assert that an inconvenience he might suffer by having his view shut off, or by being forced to walk 100 feet farther to fetch his wood and water, or to travel an additional hundred yards in order to reach his cowpen, means that he has been deprived of a necessity or that by reason of such inconvenience the demised premises are untenantable. An easement uncertain in extent and duration without a written record of its existence "fettering estates, and laying an embargo upon the hand of improvement, which carries the trowel and the plane, and, as applied to a subsequent purchaser, against the spirit of our recording acts, and not demanded by any consideration of public policy * * * should not be held to exist by mere implication." Kennedy v. Burnap, 120 Cal. 488, 491, 52 P. 843, 844. Also, it is the established law that a proprietor of land may not by user acquire an easement over adjoining land for passage of light and air. Western Granite & Marble Co. v. Knickerbocker, 103 Cal. 111, 113, 37 P. 192. No right of this character can be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed. Kennedy v. Burnap, supra; Civ.Code, sec. 820; see Walter Henry Cook: Legal Analysis in the Law of Prescriptive Easements, 15 S.C.L.R. 44.

The judgment is reversed with instructions to enter judgment that defendant Hamner has no right to use or occupy any portion of the building of plaintiffs other than that described in his lease or to the light or air from any other portion of the building and that plaintiffs may dispose of the patio in such manner as they shall determine and building restrictions allow.

McCOMB and WILSON, JJ., concur.

98 Cal.App.2d 194

QUIRICI v. FREEMAN et al.

No. 14255.

District Court of Appeal, First District, Division 1, California.

June 26, 1950.

Action by Peter Quirici, an individual doing business under the fictitious name and style of Stanford Painting Company, against L. E. Freeman, Sherre G. Freeman, individually and as co-partners doing business under the firm name and style of Stacoat Paint & Varnish Co., a co-partnership, and another for damages sustained as result of purchase from defendants of alleged defective paint primer. The Superior Court, in and for County of San Mateo, A. R. Cotton, J., entered a judgment of dismissal, and plaintiff appealed from an order sustaining a demurrer and from the judgment of dismissal. The District Court of Appeal, Schottky, J. pro tem, held that allegations that defendants wilfully manufactured a so-called primer which they knew would not perform functions of a paint primer and which they knew would damage persons who used it stated a cause of action and allegations that defendants intentionally failed to include any specification of ingredients of so-called primer on label of can in order to conceal its defects and adulteration from plaintiff and others in a similar situation also stated a cause of action.

Judgment reversed with directions.

1. Appeal and error ⚿102

No appeal lies from an order sustaining a demurrer.

2. Pleading ⚿18, 19, 34(1)

As against a general demurrer, a complaint will be liberally construed with a view to substantial justice, and any mere ground of special demurrer for uncertainty will be resolved in support of complaint and demurrer will be overruled when necessary facts are shown to exist, although inaccurately or ambiguously stated, or appearing only by necessary implication. Code Civ.Proc. § 452.

3. Negligence ⚿27

Rule that where there is no contractual relation, recovery from seller can only be had in tort, and then only when compound or substance sold is imminently and inherently dangerous and such danger concealed by seller, applies only where tort liability is sought to be based on negligence.

4. Negligence ⚿27

A manufacturer may be liable to a buyer without privity of contract and without an inherently dangerous article in cases of fraud or in those where there is a violation of a statute designed for the user's protection.

5. Negligence ⚿27

If a so-called paint primer contains ingredients which cause it to fail to fulfil purpose for which a paint primer is purchased, and as a result from its use, paint applied over it begins to peel and flake off within six months, so as to expose to elements wood of buildings to which it has been applied, primer would, be an "article inherently dangerous to property," within rule permitting buyer to recover from manufacturer with whom he was not in privity of contract.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Article Inherently Dangerous To Property".

6. Negligence ⚿111(2)

Where complaint alleged that manufacturers willfully manufactured a so-called primer which they knew would not perform function of a paint primer, and which they knew would damage persons who used it, and that buyer purchased primer from distributor for use as paint primer and that after application of primer, paint peeled and flaked off within a few months when it should have lasted at least five years, complaint stated a cause of action, and it was immaterial whether primer was, in addition to its other alleged deficiencies, manufactured in accordance with requirements of statute. Business and Professions Code, § 20500 et seq.

7. Fraud ⚿41

Where buyer's complaint alleged that manufacturers wilfully manufactured a so-called primer which they knew would not perform function of a paint primer, which buyer purchased from distributor and that manufacturers intentionally failed to include any specifications of ingredients of so-called primer on label of can in order to conceal its defects and adulteration from buyer and that manufacturers knew it would be represented to those in buyer's position that it was a primer and that there was intent on part of manufacturers to deceive and defraud, and that buyer was damaged thereby complaint stated a cause of action. Business and Professions Code, § 20500 et seq.

◆

DiMaria & DiMaria, Palo Alto, attorneys for appellant.

Leon Boro, Matt Goldstein, Fresno, attorneys for respondents.

SCHOTTKY, Justice pro tem.

[1] Plaintiff Peter Quirici, doing business as the Stanford Painting Company, purchased from the Hoffmann-Raissle Paint Co., approximately $800 worth of primer labeled as "Stacoat, 4 in 1, outside undercoater primer, white," manufactured by defendants L. E. Freeman and Sherre G. Freeman, doing business as the Stacoat Paint & Varnish Co., and used such primer on 55 homes and buildings in Palo Alto and vicinity. Within six months the paint applied over this primer began to peel and flake off so as to render the buildings unsightly and to expose to the elements the wood to which it had been applied. Thereafter plaintiff filed an action for damages against L. E. Freeman, Sherre G. Freeman, Stacoat Paint & Varnish Co., Gunther Hoffmann, Arnold Raissle, Hoffmann-Raissle Paint Co. (and various Does). The first amended verified complaint contains six causes of action. The last four counts apply only to the three last mentioned defendants, the retailers, and have gone to trial so are not involved here. The trial court made an order sustaining a general demurrer to the first two causes of action without leave to amend, and a judgment of dismissal was entered as to said manufacturing defendants. Plaintiff has appealed from the order sustaining the demurrer and from said judgment of dismissal. No appeal lies from an order sustaining a demurrer, so the appeal therefrom must be dismissed.

The first cause of action alleges that L. E. Freeman and Sherre G. Freeman were the president and secretary, respectively, of the Stacoat Paint & Varnish Co.; that as "paint chemists they prepared the formula for the composition of the product hereinbelow described as: 'Stacoat, 4 in 1, outside undercoater primer, white,' and for all shipments of said so-called 'primer' which came into possession of the plaintiff; likewise, that at all times hereinmentioned as such chemists they supervised the manufacture of said Stacoat outside undercoater primer and in particular all shipments coming into the possession of the plaintiff; * * * that said formula was totally inadequate, defective and erroneous and caused the manufacture of an adulterated so-called outside undercoater primer, as hereinbelow alleged; * * * [that they] were negligent and careless thereby in relation to the property rights of the plaintiff as a painting contractor as hereinbelow alleged, and said negligence and carelessness was a direct and proximate cause of all the damages hereinbelow alleged to have been suffered by the plaintiff; and moreover, said defendants wilfully and wantonly and maliciously committed said acts knowing full well the inadequacy, deficiencies and errors of said formula and that it would produce an adulterated so-called outside undercoater primer in the terms of the statute hereinbelow referred to and knowing that by so doing they would damage, as alleged in this cause of action, the property rights of the plaintiff and persons in his position of painting contractor purchasing said so-called primer; that said wilfulness and wantonness in relation to said acts of defendants and said acts of defendants themselves alleged in the herein paragraph were a direct and proximate cause of the damages alleged in the herein cause of action to have been suffered by the plaintiff."

Paragraph V of the first count alleges that there are two functions of any primer, (1) to provide adhesion for subsequent coats of paint and (2) to act as a binder or seal for subsequent coats of paint so as not to cause the binder of the coat of paint to seep into the wood and away from the pigment of the paint; and that the Stacoat primer manufactured by the defendants and bought by plaintiff failed to perform either of these functions due to the presence in it of zinc oxide, which no primer should contain, and the total absence of basic carbonate white lead and titanium dioxide, which are necessary in any primer, and that as a result the Stacoat primer was "an imitation of a primer and not an actual primer."

Paragraph VI of the first count alleges that the adulteration of the so-called primer was done wilfully and maliciously by and through carelessness and negligence, and paragraph VII alleges that such adulteration was in violation of chapter 6 of division 8 of the Business and Professions Code, which is incorporated in the complaint, and that plaintiff is one of a class which the statute was intended to protect and the provisions thereof create a civil liability. Further paragraphs of the first cause of action allege the purchase of the primer from the Hoffimann-Raissle Paint Co.; its application to 55 homes and buildings; the peeling and flaking off of paint within a few months when it should have lasted at least five years; the complaints of owners of buildings so painted; the cost of repainting, and the loss of profits and of good will.

The second cause of action alleges the superior knowledge of the defendants as to the chemical components of said primer; the intentional failure of the defendants to include the specifications and ingredients of the primer on the label of the can "in order to conceal from persons in the position of the plaintiff and to conceal from plaintiff in particular the adulteration of said Stacoat primer, its lack of the necessary ingredients hereinabove mentioned and its inclusion of the improper ingredient of zinc oxide"; that the label had the designation "Stacoat, 4 in 1, outside undercoater primer, white"; that the defendants knew that the plaintiff in purchasing the primer and making use of it "was acting under a mistaken belief that said product could perform the purposes of a primer hereinabove alleged"; that plaintiff could not reasonably have discovered the alleged deficiencies prior to the date of discovery of his damage (December 20, 1947); that plaintiff relied upon the defendants, and that the defendants knew that plaintiff would be misled to his injury if they failed to disclose the incapacity of said primer to perform the functions of a primer. It also is alleged that the defendants knew that the Stacoat primer would be represented to those in plaintiff's position that it was a primer and that they would rely upon such representations, when in fact they knew it was no primer at all and could not perform the functions of one, and that there was intent to so deceive and defraud; that it was represented by defendants as a fact and not an opinion to Hoffmann and Raissle that the Stacoat product was a primer capable of performing the functions of a primer and that the latter so represented it to the plaintiff; that such concealments and representations of defendants were made with intent to deceive and defraud plaintiff, and that plaintiff was so deceived and defrauded to his damage which the exercise of ordinary care by him could not have avoided. Total damage was set at $100,000.

A general demurrer was filed by the defendants Freeman to the first two causes of action, it being urged in the points and authorities filed in support of said demurrer that the article manufactured was not imminently or inherently dangerous to life or property, that there was no privity of contract between them and the plaintiff, and therefore there could be no liability on the part of the third party defendant manufacturers.

The trial court evidently was of the opinion that the complaint went no further than to allege negligence on the part of the defendant manufacturers and that the complaint could not be amended so as to state a cause of action against said defendants, and sustained the general demurrer to both the first and second causes of action without leave to amend.

Section 452 of the Code of Civil Procedure provides that "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties."

[2] And in 21 California Jurisprudence, section 30, page 54, it is stated: "So as against a general demurrer a complaint will be liberally construed with a view to substantial justice; any mere ground of special demurrer for uncertainty will be resolved in support of the complaint, and the demurrer will be overruled when the necessary facts are shown to exist, although inaccurately or ambiguously stated, or appearing only by necessary implication."

We have analyzed carefully the allegations of the first and second causes of action and are convinced that each of them states a good cause of action, and that, therefore, the general demurrer should have been overruled. Defendants and respondents cite many authorities in their efforts to sustain the ruling of the trial court, and their arguments are ingenious but not convincing. They cite the general rule as formulated by the case of Winterbottom v. Wright, 152 Eng.Rep. (Reprint) 402 (10 M. & W. 109), and MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696, Ann.Cas.1916C, 440, which hold that there is no liability on the part of a negligent manufacturer to another in the absence of privity, unless the article manufactured and sold is imminently or inherently dangerous to persons using the substance or article as intended. They also cite the case of Cliff v. California Spray Chemical Co., 83 Cal.App. 424, 257 P. 99. There the court in upholding a judgment for the defendant manufacturers stated that a motion for a directed verdict in their favor should have been granted, there being no privity of contract and "there being no testimony that the defendant knew or had any cause to know of any dangers in the handling of the compound, or knew or had reason to know of any negligence connected with the preparation or marketing thereof, or in any manner concealed, or attempted to conceal, anything whatever that might render the use of the spray material injurious * *." 83 Cal.App. at page 429, 257 P. at page 101. The court stated the general rule of the Winterbottom case that where there is no contractual relation "recovery can only be had in tort, and then only when the compound or substance sold is imminently and inherently dangerous and such danger concealed by the seller." 83 Cal.App. at page 430, 257 P. at page 102.

[3, 4] This rule, however, would seem to apply only where tort liability is sought to be based on negligence. The better view would seem to indicate that this is not a limiting rule and a manufacturer may be liable without privity of contract and without an inherently dangerous article in cases of fraud or in those where there is a violation of a statute designed for the user's protection.

In Lewis v. Terry, 111 Cal. 39, 43 P. 398, 31 L.R.A. 220, 52 Am.St.Rep. 146, the court reversed the lower court and directed that the demurrer be overruled where the allegations of the complaint showed that a folding wall bed had been sold to the plaintiff's landlord, which, because of its defects, collapsed on plaintiff's arm. The court said 111 Cal. at pages 44-45, 43 P. at page 399, 31 L.R.A. 220, 52 Am.St.Rep. 146: "But when the seller, as in the case made by the complaint before us, represents the article to be safe for the uses it was designed to serve, when he knows it to be dangerous, because of concealed defects, he commits a wrong independent of his contract, and brings himself within the operation of a principle of the law of torts. 'It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person *or any other who is not himself in fault.*' [Citing cases.] * * *

"The fact insisted upon by respondents that a bed is not ordinarily a dangerous instrumentality is of no moment in this case. If mere nonfeasance or perhaps misfeasance were the extent of the wrong charged against defendants, that consideration would be important * * *; but the fact that such articles are in general not dangerous would seem to enhance the wrong of representing one to be safe for use when known to be really unsafe, for the danger is thus rendered more insidious." (Emphasis added.)

Defendants and respondents seek to distinguish the Lewis case as nonapplicable on the ground that a bed, if negligently manufactured, is imminently dangerous. In the instant case, the complaint alleges the manufacture of the primer by the defendants, that it contained zinc oxide which no primer should contain, and that there was a total absence of certain other required components of a primer. It is alleged that this was done wilfully and maliciously and that it resulted in merely an imitation of a primer, and was not a primer because it did not contain the ingredients of a primer; that the defendants nevertheless labeled it a primer and represented it as such to the retailer from whom plaintiff bought, knowing that such information would be passed on to plaintiff who would use the product under the mistaken belief that it could perform the purposes of a primer and that plaintiff and others in his position could not discover their error until already damaged.

In Kolberg v. Sherwin-Williams Co., 93 Cal.App. 609, 269 P. 975, the court affirmed a recovery by the plaintiff where his orchard had been damaged by use of a spray containing ingredients which were inherently dangerous to orchards, and the defendant manufacturer knew of such inherently dangerous elements. There evidently were direct representations made by the defendant's agents that the compound would not injure orange trees such as in the plaintiff's orchard, but the court stated, "The liability of the defendant rests upon the sound rule that a manufacturer or seller of an article inherently dangerous to life or property is liable for injuries to the ultimate consumer who has purchased through a middleman. 17 A.L.R. 674, 683." 93 Cal.App. at page 613, 269 P. at page 977.

[5] Defendants and respondents contend that the injuries resulting to plaintiff here do not come within the property damage rule of the Kolberg case because the primer did not actually damage the property of plaintiff but merely failed to protect the exterior surfaces of the buildings to which it was applied. Plaintiff and appellant contends that the defendants' product was dangerous to the continued good condition of the buildings to which it was applied and that there was no distinction between the damage here and that in the Kolberg case, both being in terms of dollars and cents and not human suffering and feeling. If a so-called primer contains ingredients which cause it to fail to fulfill the purposes for which a paint primer is purchased, and as a result from its use the paint applied over it begins to peel and flake off within six months, so as to expose to the elements the wood of the buildings to which it has been applied, it would, in our opinion, be an article inherently dangerous to property. Neither law nor equity will draw such a fine-spun distinction as respondents seek to draw.

In plaintiff's first cause of action it is also alleged, as hereinbefore set forth, that the adulteration of said primer was in violation of the Business and Professions Code, and that plaintiff is one of a class which this statute was intended to protect. Plaintiff contends that the violation of a statute as alleged in the first count creates an exception to the rule of Winterbottom v. Wright, supra. Plaintiff refers to 17 A.L.R. 705, "g. Liability under statute," which reads in part as follows: "A number of cases involving the sale of dangerous articles or substances present the further element of a sale in violation of statute. This alone would seem to be sufficient to render the manufacturer or seller liable to strangers, regardless of the fact that the article was also intrinsically dangerous, and, as a matter of fact, the cases appear to base their decisions upon the violation of statute, rather than upon the character of the article sold."

[6] We are convinced that the first count states a good cause of action independent of any alleged violation of a statute. If, as is alleged, defendants "wilfully

and wantonly and maliciously" prepared and manufactured a so-called primer which they knew would not perform the function of a paint primer, and which they knew would damage the persons who used it, and if, as alleged in said first count, said primer so manufactured and sold by defendants was inadequate and was "an imitation of a primer and not an actual primer," then it would be quite immaterial whether or not said primer was, in addition to its other alleged deficiencies, manufactured in accordance with the requirements of the statute.

The second cause of action incorporates most of the allegations of the first cause of action and then alleges further that defendants intentionally failed to include any specifications of the ingredients of the so-called primer on the label of the can, in order to conceal its defects and adulteration from plaintiff and others in a similar position; that defendants knew it would be represented to those in plaintiff's position that it was a primer, and that there was intent on the part of defendants to deceive and defraud.

[7] We are convinced that the second count also states a cause of action which is good as against a general demurrer. Indeed, it is difficult to understand how a general demurrer to either cause of action could have been sustained except upon the mistaken belief that the only issue was whether or not the primer was inherently dangerous to property. The other allegations of the complaint as to fraud and deceit and knowingly manufacturing and selling an article which the manufacturer knew to be defective and injurious appear to have been completely overlooked.

No other points require discussion. The general demurrer of defendants and respondents to the first and second causes of action should have been overruled.

In view of the foregoing, the judgment is reversed with directions to the trial court to overrule the demurrer.

PETERS, P. J., and BRAY, J., concur.

---

98 Cal.App.2d 214

WILLIAMS v. MOON.

Civ. 13914.

District Court of Appeal, First District,
Division 1, California.
June 27, 1950.

Action by Naomi Williams, for and in behalf of her minor child, Benjamin James, against Benjamin James Moon to have defendant declared to be the father of the child and for other relief. The Superior Court of Alameda County, A. T. Shine, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Peters, P. J., held that where husband had access to plaintiff, his wife, during crucial period though spouses were separated, child born just a little less than six months after plaintiff obtained interlocutory divorce decree must be conclusively presumed to be legitimate notwithstanding plaintiff during crucial period had intercourse with defendant.

Reversed.

1. Bastards ⚷3

If a child is born nine months after marriage, or was conceived before dissolution of marriage and husband had opportunity of access to his wife during their marriage, and husband is not impotent, the presumption of legitimacy is conclusive, subject only to certain exceptions. Code Civ.Proc. §§ 1962, subd. 5, 1963, subds. 28, 31; Civ.Code, §§ 193, 195.

2. Evidence ⚷86

Where law makes certain fact a conclusive presumption, evidence cannot be received to the contrary.

3. Bastards ⚷5

Illegitimacy may be proved but it cannot be proved by evidence of a husband or wife that while living together they did not have sexual intercourse.

4. Bastards ⚷5

The fact that it was not possible by the laws of nature for husband to be father of child, where that fact is in issue, is to be inquired into in the same manner as any other fact which is subject to judicial inquiry, and any competent evidence relevant to question is admissible as in other cases except that neither husband nor wife is competent to testify to lack of intercourse.

5. Bastards ⚿3

To prevent conclusive presumption of legitimacy from arising where child is conceived during marriage, evidence must be clear and convincing that there in fact was no access by husband to wife, not simply that parties were separated. Code Civ.Proc. §§ 1962, subd. 5, 1963, subds. 28, 31; Civ.Code, §§ 193, 195.

6. Bastards ⚿3

Where husband had access to wife during crucial period although parties were separated, child born just a little less than six months after interlocutory divorce decree was entered for wife, must be conclusively presumed to be legitimate, notwithstanding wife had during crucial period intercourse with third person. Code Civ. Proc. §§ 1962, subd. 5, 1963, subds. 28, 31; Civ.Code, §§ 193, 195.

7. Bastards ⚿75

In bastardy proceeding where it was admitted that there was a valid marriage in existence at time of conception, judgment simply containing the findings that defendant was father of child in question but containing no findings at all on pivotal issue of husband's opportunity of access to wife, would not be allowed to stand. Code Civ.Proc. §§ 1962, subd. 5, 1963, subds. 28, 31; Civ.Code, §§ 193, 195.

◆

Elmer E. Nichols, Oakland, for appellant.

Raymond A. Ferrario, Oakland, for respondent.

PETERS, Presiding Justice.

The trial court, in an action brought by plaintiff to have defendant declared to be the father of one of her children, determined that defendant was the father of the child, and ordered him to make monthly payments for the support of the child, to pay the hospital and doctor's bills incurred by plaintiff during the birth of the child, and to pay plaintiff's counsel fees. Defendant appeals.

There has been but one brief filed on this appeal—the appellant's opening brief. Respondent has informed the clerk of this court that she is unable to pay for the preparation of a brief on appeal, and submits her case upon the record.

Respondent was married to Frank L. Williams in 1935, and by him admittedly had four children. On June 1, 1945, she filed an action for divorce, and on October 23, 1945, she obtained her interlocutory decree of divorce. At the time of trial—October, 1947—the final had not yet been entered. The child that is the subject of this action—Benjamin James Williams—was born on April 14, 1946, just a little less than six months after the interlocutory. With a normal period of gestation, the child was conceived in July of 1945.

Respondent testified that she met appellant in March, 1945, and that from May, 1945, until March of 1946, she frequently engaged in sexual intercourse with him, and that during such period she had intercourse with no other man. Appellant admitted that, although he and respondent at no time had lived together, he had had intercourse with respondent during the period when conception would normally have occurred. There is evidence, denied by appellant, that he admitted paternity of the child.

Just when respondent and her husband separated, and whether after such separation the husband and respondent had access to each other, are the pivotal questions in the case. Respondent testified that when she met appellant, which she testified was in March, 1945, she was "separated" from her husband. In the questionnaire filed with her divorce complaint she averred that she separated from him on May 29, 1945. This affidavit is dated June 29, 1945, and was filed in the action on July 6, 1945. It is there averred that on June 29, 1945, the "children, myself and husband—he won't leave" lived in the same house with respondent. Appellant testified, and this testimony stands uncontradicted, that he was introduced to respondent's husband by respondent in the latter's home sometime late in July, 1945. Respondent testified that the last time she had seen her husband was in November, 1945. The brother of the husband testified that the husband had lived with him since about January, 1944.

When the child was born in April of 1946, respondent told the hospital authorities that her husband was the father of the child, and she registered the child with the hospital in that fashion, and directed that the birth certificate so declare. She testified that she did this at the suggestion of appellant, but that she also gave the child the first two names of "Benjamin James" (which are the first two names of appellant) at his request.

On this evidence the trial court found that appellant was the father of the child. That finding is undoubtedly supported if, on any theory, the above evidence was admissible. The trial court made no findings at all in reference to the marriage of respondent and the date of separation, and, in particular, made no finding as to whether or not the husband of respondent had access to respondent during the crucial period here involved.

The judgment cannot stand. Section 1962, subd. 5, of the Code of Civil Procedure provides: "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." That is a conclusive presumption. Subdivision 31 of section 1963 of the Code of Civil Procedure lists as a disputable presumption: "That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate." Subdivision 28 of the same section lists another disputable presumption as follows: "That things have happened according to the ordinary course of nature and the ordinary habits of life." Section 193 of the Civil Code provides that "All children born in wedlock are presumed to be legitimate." Section 194 makes that presumption continue for ten months after the "dissolution of the marriage." Section 195 provides that the only persons who can dispute the presumption of legitimacy are "the husband or wife, or the descendant of one or both of them." See Gonzales v. Pacific Greyhound Lines, —— Cal.2d ——, 209 P.2d 598; Id., 34 Cal.2d 749, 214 P.2d 809.

[1-3] Obviously, there is some confusion in these sections. Under some of them the presumption of legitimacy is conclusive, while under the others the presumption is rebuttable by certain designated persons. But, despite this confusion, one thing is quite clear. If a child is born nine months after marriage, or was conceived before its dissolution (here the child was born six months after the interlocutory), and the husband had the opportunity of access to his wife during their marriage, and the husband is not impotent, the presumption of legitimacy is conclusive, subject only to certain exceptions not here involved. This was firmly established in 1902 by the In re Estate of Mills, 137 Cal. 298, 70 P. 91, 92 Am.St.Rep. 175. In that case evidence was admitted that supported the finding that, although the husband and wife were living in the same house for several years before and after the child was born, Mills, and not the husband, was in fact the father. The judgment was reversed. The court pointed out, 137 Cal. page 303, 70 P. page 93, that: "Where the law makes a certain fact a 'conclusive presumption,' evidence cannot be received to the contrary. * * * Illegitimacy may be proved, but it cannot be proved by the evidence of a husband or wife that, while living together, they did not have sexual intercourse." The court concluded its opinion as follows, 137 Cal. page 304, 70 P. page 93: "The modern rule was stated by Lord Langsdale in Hargrave v. Hargrave, 9 Beav. 552, as follows: 'A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so as to

have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse.' And the same rule is supported by the authorities in this country. [Citing authorities.] But the above rule does not allow either of the parents to testify to the fact of nonaccess during cohabitation. Nor is the rule inconsistent with the conclusive presumption that a child begotten and born while the husband and wife are living together as such, and the husband not impotent, is legitimate."

The Estate of Mills has been reaffirmed in many later cases discussing the problem. In Re Estate of Walker, 180 Cal. 478, 181 P. 792, twin sons were born nine months and eight days after the parties received an interlocutory decree of divorce. It was held that the presumption of legitimacy, under such facts, was conclusive, subject only to very limited exceptions not here involved. At page 484 of 180 Cal., at page 794 of 181 P., it is stated: "There is no doubt but that the presumption of legitimacy goes at least to this extent: That if it appear that by the laws of nature it is possible that the husband is the father (that is, if it appears that the husband had intercourse with the mother during the period of possible conception), legitimacy is conclusively presumed, and no guessing or weighing of probabilities as to paternity because of relations between the mother and other men will be permitted. The only exception to this, if it really be an exception, is where it is clear that, although the husband had intercourse with the wife, yet by the laws of nature it is impossible for him to have been the father, as, for instance, where husband and wife are white and the child a mulatto." The court reiterated this rule throughout its opinion. At page 491, of 180 Cal., page 797 of 181 P., after reviewing many English and American authorities, it restated the rule as follows:

"* * * the true rule in America, as well as England, is, we believe, that if it is possible by the laws of nature for the husband to be the father (that is, if there was coition and no impotency), no inquiry will be permitted into the probabilities of the case one way or the other, but the presumption of legitimacy is conclusive; and, on the other hand, it is always permitted to show that it was not possible by the laws of nature for the husband to be the father, as by showing impotency on his part, want of intercourse during the possible period of conception, or that the child is of a race or color such that it could not have been conceived by the husband.

[4] "The fact that it was not possible by the laws of nature for the husband to be the father, where that fact is in issue, is to be inquired into in the same manner as any other fact which is the subject of judicial inquiry, and any competent evidence relevant to the question is admissible as in other cases; it being the rule, however, in California, as in many jurisdictions, that neither the husband nor the wife is competent to testify to lack of intercourse."

It is thoroughly settled by these and other cases that if there was access to the wife by the husband during the period that conception normally would occur, the presumption, except in certain cases not here relevant, is conclusive. People v. Kelly, 77 Cal.App.2d 23, 26, 174 P.2d 342; Dazey v. Dazey, 50 Cal.App.2d 15, 17, 122 P.2d 308; People v. Hamilton, 88 Cal.App.2d 398, 400, 198 P.2d 907.

[5, 6] Thus, the key question is whether the husband did or did not have access to his wife during the period that the child must have been conceived. If he had the opportunity for such access, the presumption of legitimacy is conclusive, inasmuch as the child was admittedly conceived while respondent was married. On this pivotal question all the evidence is to the effect that during June and July of 1945 the husband had access to respondent. Under oath respondent averred that she had

"separated" from her husband on May 29, 1945, but that as late as June 29, 1945, she was living in the same house with him. Appellant testified that he met the husband in respondent's home in late July of 1945. As opposed to this testimony respondent did testify that she had "separated" from her husband as early as March of 1945, and had not had intercourse with him since the "separation." But "separation" is not the test. To prevent the strong conclusive presumption from arising where the child is conceived during marriage, the evidence must be clear and convincing that there in fact was no access, not simply that the parties were separated. If there is the reasonable possibility of access, the conclusive presumption arises and testimony as to nonintercourse is totally incompetent. The testimony of the husband's brother that the husband had lived with him in the same city as respondent does not prove nonaccess. Thus, it would appear that the record demonstrates that the husband had access to respondent during the crucial period, and that, therefore, the child must be conclusively presumed to be legitimate.

[7] Even if this were not so, the cause would have to be reversed for another reason. The trial court simply found that appellant was the father of the child in question. It made no finding at all on the pivotal issue of the husband's opportunity of access. Without such a finding, in view of the admitted fact that there was a valid marriage in existence at the time of conception, the judgment cannot stand. In such a case, before a stranger to the marriage can be held to be the father of such a child, the court must find, or the evidence must indisputably show, lack of access by the husband. If the evidence is conflicting on this issue, it becomes the basic issue in the case. To fail to find on it in such a case is the failure to find on a material issue which compels a reversal.

The judgment appealed from is reversed.

BRAY, J., and SCHOTTKY, Justice pro tem., concur.

CITY OF SAN DIEGO v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.*

Civ. 4209.

District Court of Appeal, Fourth District, California.

June 23, 1950.

Rehearing Denied July 10, 1950.

Hearing Granted Aug. 17, 1950.*

The City of San Diego brought a proceeding for a writ of prohibition to restrain the Superior Court in and for the County of San Diego, Robert B. Burch, J., from proceeding with the trial of a condemnation action by petitioner pursuant to an order vacating so much of an order setting aside a default judgment as ordered that the market value and damages for taking of defendants' lands be fixed as of the date on which summons was issued. The District Court of Appeal, Barnard, P. J., held that respondent court's threatened action in proceeding with the trial exceeded the court's jurisdiction and could be restrained by a writ of prohibition.

Writ granted.

1. Judgment ⚷380
Prohibition ⚷5(3)

An order, made as part of order vacating default judgment entered within preceding year in city's condemnation action, that market value and damages for taking of defendants' lands be fixed as of date of issuance of summons, was not merely procedural or incidental ruling on admissibility of evidence, but definite determination of a main issue as basis for valuation of property, and hence not subject to vacation as legally erroneous after being accepted and acted on by parties without objection for nearly three years, so that city was entitled to writ of prohibition restraining Superior Court from proceeding with trial of action pursuant to order vacating such portion of order vacating judgment. Code Civ.Proc. §§ 473, 1249, 1908.

2. Judgment ⚷176

An order, made as part of order vacating default judgment in condemnation action, that market value and damages for taking of defendants' lands be fixed as of date of issuance of summons, may not be set aside and different basis for trial of such issue established, except in manner permitted by statute. Code Civ.Proc. §§ 473, 1249, 1908.

---

* Subsequent opinion 224 P.2d 685.

3. Judgment ⚷176

A Superior Court order, vacating default judgment in city's condemnation action, was appealable, so as to preclude vacation on defendants' motion of included order that market value and damages for taking of defendants' lands be fixed as of date of issuance of summons. Code Civ. Proc. §§ 473, 1249, 1908.

4. Prohibition ⚷10(2)

A city's application for writ of prohibition restraining Superior Court from proceeding with trial of city's condemnation action pursuant to order vacating order, made as part of court's order setting aside default judgment, that market value and damages for taking of defendants' lands be fixed as of date of issuance of summons, was proper as seeking to restrain court from proceeding, in excess of its jurisdiction, to retry an issue finally settled by original order, not merely to review a completed act. Code Civ.Proc. §§ 473, 1249, 1908.

◆

J. F. DuPaul, City Attorney, Thomas J. Fanning, and Douglas D. Deaper, Deputies, all of San Diego, for petitioner.

Warren E. Libby and Harry A. Chamberlin, Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an application for a writ of prohibition to restrain the respondent court from proceeding with the trial of a condemnation action pursuant to an order striking and vacating a portion of a prior order. The matter is presented on demurrer by two of the defendants in that action, as real parties in interest, who will be referred to as the respondents.

On December 14, 1945, the petitioner brought this action to condemn a large number of parcels, including lands owned by the respondents, needed in the development of Mission Bay Park in the Mission Bay area. Summons was issued the same day. The respondents were served on July 31, 1946, their default was entered December 12, and a default judgment was entered against them on December 13, 1946. This judgment, after reciting that it was based upon evidence produced, adjudged that the value of the property in question was $18,000 on December 14, 1945, and ordered this paid to the respondents or deposited in court for them. It was so deposited in court by the petitioner.

On May 9, 1947, the respondents filed notice of a motion to set aside their default and this judgment, and to permit them to file an answer, on the ground that they were entered prematurely, without authority of law, and "through the mistake, inadvertence, surprise, and excusable neglect of defendants." On May 26, 1947, after a full hearing, the court entered an order granting the motion, ordering the default and judgment set aside and vacated, ordering that the answer theretofore submitted be thereby filed, and then providing "It is further ordered that the market value and damages (of this land), upon the trial of said action, shall be determined and fixed as of December 14, 1945."

On March 6, 1950, the respondents filed notice of a motion for an order amending this order, by striking therefrom "that portion thereof ordering that damages shall be determined and fixed as of December 14, 1945", upon the ground that this part "was and is erroneous, contrary to law, and beyond the power of the court." On March 13, 1950, this motion was denied by the judge who made the original order "without prejudice to its renewal at the time of trial." This motion was renewed on March 28, 1950, at the commencement of the trial, before another judge who entered an order striking and setting aside that portion of the relief order.

The petition further alleges that the respondent court threatens to, intends to and, unless restrained, will continue to act in excess of its jurisdiction by trying and deciding the issue of damages, as to the respondents, upon the theory that compensation and damages are deemed to have accrued at the date of the trial; that the trial court has continued the trial for the purpose of having the question here raised finally determined; and that the petitioner has no plain, speedy or adequate remedy in the ordinary course of law. It is further alleged that any remedy by appeal from any judgment rendered would be neither adequate nor speedy, since a delay involving two more trials will hinder development of this large project; that if the condemnation suit is not speedily concluded the federal government will be forced to condemn a portion of the property; that in such event, pursuant to obligations assumed in connection with the entire project, the petitioner will have to pay the damages awarded without having any control over the action; that the property is immediately required for the prosecution of work now in progress; that such immediate possession can only be obtained by depositing in court the amount of any judgment entered; and that if such monies are thus deposited its right of appeal will be lost.

The affidavits considered by the court in making the relief order of May 26, 1947, were made a part of the record here. It appears therefrom that the evidence was conflicting as to matters relied on to excuse respondents' delay and default; that the parties had, orally and by letters, agreed to stipulate that the order might be made if it contained a provision that the damages should be determined as of December 14, 1945; and that the petitioner consented to the granting of such relief provided it was based on a finding that if and when the case went to trial the damages should be determined as of the date summons was issued.

The writ is here sought on the ground that the court threatens to and will, in excess of its jurisdiction, proceed to try the action on a theory of damages and values other than the one already established. The respondents argue that the portion later stricken was not a part of the order setting aside the judgment; that it was a purely procedural and preliminary ruling on evidence, and established no right; that they could not have appealed from the original order; and that prohibition is not available since the court has jurisdiction to try all issues in the case.

[1] This raises a question as to the nature of the order fixing the date at which damages shall be assessed, and the power of the court to later change such an order. As distinguished from the constitutional "right" to compensation, the provisions of section 1249 of the Code of Civil Procedure are a part of the established procedure for determining the value. City of Los Angeles v. Oliver, 102 Cal.App. 299, 283 P. 298. It does not follow that a court order fixing such date, pursuant to that statute, is merely procedural. Under section 1249 the issuance of summons is made the controlling date in all cases, except where a trial is delayed over a year and this delay is not caused by the defendant. The purpose of section 1249 is that this controlling date shall be fixed in advance so that the measure of compensation to be applied at the trial shall be known. City of Los Angeles v. Morris, 74 Cal.App. 473, 241 P. 409. The order fixing this date was here made after the issue of damages had been once tried within a year, and in response to a request for relief which would inevitably delay the trial beyond the year. The question being directly presented, the court by its order judicially determined that the exception provided for in section 1249, whereby a different date may sometimes be used, was not applicable in this case. Such an order is more than a mere procedural matter or an incidental ruling as to the admissibility of evidence. It is a definite determination of one of the main issues in such a case, which establishes the basis on which the value of the property is to be determined. It is intended to, and does, settle that issue, and creates a substantial right for the purposes of the action.

A further consideration is that this order was made as a part of, and as one of the terms of, an order relieving these respondents from a judgment entered within one year. A "trial" or hearing had been had within a year, within the meaning of the statute, and a value had been fixed on that basis. The order preserved an existing right, and granted relief on the condition that the respondents' delay, although thus excused, should not have the effect of changing the status quo in that respect or give them a benefit based upon their own delay. Relief was thus granted on "such terms as may be just," as permitted by section 473 of the Code of Civil Procedure, and in accordance with an agreement between the parties. It was accepted and acted upon, and no objection was voiced for nearly three years. A part only of the relief order was then attacked on the sole ground that it was legally erroneous. This was clearly an attempt to correct a claimed judicial error in determining that the exception provided for in section 1249 was not applicable under the facts shown. The rules permitting a judge to correct incidental but erroneous rulings on matters of law are not applicable, and may not be thus used to enable a party to escape the burden of such a relief order while keeping its benefits. To permit a court to vacate such an order after it has been accepted and acted upon over a long period, would not only be unjust, in such a case as this, but would lead to interminable uncertainty and confusion. Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222, 22 P. 594, 15 Am. St.Rep. 50.

[2, 3] Such an order, once made, may not be set aside and a different basis for trial established, except in the manner permitted by some statutory provision. Section 1908 of the Code of Civil Procedure provides that a final "order is, in respect to the matter directly adjudged, conclusive between the parties * * *". The order granting relief, of which the portion later stricken was an integral part, was entered after judgment and was appealable. Armstrong v. Armstrong, 81 Cal.App.2d 316, 183 P.2d 901. In United Railroads of San Francisco v. Superior Court, 170 Cal. 755, 151 P. 129, 132, Ann.Cas.1916E, 199, where it was held that the court had no power to set aside a previous order granting a temporary injunction for the pendency of the action, the court said: "The decisions of this court are numerous and uniform to the effect that a judgment or order once regularly entered can be reviewed and set aside only in the [manner] prescribed by statute." In Vale v. Maryland Casualty Co., 101 Cal.App. 599, 281 P. 1058, it was held that the court, having denied a motion for relief and to vacate certain default judgments, was without power to again consider the matter and vacate the judgments. In Harth v. Ten Eyck, 16 Cal.2d 829, 108 P.2d 675, a reconsideration was permitted of an order denying a motion to set aside a previous order dismissing a defendant, but only because the original order had not become final and the matter was timely presented under section 473. In St. Laurent v. St. Laurent, 35 Cal.App.2d 345, 95 P.2d 475, it was held that the court had no power to set aside an order fixing attorneys' fees, where the time for appeal had elapsed, and where no proper showing was made under section 473. In Phillips v. Trusheim, 25 Cal.2d 913, 156 P.2d 25, an order vacating a judgment on the ground that it was entered more than three years after service of summons, was reversed. It was held that while the judgment had been erroneously entered this judicial error could not be thus corrected, and that any relief under section 473 was unavailable since more than three years had elapsed. In Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988, 990, an order had been entered denying a motion for a new trial. Later, an order was entered reciting that in making the prior order the court had misinterpreted a waiver, setting aside the prior order, and granting a new trial in part. The court held that this was an attempt to correct a judicial error saying: "While a court has power to correct mistakes in its records and proceedings, and to set aside judgments and orders inadvertently made, which are not actually the result of the exercise of judgment, it has no power, having once made its decision after regular submission, to set aside or amend for judicial error."

There is no merit in respondents' contentions that they could not have appealed from the original order, having received the relief requested, and that the long delay before the trial entitled them to the increased value since 1945, and justified the court's action in changing the order for this purpose. The order fixing the date was part of an appealable order, from which they could have appealed had they been dissatisfied. They were free to have the case set for trial at any time. The order was unconditional in this respect, and was not subject to change for this purpose. It was, in fact, designed to eliminate that very element in any future fixing of values.

[4] The respondents further contend that prohibition will not lie to correct a completed order; that it may not be assumed that the court will erroneously rule on this issue at the trial; that it may not be inferred that the court will proceed in accordance with the void amending order; and that, in any event, the petitioner has a "plain, speedy and adequate remedy" at law.

The effect of the original order was to grant a new trial in a certain manner, with the express limitation that one of the main issues was settled and was not to be further litigated. The effect of the second order is to so amend the first order as to remove this limitation and to grant a new trial on all issues, thus reopening an issue which had been finally settled and permitting a trial on a different theory. The petition alleges, and the demurrer admits for present purposes, that the court threatens and intends to thus proceed in accordance with this void order. That the court so intends, if not restrained, rather clearly appears from the fact that it postponed the trial for the express purpose of having its right to do so tested. The writ is here sought to restrain it from taking this further step, in excess of its jurisdiction, and not merely to review a completed act.

In Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988, such a writ was granted to prevent the court from proceeding with a new trial pursuant to a void order setting aside a previous order. While somewhat different orders are here involved their effect is very similar and the same principles should be applied. A limited new trial having been granted by the relief order, the court has no jurisdiction to proceed in a different manner in pursuance of a void order removing that limitation, and to retry the settled issue. The threatened action of the court in thus proceeding with the trial, upon a different theory and as to all issues, is an act in excess of its jurisdiction which may be restrained. Mooney v. Superior Court, 183 Cal. 705, 192 P.2d 542. Moreover, in view of the substantial showing to the contrary, it cannot reasonably be said that a plain, speedy and adequate remedy at law here appears. Under the circumstances, a prolonged procedure involving two trials and leading ultimately to an inadequate remedy should not be required.

It is ordered that the writ of prohibition issue as prayed for.

GRIFFIN and MUSSELL, JJ., concur.

98 Cal.App.2d 285

In re WALLACE'S ESTATE.

WALLACE et al. v. WALLACE.

Civ. 14243.

District Court of Appeal, First District,
Division 2, California.
July 6, 1950.

Rehearing Denied Aug. 5, 1950.
Hearing Denied Aug. 31, 1950.

Proceeding in the matter of the estate of Jessie D. Wallace, deceased, by Russell J. Wallace and another against T. Hunter Wallace, as trustee under decedent's will. The Superior Court in and for the County of Alameda, James R. Agee, J., entered an order as to distribution of trust income and Russell J. Wallace and another appealed. The District Court of Appeal, Dooling, J., held that clear and unambiguous provision in previous decree of distribution which had become final was conclusive as to persons entitled to share in division of portion of trust income under specified contingency, but that trial court erroneously construed decree as to portion of trust income subject to such division.

Order reversed.

1. Executors and administrators ⚷315(6)

A plain and unambiguous provision in decree of distribution, once the decree has become final, cannot, under the doctrine of res judicata, be impeached or contradicted by a reference to the will, even if incorporated in the decree by way of recital.

2. Executors and administrators ⚷315(5)

If decree of distribution is ambiguous, the will may be used to resolve the ambiguity.

3. Executors and administrators ⚷315(6)

Clear and unambiguous provision in final decree of distribution that, if division among testatrix's nephews and niece of the share of trust income of a brother or sister who died without issue should result in any niece or nephew receiving more than a surviving brother or sister, such income should be paid to survivors of such brothers, sisters, nephews and niece share and share alike was conclusive, though will clearly limited payment of such income to surviving brothers and sisters and the niece or nephew who would otherwise receive more than a surviving brother or sister.

4. Executors and administrators ⚷315(5)

Final decree of distribution providing that if division among testatrix's nephews and niece of the share of trust income of a brother or sister who died without issue should result in any nephew or niece receiving more than a surviving brother or sister, "such income" should be paid to survivors of such brothers, sisters, nephews and niece share and share alike used quoted phrase as referring only to income to the niece or nephew which would result in his receiving more than brothers and sisters and not to the entire share of a deceased brother or sister.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Such Income".

5. Executors and administrators ⚷315(5)

If the phrase "such income," as used in final decree providing for distribution of income of testamentary trust, was ambiguous, resort to will creating trust was proper to resolve such ambiguity.

6. Wills ⚷684(9)

Under will providing that if division among testatrix's nephews and niece of share of trust income of deceased brother or sister who died without issue should result in any nephew or niece receiving more than a surviving brother or sister, the income should be equally divided among such niece or nephew and surviving brothers and sisters, only income to the nephew or niece which would result in his receiving more than a brother or sister was to be thus divided.

7. Executors and administrators ⚷314(12)

Where no extrinsic evidence was introduced, appellate court was not bound by construction placed upon final decree of distribution by trial court.

◆

Gordon L. Byers, Franklin A. Dill, Berkeley, for appellants.

Clark & Morton, Berkeley, for respondent.

DOOLING, Justice.

Jessie D. Wallace died testate on February 28, 1920, and a final decree of distribution was entered in her estate on August 22, 1921.

The testatrix left surviving her five brothers and sisters, to wit: Agnes I. Leggett, an appellant herein, T. Hunter Wallace, William Wallace, Jr., James H. Wallace, and Mary B. Wallace. Also surviving the testatrix were three nephews and one niece, to wit: Russell J. Wallace, appellant, son of James H. Wallace; and Martha T. Tenney, Donald H. Wallace and Robert Bruce Wallace, the children of T. Hunter Wallace.

By her will testatrix created a trust for the payment of income in the first instance to her surviving brothers and sisters. The will, and the decree of distribution, provide that in case of the death of a surviving brother or sister leaving issue, the part of said income so provided for the parent shall be paid to his issue. The brother James H. Wallace died in 1925, making this provision operative as to his son, the appellant Russell J. Wallace.

Mary B. Wallace died in 1937 and William Wallace, Jr. died in 1944, both without issue. It is the death of this brother and sister without issue which raises the questions of interpretation presented on this appeal.

The will provided for the contingencies which might arise upon the death of a brother or sister of testatrix without issue in the following language: "and, in case of the death of a sister or brother without issue, his or her share to be given to my niece and nephews in equal shares, unless the income from my estate has been reduced to such an extent that each brother and sister remaining would receive less than five hundred dollars a year, in which case such share of the income is to be divided among the surviving brothers and sisters equally, but, in case such division results in a niece or nephew receiving more than a surviving brother or sister, the income is to be equally divided among *such niece or nephew* and the surviving brothers and sisters." (Emphasis added.)

The decree of distribution provides for the same contingencies as follows:

"provided, further, that in case of the death of any one of said brothers and sisters without issue surviving, such deceased person's share shall be paid annually to the niece and nephews of decedent, share and share alike (naming them) unless by such payments, the said annual income has been reduced to such an extent that each of said five brothers and sisters shall receive less than Five Hundred ($500.00) Dollars per year, in which event the share of such deceased brother or sister shall be divided annually among the surviving brothers and sisters of decedent, share and share alike; provided, finally, that, in case such division of income results in any one of decedent's said nephews and niece receiving more than a surviving brother or sister, then such income shall be paid annually to the survivors of the said brothers, sisters, *nephews and niece* of decedent, share and share alike." (Emphasis added)

In the italicized words of the decree it has clearly departed from and misconstrued the italicized words of the will. The will provides that if any nephew or niece by the receipt of a portion of the share of a brother or sister dying without issue would receive more income than a surviving brother or sister, the income is to be divided between that nephew or niece (excluding the other nephews and niece) and the surviving brothers and sisters, while the decree includes the other nephews and niece among the persons who are to share in the division.

Unfortunately the contingency so provided for has arisen. There are, in addition to appellant Russell J. Wallace, two nephews and a niece now living, all the children of the brother, T. Hunter Wallace, also still living. Under the order of the court here appealed from, they are given an additional share of the income of the estate, by reason of the fact that appellant Russell J. Wallace if he received the share of his deceased father, plus one-fourth of the shares of his deceased aunt and uncle would receive more than the income of the testatrix' surviving brother and sister.

In this respect the order appealed from provides that whenever the share of a nephew or niece is in excess of the amount of the annual income payable to a surviving brother or sister "then the *entire amount of such annual income* is distributable by the trustee in equal shares to those of the following persons who are still living, said persons being T. Hunter Wallace, Agnes Leggett, brother and sister of said decedent, and Russell Wallace, *Donald Wallace, Robert Wallace,* three nephews of decedent, and *Martha Tenney,* niece of decedent. * * *" (Emphasis added.)

We have italicized certain words of the order to point up the two questions raised on this appeal: 1. What income is to be divided in case of the contingency therein provided for? And 2. Are the other nephews and niece entitled to share in such division?

We first address ourselves to the question last stated. The will clearly excludes the other nephews and niece from a share in such division, and the decree as clearly and unambiguously includes them. Can we, under such circumstances, look to the will to contradict or impeach the decree in this respect?

[1] It is settled by a long line of authorities that under the doctrine of *res judicata* a will cannot be looked to for the purpose of impeaching or contradicting a plain and unambiguous provision in a decree of distribution, once the decree has become final. Estate of Loring, 29 Cal.2d 423 and cases cited at pages 427–428 and 432, 175 P.2d 524; Estate of Van Deusen, 30 Cal.2d 285, 290, 182 P.2d 565; Wells Fargo Bank & Union Trust Co. v. Superior Court, 32 Cal.2d 1, 9, 193 P.2d 721; 11b Cal.Jur., Executors and Administrators, sec. 1296, p. 796 et seq.

[2, 3] It is true that if the decree is ambiguous the will may be used to resolve the ambiguity, Fraser v. Carman-Ryles, 8 Cal.2d 143, 146, 64 P.2d 397; Clark v. Capital National Bank, 91 Cal.App.2d 865, 206 P.2d 16, but while the decree before us may be ambiguous in other respects there is no uncertainty or ambiguity in the provision of the decree as to the parties who are to share in the division therein provided for. To requote that portion of the decree: "such income shall be paid annually to the survivors of the said brothers, sisters, nephews and niece. * * *"

The will is referred to in the decree and appellants cite Horton v. Winbigler, 175 Cal. 149, 165 P. 423, as authorizing a resort to the will in construing the decree because of the incorporation of the will in the decree by reference. In that case the will was used to supplement, but not to contradict or impeach, the terms of the decree. A plain and complete construction of a provision of a will in the distributive portion of the decree, even though erroneous, cannot under the doctrine of *res judicata* be contradicted by a reference to the will, or even its incorporation *in haec verba,* in the decree by way of recital. Estate of Norris, 78 Cal.App.2d 152, 159, 177 P.2d 299. This is so because a plain and unambiguous direction for distribution in the decree is necessarily a judicial construction and enforcement of the provision of the will thereby construed.

Appellants further argue that the order is incorrect in providing that "the entire amount of such annual income" shall be distributed in equal shares to the brother and sister, nephews and niece. In this we agree with appellants. The entire clause of the decree of distribution here in question deals with the contingency which will arise if a brother or sister dies without issue and what shall be done with *the share* of that brother or sister. The portion of the decree of distribution in question first provides that in case of the death of a brother or sister without issue "such deceased person's *share*" shall be paid to the niece and nephews. The decree then provides that in the event the surviving brothers and sisters are receiving less than $500 per year *the share* of such deceased brother or sister shall go to the surviving brothers and sisters. The decree finally provides for a third contingency "in case *such division* of income results in any one of decedent's said nephews and niece receiving more than a surviving brother or sister, then *such income* shall be paid annually to the survivors of the said brothers, sisters, nephews and niece of decedent, share and share alike."

To what does "*such* income" refer? The entire clause is dealing with the distribution of the income which before his death went to a brother or sister who has died without issue. Nowhere in the precedent part of the clause was the decree dealing with the entire income of the trust. "Such" is a relative adjective referring back to and identifying something previously spoken of. It naturally, by grammatical usage, refers to the last precedent antecedent. 60 C.J. 988; 40 Words and Phrases, Perm.Ed., p. 562. In this respect it is equivalent to "said", "aforesaid", "afore described" and "same", as to all of which the same grammatical rule applies, i. e., in the absence of some controlling reason they refer to the last antecedent. "said" 54 C.J. 1118; "aforesaid" 2 C.J.S., 1007; "afore described" 2 Words and Phrases, Perm. Ed., p. 678; "same" 56 C.J. 122–123.

Here grammatical usage, which may be departed from where the obvious intent or purpose requires, conforms to the natural intent to be assigned to the testatrix and to the decree construing her will. She was here dealing with a single subject, the disposition of the income which would have gone to a deceased brother or sister who has died without issue. The decree first provides that that income, i. e., the deceased brother's or sister's share, shall go to the surviving nephews and niece. It next provides that that income, i. e., the deceased brother's or sister's share, shall go to the surviving brothers and sisters if their other income from the trust falls below $500 per year. In the third contingency—if the income to a nephew or niece exceeds that of a brother or sister by reason of "such division of income", i. e., the payment to such nephew or niece of a share of a brother or sister dying without issue, "such income shall be paid annually to the survivors of the said brothers, sister, nephews and niece."

Appellants argue that *"such* income" in the third contingency applies likewise to the entire share which would have gone to the brother and sister who has died without issue. On close analysis of this provision we have concluded that it more reasonably bears another construction.

In the second contingency the decree, when it clearly refers to the entire share which would have gone to such deceased brother or sister before his or her death, provides explicitly: "in which event the *share* of such deceased brother or sister shall be divided annually among the surviving brothers and sisters. * * *" But for the third contingency the decree does not use the word "share."

[4] It turns to a new subject. It is no longer dealing with the entire share of a deceased brother or sister, but only with the portion of that entire share provided to be paid to a nephew or niece. If the payment of that portion of the deceased brother's or sister's share to a nephew or niece results in that nephew or niece getting more than a surviving brother or sister "such income" shall be divided equally between said brothers, sisters, nephews and niece. "Such income" refers to the "division of income" (the last antecedent) which results in the nephew or niece receiving more than the brothers and sisters, since the income from the deceased brother's or sister's share to that particular nephew or niece is the subject of this provision. It alone is the "such income" which is to be divided in order to equalize the payments.

The primary concern of the testatrix was with the income to go to her brothers and sisters, so that the brothers and sisters should be adequately provided for. Her secondary concern was that the share of a deceased brother or sister dying with issue should go to his issue. Her third concern was with the disposition of the share of a deceased brother or sister dying without issue. As to such share the testatrix primarily provided for its division among the nephews and niece. Having in mind adequate provision for surviving brothers and sisters, she provided that in case their income from the trust had fallen below $500 per year they should get the share of the deceased brother or sister dying without issue instead of the nephews and niece.

Having made these provisions the testatrix then desired to make sure that in no event would any nephew or niece receive more total income from the trust than a brother or sister. To accomplish this she made the provision, the counterpart of which in the decree we are called upon to interpret.

Considering the testatrix' purpose as discoverable from the language of the decree the equalization which is thereby sought is concerned only with the particular income to the nephew which would result in the nephew receiving more than the surviving brother and sister. By dividing this income the payments are equalized so that the surviving brother and sister receive the same amount as the nephew who would otherwise receive more than they.

[5, 6] If the words "such income" are considered ambiguous, resort to the will is proper. Fraser v. Carman-Ryles, supra, 8 Cal.2d 143, 64 P.2d 397; Clark v. Capital National Bank, supra, 91 Cal.App.2d 865, 206 P.2d 16; Horton v. Winbigler, supra, 175 Cal. 149, 165 P. 423. The will makes it clear that only income to the nephew or

niece which would result in his receiving more than a brother or sister is to be divided, since no reference to the other nephews and niece occurs in that particular provision.

[7] Under Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825, we are in nowise bound by the construction of the decree placed upon it by the trial court, since no extrinsic evidence was introduced. We are satisfied that only the income which would otherwise go to Russell J. Wallace by reason of the death of Mary B. Wallace and William Wallace, Jr. is to be divided by reason of the provision of the decree of distribution here under consideration.

The order is reversed with costs to appellants.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; SCHAUER, J., dissenting.

CALIMPCO, Inc., et al. v. WARDEN et al.*

No. 14356.

District Court of Appeal, First District,
Division 1, California
June 27, 1950.

Rehearing Granted July 27, 1950.*

Calimpco, Inc., and others sued Carl Warden, S. C. Forsey, Frank G. Norman, Luther Warda, Louis Mazzera, doing business as G. Mazzera Building Materials Company, and Arco Building Company, to recover the statutory penalty for usury. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., rendered judgment in specific amounts against each defendant excepting defendants Luther Warda, Louis Mazzera, doing business as G. Mazzera Building Materials Company, and Arco Building Company, and judgment for costs against plaintiffs was rendered in favor of the latter defendants, and plaintiffs appealed from judgment in favor of such defendants and from portion of judgment denying plaintiffs, as against all other defendants, the amounts sued for in excess of amounts awarded, and such other defendants appealed from the judgments awarded plaintiffs as against them respectively. The District Court of Appeal, Bray, J., held, inter alia, that agreement involved was usurious.

Judgment in accordance with opinion.

1. Appeal and error 🔑931(1)

On appeal from judgment for plaintiffs, evidence and the reasonable inferences therefrom were required to be taken most strongly in favor of plaintiffs.

2. Appeal and error 🔑931(1), 1010(1)

Before reversing findings of trial court, District Court of Appeal must find, as to controverted questions of fact, after resolving all conflicts in and all legitimate inferences from the evidence in favor of those findings, that there is no substantial evidence which will support conclusions.

3. Usury 🔑52

It is the intent of the usury law to forbid absolutely to the lender any profit by way of commission, bonus or other kind of charge, if in so doing the maximum interest rate declared in law is exceeded. Gen.Laws, Act 3757, § 1; Const. art. 20, § 22.

4. Usury 🔑13

"Forbearance" as used in usury law means a waiting to collect the debt, or an agreement not to insist upon payment, or the giving of further time. Gen.Laws, Act 3757, § 1; Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Forbearance".

5. Usury 🔑52

Where one advances money under a contract that may be satisfied by delivery of property of uncertain or speculative value or the payment of an increased amount by a specified date, the amount to be repaid may be considered a price set for the surrender of an investment rather than a usurious loan.

6. Usury 🔑117

Evidence established that claims of defendants, who furnished building supplies and materials to plaintiffs, were not in hazard, so that when defendants and plaintiffs entered into agreement whereunder defendants were to forbear pressing claims and defendants were to receive money and property in excess of amount permitted by law for forbearance, amount to be paid would be held to be usurious and would not be considered as a price set for surrender of an investment. Gen.Laws, Act 3757, § 1; Const. art. 20, § 22.

---

* Subsequent opinion 224 P.2d 421.

7. Appeal and error ⚷1010(1)
Usury ⚷117

Finding that agreement whereunder defendants, who furnished building supplies and materials to plaintiffs, were to forbear pressing claims and were to receive money and lots for forbearance, contemplated payment to defendants within a reasonable time, and that three years taken to make payment was a reasonable time, which made the amount to be repaid usurious, although amount to be repaid would not have been usurious if value of lots was spread over a longer period than three years, was supported by substantial evidence and was therefore binding upon District Court of Appeal. Gen.Laws, Act 3757, § 1; Const. art. 20, § 22.

8. Evidence ⚷222(6)

Where defendants, who furnished building supplies and materials to plaintiffs, who were constructing housing projects on lots owned by plaintiffs, entered into agreement whereunder defendants were to forbear pressing claims against plaintiffs, and defendants, within reasonable time, were to receive a specified amount of money and specified number of unsold lots, minimum prices set in agreement for which lots in building project could have been sold were admissions by defendants, as against contention that minimum price schedule was not evidence of fair market value, upon which rested determination as to whether payments were usurious. Gen. Laws, Act 3757, § 1; Const. art. 20, § 22.

9. Appeal and error ⚷1010(1)
Usury ⚷117

Finding that fair market value of lots which, along with money, defendants were to receive under terms of agreement whereunder defendants, who furnished building supplies and materials to plaintiffs, were to forbear pressing claims against plaintiffs for reasonable time, was $44,950 over encumbrances, which was an amount sufficient to make payment to defendants usurious, was supported by substantial evidence and was therefore binding on District Court of Appeal. Gen. Laws, Act 3757, § 1.

10. Usury ⚷52

Terms of agreement whereunder defendants, who furnished building supplies and materials to plaintiffs, were to forbear pressing claims for reasonable time and were to receive money and lots owned by plaintiffs, justified an inference that defendants intended to violate the usury law. Gen.Laws, Act 3757, § 1; Const. art. 20, § 22.

11. Partnership ⚷219(2)

Where partnership entered into agreement providing for usurious payment to partnership, a joint and several judgment could be entered under statute against both the partnership and a partner for statutory penalty for usury. Civ.Code, §§ 2407, 2409 (a); Gen.Laws, Act 3757, §§ 1, 3; Const. art. 20, § 22.

12. Usury ⚷141

Where defendants who furnished building supplies and materials to plaintiffs agreed to forbear from pressing claims against plaintiffs for reasonable time, and houses completed by plaintiffs were to be sold, and a third person was to be designated to whom 20 lots owned by plaintiffs were to be deeded for benefit of defendants, after defendants' claims were paid, and 20 lots were deeded to third person after payment of defendants' claims, third person in effect received lots from defendants and not from plaintiffs, and was not liable for statutory penalty for usury because transfer of lots to defendants was usurious. Gen.Laws, Act 3757, §§ 1, 3; Const. art. 20, § 22.

13. Usury ⚷141

The words "personal representative" in section of usury law providing for recovery in treble amount against person, company, association or corporation, or his or its personal representative receiving usurious payment, means something more than an executor or an administrator, and a person who was president and a director of corporation which received usurious payment was liable for statutory penalty. Gen.Laws, Act 3757, §§ 1, 3; Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Personal Representative".

14. Usury 🔑141

A usurious payment made to third person for benefit of a company at request of company was payment to company, rendering company liable for statutory penalty for usury. Gen.Laws, Act 3757, §§ 1, 3; Const. art. 20, § 22.

15. Usury 🔑141

An assignee of contract providing for usurious payment, which received usurious payment, was liable for statutory penalty for usury. Gen.Laws, Act 3757; Const. art. 20, § 22.

16. Interest 🔑3
Usury 🔑6

Laws enacted to guard against unreasonable rates of interest should be favorably regarded.

17. Usury 🔑50

Where debtor and creditor agreed upon a compromise figure, interest could not be charged thereon in excess of interest permitted by law, even though interest added to the principal totaled less than the claim originally asserted. Gen.Laws, Act 3757, §§ 1, 3; Const. art. 20, § 22.

18. Usury 🔑138

Where conveyance of lots by debtors to creditors was usurious, value of lots at time they were received by creditors was basis upon which statutory penalty for usury would be computed, rather than amount of money creditors realized from sale of lots. Gen.Laws, Act 3757, §§ 1, 3; Const. art. 20, § 22.

19. Appeal and error 🔑882(3)

Where a party adopts a theory at trial he cannot on appeal complain of a finding in favor of that theory.

20. Appeal and error 🔑151(5)

A plaintiff may appeal from a judgment in his favor when amount of judgment is less than amount demanded and to which plaintiff considered himself entitled, but such appeal is from provisions of judgment denying plaintiff the full relief demanded and is not from part of judgment in plaintiff's favor.

21. Usury 🔑31

Transfer of lots by debtors to creditors, after payment of debts, was not required to be sole consideration in order for agreement whereunder creditors were to forbear pressing claims against debtors to be usurious. Gen.Laws, Act 3757, §§ 1, 3.

22. Usury 🔑13

Personal liability is not an indispensable requisite to constitute a debt which creditor can forbear from pressing at interest rate not exceeding amount permitted by usury law. Gen.Laws, Act 3757, § 1; Const. art. 20, § 22.

23. Usury 🔑14

An agreement may be usurious, although no time for payment is therein fixed. Gen.Laws, Act 3757, § 1; Const. art. 20, § 22.

24. Usury 🔑50

In testing a transaction for usury, interest must be computed on the actual sum advanced from date of advancement. Gen. Laws, Act 3757, § 1; Const. art. 20, § 22.

25. Usury 🔑42

Transaction is usurious where excessive interest is caused by a contingency under the lender's control, or not under borrower's control. Gen.Laws, Act 3757, § 1; Const. art. 20, § 22.

26. Usury 🔑72

Where agreement whereunder creditors were to forbear from pressing claims against debtors, and provision was made for payment of debts, contained no specified time of payment, agreement would be deemed to provide for a reasonable time. Civ.Code § 1657.

27. Appeal and error 🔑1008(1)

Where agreement whereunder creditors were to forbear from pressing claims against debtors, and provision was made for payment of debts, contained no specified time of payment, so that agreement would be deemed to provide for a reasonable time, what was a reasonable time was for trial court in action for statutory penalty for usury tried to court without a jury. Civ.Code, § 1657.

28. Usury ⚿16

An ostensibly lawful transaction may be shown to have constituted a usurious loan made with intent to evade the usury law. Gen.Laws, Act 3757, § 1; Const. art. 20, § 22.

◆

Hoffman, Davis & Martin, San Francisco, for plaintiff, respondents, and appellants.

Frank J. Perry, San Francisco, John F. O'Sullivan, San Francisco, for F. G. Norman and F. G. Norman & Sons.

Cosgrove, Molinari & Tinney, San Francisco, for Warden Bros. and Carl Warden.

Matthew Weber, San Francisco, for John Pestana.

Fitzgerald, Abbott & Beardsley, Oakland, for remainder of defendants and Warden Bros. and Carl Warden.

BRAY, Justice.

In an action to recover the statutory penalty for usury, tried without a jury, plaintiffs recovered judgment in specific amounts against each defendant, excepting defendants Luther Warda, Louis Mazzera, doing business as G. Mazzera Building Materials Co., and Arco Building Co. Judgment for cost against plaintiffs was given in favor of these last mentioned defendants. Plaintiffs appealed from the judgment in favor of said defendants, and also from that portion of the judgment denying plaintiffs, as against all the other defendants, the amounts sued for in excess of the amounts awarded. All these defendants appealed from the judgments awarded plaintiffs as against them respectively.

Questions Presented.

The main question presented by the defendants' appeals is the basic one of whether the contract in dispute was usurious. In addition, certain defendants raise other questions peculiar to them which will be considered later. Plaintiffs' appeal is based on the finding that the contract was usurious, and raises the contention that the amounts awarded them because of the usury were not sufficient. Plaintiff's appeal is on the judgment roll alone. Defendants' appeals are on the complete record. At oral argument it was stipulated that plaintiffs' appeal might be considered on the record. Inasmuch as the defendants' appeals deal with the fundamental question of usury, they will be considered first.

Facts.

[1] This action was brought on the theory that with intent to violate the Constitution[1] and the Usury Law of California,[2] defendants, by an agreement dated September 27, 1943, demanded of plaintiffs, for forbearance of their claims, a greater value than 10% per annum, the maximum permitted by law. Taking the evidence, and the reasonable inferences therefrom, most strongly in favor of plaintiffs, as we are required to do, the facts are as here set forth.

Plaintiffs were engaged in a joint adventure constructing 153 houses in Contra Costa County as a Defense Housing Project under Title VI of the National Housing Act, 12 U.S.C.A. § 1736 et seq. The title to the property upon which the houses were constructed stood in the names of plaintiffs. All 153 lots were subject to first deeds of trust to San Jose Building & Loan Association (later known as Pioneer Investors Savings & Loan Association) in the sum of approximately $589,600 (averaging about $3,850 per house). Defendants had furnished building supplies and materials to plaintiffs and on September 27, plaintiffs owed defendants $63,420.91, for which amounts mechanics' liens were of record as liens second to the deeds of trust. Defendants also had instituted various actions for the enforcement of the liens and the recovery of the amounts due them. The market value as of this date was variously estimated from $4250 to $4750 per house. The total value of the lots and improvements (at their highest estimate) was $726,750. Deducting the $589,600 deed of trust indebtedness and the mechanics' lien indebtedness of $63,420.91, totaling $654,020.91, it appears that the equity or the amount which the plaintiffs could then expect to realize if the houses were all sold at their highest estimate would be $73,729.09. The president of Calimpco, Inc., testified that the actual cost of the land and houses was $641,000. Thus there was due against the property practically as much as it and the houses had actually cost. Of course, if the lower estimates of value are accepted, the margin between the market value and the indebtedness entirely disappears. It is evident that at this time, if plaintiffs were to come out whole on the project, it was necessary that defendants withhold foreclosure of their liens. Some of the houses were incomplete and the amount of money in the construction loan account of the building and loan association was not sufficient either to pay the liens or to complete construction. More money was needed. (Later, $9300 was advanced by the building and loan association to complete construction.) The houses were not selling readily. Most of them were occupied by renters. The aggregate rentals approximated $90,000 per year. The annual loan payments were approximately $55,000.

---

[1] Article XX, § 22.

[2] Deering's General Laws 1944, Act 3757.

In the months of August and September a creditors' committee had been formed by defendants and meetings were held with plaintiffs. There was various testimony that at one of the creditors' meetings with plaintiffs an agreement had been submitted which was supposed to be satisfactory to all concerned, when Tisher, one of the plaintiffs, refused to sign on the ground that it did not contain a release of personal liability. The plaintiffs then withdrew to another room to discuss the matter, and when they came out offered the twenty lots (and possibly the water deposit, hereinafter mentioned) as consideration for a release of personal liability. Tisher desired this because he wished to do further construction work and could not have his financial standing impaired. There was some conflict as to whether a release of personal liability had been previously discussed, or an offer of twenty lots "bonus" made. There was testimony by Mooser, president of Calimpco, and Shaffer, secretary, that the creditors had not asked for the twenty lot bonus. There was also testimony to the effect that defendants at first refused to accept plaintiffs' proposition. Finally, however, the agreement dated September 27 was signed by all parties.

This agreement, entered into between plaintiffs as first parties, Carl Warden, S. C. Forsey and Frank Norman as second parties[3] and defendants as third parties, referred to the fact that certain difficulties had arisen regarding the finishing of certain of the houses and that third parties were creditors and lienholders. It stated that all parties desired defendants' claims to be paid in full together with interest at 4% per annum, that the equities of first parties be preserved insofar as they could be preserved without prejudice to defendants' rights, and that the houses be completed. It then provided that plaintiffs would convey to a certain title company title to all the property and a $12,000 deposit with the water company, subject to a prior assignment to the building and loan association. (This deposit was repayable without interest over a ten year period, from water payments made from time to time to the water company by householders.) The second parties were to have full power to sell or lease, or if necessary refinance all the houses on such terms as they might determine, except that the selling prices and rentals could not be less than those set forth on an annexed schedule (most of the houses $4750 or $4700, seven houses $4500). The receipts from sales and rentals were to be used to pay the building and loan association, the expenses of the trustees, and defendants' claims plus 4% per annum; the balance, if any, then to be paid plaintiffs. Defendants agreed to release their liens and "In addition thereto, * * * they do hereby release first parties and each of them from any personal liability or any deficiency and agree to look solely to the properties herein described for the payment of their claims." The title company was to convey to purchasers title to the respective lots when paid for.

---

[3] Hereafter referred to as "trustees."

Now comes the portion of the agreement upon which the claim of usury is based. When all indebtedness had been paid, "The Title Company shall thereupon reconvey said lots which are unsold to first parties as their interest may appear, save as to twenty (20) lots which are referred to in paragraph 13 hereof.

"13. As additional consideration for second and third parties entering into this agreement, first parties agree that at the termination of this agreement or when all lots have been sold save for twenty (20) lots in number, they will deed, or cause Title Company to deed, to such person, firm or corporation as may be designated by second parties, twenty (20) lots from those above described. Said twenty (20) lots shall be owned by and held for the benefit of third parties in proportion to their respective claims. No part of any selling price of said twenty (20) lots, nor of any rentals received thereon after such conveyance, shall belong to first parties, nor shall such selling price, if said lots are thereafter sold, or rentals received after such conveyance, be applicable in payment of the claims of third parties, it being understood that the entire profit or gain from said twenty (20) lots shall be the sole property of third parties." A contemporaneous agreement was entered into by which plaintiffs agreed that in the event of bankruptcy, the release of personal liability should become void.

Pursuant to the agreement, the plaintiffs conveyed their title to the title company and the trustees proceeded to manage the disposition of the houses. The houses were sold at prices for the most part in excess of the minimum set forth in the agreement, the deeds of trust were paid off, the expenses of the trustees paid, and on July 16, 1946, the claims of defendants were paid in full plus interest at the rate of 4% per annum. In the meantime, as provided in the agreement, the trustees had designated twenty lots to be held for the benefit of defendants. On July 16, plaintiffs were informed that defendant Frank Norman (who was one of the trustees) had offered $20,000 for these twenty lots. Plaintiffs were given an opportunity to buy them at that price. The plaintiffs having declined so to do, the title company was instructed by the trustees to convey the lots to Norman, obstensibly for said sum of $20,000. Norman thereafter sold them for a sum which the court found netted Norman $44,950, of which Norman distributed $20,000 to the defendants.

There was also testimony to the effect that before the agreement, plaintiffs had been trying for some time to work out an arrangement to save the project, and that this continued after the agreement was executed; that as late as 1945 an agreement was considered with another party to take over and pay the creditors 80% of their claims, which agreement was to be subject to approval of plaintiffs, or they could meet that bid; and that at one time almost all of the creditors had agreed to settle at fifty cents on the dollar. Thus it appears from the record that even more than a year after the agreement of September, 1943, the creditors did not believe they would get their claims paid in full, and the plaintiffs expected to realize very little from their interest.

Findings.

The court found substantially the facts as hereinbefore set forth; that the minimum selling prices fixed in the agreement aggregated $723,700, and were the fair market value of the properties at the date of the agreement; that plaintiffs' equity was valued at at least $134,000 over the amounts of the deeds of trust, and that the water deposits and other personal property transferred under the agreement were then of the value of $14,750; that the payment of plaintiffs' indebtedness to defendants was amply secured by the agreement and the transfers made thereunder; that the agreement was fully performed, and the indebtedness fully paid within three years, and "That the said period of three years was a reasonable time for the performance of said agreement and for the full payment of the aforesaid indebtedness. * * *

"That the said agreement of September 27, 1943, was entered into by the parties thereto, and the aforesaid interest and the additional consideration or bonus of twenty (20) lots of real property was agreed to be paid and delivered by plaintiffs to defendants, in consideration of and as compensation for the forbearance by defendants to insist upon the immediate payment of the aforesaid indebtedness then due, owing and unpaid from plaintiffs to defendants, and the agreement of defendants to wait to receive payment of such indebtedness from the proceeds of rentals and sales of plaintiffs' said real property, as and when and in such installments as the Creditors' committee should direct, and that on or about July 16, 1946, after payment of the aforesaid indebtedness had been completed, the said twenty (20) lots were taken by defendants as additional consideration for said forbearance."

The court then found that on July 16, 1946, the twenty lots were of the fair market value of $44,950 over and above existing encumbrances, the net amount for which Norman sold them; that Norman kept $24,950 of this sum under agreement with the trustees of which he was one, and that it was kept by him as "additional consideration or compensation for the forbearance of the indebtedness of plaintiff[s] to defendants." It found in detail the amounts of interest and share of said $20,000 each defendant had received "for the forbearance of the aforesaid indebtedness * * * from September 27, 1943, to July 16, 1946" which constituted an amount "far in excess of ten per cent (10%) per annum" upon said indebtedness. It then found that in making the agreement defendants contemplated and intended that the amounts to be charged in money and things of value for said forbearance would exceed 10% per annum upon the indebtedness and that with intent to violate the Constitution and the Usury Law of California, defendants "charged, took and received" such amounts.

As to defendants Luther Warda and G. Mazzera Building Materials Co. it found that the amounts received by them, including the principal sum, were less than "the total amount asserted as a claim by said defendants on September 27, 1943" and therefore were not usurious. As to defendant Arco Building Co., it found that it was the assignee of C. M. Homes, Inc., and therefore the amounts received by said defendant were not usurious, and it gave judgment against plaintiffs for said defendants.

The court then gave judgment against all the other defendants respectively for three times the total interest and share of the $20,000 received by such defendant.

Against defendant Frank Norman individually the court gave judgment to plaintiffs in the sum of $74,850, being three times the profit realized by him from the sale of the twenty lots.

Was the Agreement of September 27 Usurious?

[2] In considering this question it is well settled that before this court can reverse the findings of the trial court, we must find, as to controverted questions of fact, after resolving all conflicts in and all legitimate inferences from the evidence in favor of those findings, that there is no substantial evidence which will support the court's conclusions. Defendants contend that the twenty lots were not consideration for a forbearance but for releasing plaintiffs' personal liability. This involves questions of fact as well as law.

The evidence shows that while the facts might be interpreted as showing that the twenty lots were given solely for the release of personal liability, they may also be interpreted (and far more reasonably so) as showing that they were given both for a release of personal liability and for defendants forbearing to press their claims and their liens. The agreement on its face states that they are given "As additional consideration for second and third parties entering into this agreement * * *." While it is true that the plaintiffs had refused to enter into an agreement until defendants would agree to release their personal liability and offered the twenty lots to defendants as an inducement, the whole history of the transaction between the parties shows clearly that this was but an incident, although an important one, in the negotiations which finally ended in the signing of the agreement.

Article XX, section 22, of the Constitution provides: "The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court of the State, shall be 7 per cent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding 10 per cent per annum.

"No person, association, copartnership or corporation shall by charging any fee, bonus, commission, discount or other compensation received from a borrower more than 10 per cent per annum upon any loan or forbearance of any money, goods or things in action."

The Usury Law provides.: "§ 1. Legal rate of interest: Contract rate. The rate of interest upon the loan or forbearance of any money, goods or things in action or on accounts after demand or judgments rendered in any court of this state, shall be seven dollars upon the one hundred dollars for one year and at that rate for a greater or less sum or for a longer or a shorter time; but it shall be competent for parties to contract for the payment and receipt of a rate of interest not exceeding twelve dollars on the one hundred dollars for one year and not exceeding that rate for a greater or less sum or for a longer or shorter time, in which case such rate exceeding seven dollars on one hundred dollars shall be clearly expressed in writing."

[3] It is "the manifest intent of the act to forbid absolutely to the lender any profit whatever by way of commission, bonus or other kind of charge, if in so doing the maximum rate declared in the act was exceeded." Haines v. Commercial Mortgage Co., 200 Cal. 609, 615, 254 P. 956, 958, 255 P. 805, 53 A.L.R. 725.

Forbearance.

Defendants contend that the giving of the twenty lots was not for a "loan" or "forbearance." Ancillary to this contention is the one that the trial court erred in not making a specific finding on the allegation in defendants' answer that the twenty lots were given solely for a release of personal liability. While the court did not make such specific finding, it did find that the lots were taken for the forbearance of the indebtedness and that they were intended to be so taken with intent to violate the usury act. Such a finding is a complete negation of the contention that they were taken solely for the release of personal liability and hence there was no need to find specifically in the language of the answers.

[4-6] All parties agree that "forbearance" as used in the usury laws means, as set forth in 11 Cal.Jur. 10-yr. Supp. 112, "a waiting to collect the debt, or an agreement not to insist upon payment at the date of maturity, or the giving of further time." See also Murphy v. Agen, 92 Cal. App. 468, 469, 268 P. 480. The agreement of defendants not to press their claims or to enforce their liens was clearly a forbearance under the above definition. Defendants contend, however, that the circumstances here bring them within the rule of hazard, "as where one advances money under a contract that may be satisfied by delivery of property of uncertain or speculative value or the payment of an increased amount by a specified date—the amount to be repaid may be considered a price set for the surrender of an investment, rather than a usurious loan." 11 Cal. Jur. 10-yr. Supp. 112. There is evidence that defendants' claims were in hazard; that is, that because of the pendency of the war, the comparatively small margin between the total indebtedness of defendants, deeds of trust and all, and the then market value of the property, the doubt as to whether all the houses could be sold, and the possible effect of an early termination of the war, it was uncertain whether defendants would eventually be paid off. On the other hand, the court found, and there is substantial evidence to support the find-

ing, that plaintiffs' equity in the property, the amount of the rentals and payments then being made, and the other circumstances of the case, showed that plaintiffs' claims were not in hazard and were reasonably well secured.

In view of our decision herein we do not deem it necessary to determine whether, assuming that the sole consideration for the giving of the bonus lots was the release of personal liability, it would not still be a forbearance under the Usury Law.

Other Contentions.

[7] Defendants contend that the agreement cannot be held usurious for the reason that there is no definite time provided in the agreement when the defendants were to be paid. The court found, in effect, that the agreement contemplated payment within a reasonable time, and then found that three years (the time actually taken) was a reasonable time. The time element is important, for if the value of the twenty lots is spread over a longer period than three years, it, added to the 4% interest, would not constitute more than 10% interest on the amount of the claims. Again, even though there is evidence to support a contrary finding, the trial court's determination on this question is binding upon us, as there is substantial evidence to that effect. For example, the rentals then coming in were $35,000 more per year than the deed of trust payments required, and hence the defendants could be paid off in less than three years. The same is true of defendants' contention that their obligation, or that of the trustees, to manage the properties, etc., makes the agreement other than one of forbearance. Even assuming, as they contend, that the agreement constituted a novation, the situation was not changed. (However, there is no pleading of a novation.) The new agreement shows that the debt continued to exist because it provided for its payment with interest. The minimum prices set in the agreement on the twenty lots (that is, on any twenty lots defendants might choose) showed that defendants would receive at least $20,000 above the encumbrances on those lots.

[8, 9] Defendants contend that the minimum price schedule is not evidence of fair market value. The prices were, at least, admissions by defendants. Nelson v. Fernando Nelson & Sons, 5 Cal.2d 511, 519, 55 P.2d 859; Wood v. Niemeyer, 185 Cal. 526, 197 P. 795. In addition, there was substantial evidence of value to support the court's determination.

[10] Defendants contend that there was no evidence of intent to violate the Usury Law. The terms of the agreement itself justify an inference of intent. Moreover, Attorney Green, who represented defendant Brown Construction Company, testified as follows: "Q. You would have taken everything they offered. It is lucky they didn't offer you more than 20 houses? A. Well, they owed the money and they weren't able to pay it and it was only right they give us anything they had. That was only fair."

The Judgment Against Frank G. Norman.

Two judgments were rendered against him individually: one, jointly with F. G. Norman & Sons, a copartnership, for $4837.53, being the total interest and proportion of bonus found to have been paid to the copartnership; the other, for $74,850, being three times the $24,950 which the court found Norman had received "as interest, bonus or other compensation for the forbearance of the aforesaid indebtedness * * *." Incidentally, there is no finding of "aforesaid indebtedness" from defendants to Norman.

[11] As to the first judgment against Norman, the court awarded it on the theory that as a member of the copartnership he was jointly liable with it. While the evidence is not clear as to Norman's relationship to F. G. Norman & Sons, the answer of both admits that he "was and is" one of the partners. Section 2409, subdivision (a), of the Civil Code, since the judgment codified into the Corporation Code, read: "All partners are liable (a) Jointly and severally for everything chargeable to the partnership under sections 2407 and 2408." Section 2407 provided: "Where, by any wrongful act or omission of any partner acting in the ordinary course of the busi-

ness of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, *or any penalty is incurred,* the partnership is liable therefor to the same extent as the partner so acting or omitting to act." (Emphasis added.) In view of the sections and the admission in the answer, the court had the right to award a joint and several judgment against both the partnership and the admitted partner.

[12] However, the situation as to the $74,850 judgment is quite different. Norman had no individual claim against plaintiffs. Therefore, there was no claim for him to forbear. Individually, he received no part of the lots or their sale price for any forbearance. When, pursuant to the instructions of the trustees, of whom he was one, the title company deeded the lots to him, he was holding them for the defendants. What he did with them thereafter or with the proceeds of their sale was a matter between him and defendants, with which plaintiffs had no concern. The agreement provided that when the time came which entitled defendants to the lots, the trustees should designate the person to whom they were to be deeded for the benefit of defendants. The situation then was no different than if the person designated had theretofore been a total stranger to the transaction. In effect, Norman received the lots, not from plaintiffs, but from defendants, and is required to account only to them for their disposition. This is an action for the enforcement of a statutory penalty. For Norman to be liable for that penalty he must be more than the mere holder for defendants. The individual judgment against Norman is improper.

Judgment Against Individuals.

Defendants complain of the judgments against certain individual defendants, to-wit, Warden, Forsey and Mills, on the same grounds that they complained of the joint judgment against Norman. Warden was a partner in Warden Bros., a copartnership, and the judgment was jointly against the partnership and him. As shown above with reference to Norman, the judgment was proper. The same situation applies to Mills, who was a member of the copartnership of Mills & Hinz Tile Co. Mills individually was not named as a party. However, the action against the partnership was in its common name and hence comes within the provisions of section 388 of the Code of Civil Procedure. The return of service of summons, which we have had brought up from the trial court, shows that he was served. Therefore the judgment, pursuant to that section, is proper. "* * * the judgment in the action shall bind the joint property of all the associates, and the individual property of the party * * * served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability."

[13] As to defendant Forsey, he was president and a director of Eureka Mill & Lumber Co., a corporation. There is no contention that he received anything individually. Judgment was given against him jointly with the corporation. Section 3 of the Usury Law provides for recovery in treble amount against the "person, company, association or corporation * * * or * * * his *or its personal representative"* receiving the usurious payment. (Emphasis added.) In Hillier v. Muth, 132 Cal.App. 486, 489, 23 P.2d 46, 47, cited by defendants, the court said: "The words 'personal representative' do not mean 'agent,' but are used in the sense of 'executor' or 'administrator'; * * *." However, the court there was considering a situation in which the defendant corporation and its manager, also a defendant, were acting as agents of the corporation claimed to have received the usurious payment. The case merely holds that "personal representative" does not include an "agent." That the language means something more than an executor or administrator is shown by the use of the word *"its."* A corporation cannot have an executor or administrator. Moreover, considering that part of the section with the last sentence of the section—"The penalties herein provided for the violation of this section and said sections one and two shall apply to and be

imposed upon each member of any unincorporated company, association, or of any copartnership and upon each officer and director of a corporation who shall violate either of said sections"—it is obvious that a director and president of a corporation, who, as here, is active in the obtaining of the usurious payment, may be held liable for the statutory penalty. The judgment against Forsey was proper.

The Judgment Against Warden Bros.

[14] The record fails to show a direct payment to Warden Bros. However, a reasonable inference from the evidence is that the payment made to Frank Antonioli was for the benefit of Warden Bros. In their answer they admit that they with the other defendants received "the amount paid for said twenty (20) lots by" Norman. On Warden Bros. letterhead, signed by Carl A. Warden, is a direction to the title company to pay Antonioli the sum of $5881—which was the proportion due Warden Bros. from the $20,000 paid by Norman for the twenty lots. There is no contention that Warden Bros. had assigned their claim to Antonioli. A payment to another at the request of a creditor is a payment to the creditor. Civil Code, § 1476. See Wolf v. Aetna Indemnity Co., 163 Cal. 597, 126 P. 470. The finding concerning the amount received by Warden Bros. is supported by the evidence.

Plaintiffs' Appeal.

Plaintiffs contend that the trial court erred in holding (1) that defendant Arco Building Co., as assignee, was not liable for the statutory penalty; (2) that Warda and Mazzera likewise were not liable; and (3) in charging defendants with their respective proportions of $20,000, rather than with the value of the twenty lots.

1. Arco Building Co.

[15] The court found and the evidence shows, that in December, 1944, C. M. Homes, Inc., which was one of the third parties to the agreement of September 27, assigned to Arco the balance of indebtedness then remaining, to wit, $3,420, and that Arco received the total sum of $1516.15 as compensation for the forbearance. The court apparently believed that because Arco was an assignee *after* the agreement it could not be held liable even though it actually received the benefit of the usurious contract and received the usurious payments. (It is interesting to note that although defendants Mills & Hinz Tile Co. was an assignee of Cummins & Morton Tile Co., one of the creditors who signed the agreement, plaintiffs were given judgment for the statutory penalty against Mills & Hinz Tile Co.) Patently the court erred in holding that an assignee cannot be held liable for accepting usurious interest. If this were the law, the statutes on usury might as well be abolished. All a lender would have to do would be to obtain a contract from a borrower providing for usurious interest,—20 or 30 per cent or more per year,—and then assign his contract and the contract would no longer be usurious. "In the event of the assignment or transfer of a usurious contract by the lender, if the assignee has received the usurious interest, he alone is liable for the statutory penalty, although the rule appears otherwise where the usury has been received by the payee of the obligation." 55 Am.Jur. p. 429, § 153.

The California usury statute provides that where a usurious payment has been made, the payer may recover treble the amount of money paid or value delivered from the one who "shall have taken or received the same." In Liebelt v. Carney, 213 Cal. 250, 2 P.2d 144, 146, 78 A.L.R. 405, the court cited with approval the rule stated in 39 Cyc. 1038: "The proper party defendant is the person who has received the usury. It is not necessary that a third person to whom the notes executed for the usurious loan were made payable should be joined if he received no part of the usury. But when the usurious note has been transferred to a holder in due course, to whom the maker is compelled to make payment, the original payee is the proper party defendant." The court's conclusion that Arco Building Co. was not liable is erroneous.

2. Warda and Mazzera.

G. Mazzera company filed a mechanic's lien in the sum of $4,049.45 for materials supplied Luther M. Warda. Luther M. Warda filed liens totaling $15,760.20. (Apparently included in the Warda liens were the same items included in the Mazzera lien.) Prior to the execution of the agreement, in a conference with the creditors' committee (who became the second parties in the agreement) Warda agreed to compromise his claims for $8,902.20. Thus at the time Warda and Mazzera signed the contract they had agreed to accept that sum instead of the $15,760.20. The court found that the $8,902.20 was the indebtedness due Mazzera and Warda and that the total amount received by them under the contract for the forbearance was $3551.83. Thus the total amount received by them was $12,454.03, or approximately $2500 less than their original claim. It was stipulated that Mazzera received only the principal amount of their mechanic's lien, $4,049.45, "no interest, or any bonus or any profit * * * and no portion of the 20 lots * * *." In view of that stipulation the judgment in favor of Mazzera was proper.

As to Warda, however, the situation is different. We are not impressed by the fact that the claim asserted earlier was for a higher amount. It is the amount contemplated by the agreement and upon which the 4% interest was to be paid which is the amount as to which the test of usury must necessarily be made.

[16, 17] The usury statute would have a hole in it as wide as a barn door if it were so interpreted that where a compromise figure is agreed upon, interest thereon in excess of the 10% permitted by law may be charged, even though such interest added to the principal totals less than the claim originally asserted. " 'Laws enacted to guard against unreasonable rates of interest are laws against oppression, and should be favorably regarded, as they always have been favored by the common law of England.' Baker v. Bryant, 24 Cal.App. 87, 140 P. 310." In re Washer, 78 Cal.App. 759, 773, 248 P. 1068, 1074. The court's conclusion that Warda was not liable is erroneous.

3. Were Defendants Chargeable with the Value of the Lots?

[18] In determining the amount of bonus chargeable to each defendant, the court used the figure of $20,000 which was the amount Norman distributed to defendants after sale of the twenty lots. Plaintiffs appealed from the judgment entered in their favor, contending that the defendants should be charged with their respective proportions of the *value* of the twenty lots when taken by them on July 16, 1946. The court found this value to be $44,950 (over and above existing liens and encumbrances). This was also the amount for which Norman sold them. Plaintiffs' contention is correct. The Usury Law, section 2, prohibits the taking of "money, goods or things in action, or in any other manner whatsoever, any greater sum or any greater value" than the maximum allowed. Here the defendants received not money, but lots, and they are chargeable with the value of those lots at the time they received them, regardless of what amount of money they actually realized from their sale. For example, had the value increased, and, upon sale, had defendants received more than their value as of the day they received the lots, they could not be charged with that increase in value, or the amount they actually realized from their sale. The agreement provided that the trustees might select the particular lots and they would then be deeded to such person as the trustees might designate. "Said twenty (20) lots shall be owned by and held for the benefit of third parties in proportion to their respective claims." Hence when the trustees had the lots conveyed to Norman, they became the property of the defendants who immediately became chargeable with their value, rather than with the proceeds of their sale thereafter. The fact that the lots were selected, at the suggestion of plaintiffs, by chance, does not change the situation any.

[19, 20] Defendants contend that the error, if any, in apportionment of liability was invited by plaintiffs, and therefore they cannot now complain. After trial and before the decision, plaintiffs at the direction of the trial court amended their complaint to charge defendant Norman with receiving $26,234.60 and to add to the prayer a request for judgment against him in the sum of $74,850. Defendants cite cases which hold that where a party adopts a theory at the trial he cannot on appeal complain of a finding in favor of that theory. It is not necessary to discuss those cases as that unquestionably is the law. They are not applicable here, however, as the error was not invited by plaintiffs. They still sought damages against the defendants for treble the full amount. The amendment to the complaint was to conform to the court's erroneous theory as to Norman. The amendment merely increased the amount alleged against Norman and did not eliminate or reduce the amounts alleged against any of the defendants nor did it change the theory of the action against them. "A plaintiff may appeal from a judgment in his favor, when the amount of said judgment is less than the amount demanded and to which the plaintiff considered himself entitled. But in such a case the appeal is not from that part of the judgment in plaintiff's favor, but is from the provisions of the judgment denying him the full relief demanded." Maxwell Hardware Co. v. Foster, 207 Cal. 167, 170, 277 P. 327, 329.

Defendants also contend that the wording of paragraph 13 of the agreement is ambiguous, in that it is not clear whether defendants are chargeable for the value of the twenty lots or for the proceeds thereof, and therefore, in charging the defendants only with the amount they received from Norman the court was interpreting the ambiguity in their favor. They point, moreover, to the fact that when the lots were offered for sale they gave plaintiffs an opportunity to buy them for the same sum that Norman distributed to the defendants. The difficulty about this contention is that the evidence shows that the actual sale price of the lots was $44,950 and not $20,000. The court did not find, nor does the evidence show, that there was a sale to Norman, nor did the court interpret the agreement as claimed. The court found, and the evidence supports the finding, that the lots were conveyed to Norman, who thereafter sold them for $44,950 and divided $20,000 among the defendants. Moreover, there is no ambiguity in paragraph 13. It specifically provides that the lots when selected shall be owned by and held for the benefit of defendants. It then provides that no part of any selling price nor of the rentals after conveyance shall belong to first parties nor be applicable in payment of the claims of defendants, "* * * it being understood that the entire profit or gain from said twenty (20) lots shall be the sole property of third parties." Therefore the judgment should be increased, and the respective defendants charged with their proportionate shares of the $44,950 value of the lots rather than the $20,000 distributed.

Complaint.

[21-28] Defendants attack the complaint as not stating a cause of action. The complaint alleged that the agreement was given in "consideration of the forbearance by defendants to insist upon the immediate payment of their claims" and other matters to the same effect. Defendants contend this was not an allegation of an agreement to extend the time of payment. The complaint's allegations together with the terms of the annexed agreement are sufficient on this question. One of the allegations was to the effect that the lots were additional consideration for the agreement. Defendants contend that such allegation causes the complaint to be defective in that it does not allege the lots were the sole consideration for the agreement. They did not have to be the sole consideration in order for the agreement to be usurious. Defendants contend that after the agreement was signed there no longer was a debt to forbear because plaintiffs were under no personal liability. Personal liability is not an indispensable requisite to constitute a debt. Shelley v. Byers, 73 Cal.App. 44, 58, 238 P. 177. Again it is contended that the agreement was not usurious on its face because no time was fixed for payment. To constitute usury it is not necessary that there be a fixed time in the agreement. "In testing a transaction for usury, interest must be computed on actual sum advanced from date of advancement. * * * Where the excessive interest is caused by a contingency under the lender's control, or not under the borrower's control, the transac-

tion is usurious." Penziner v. West American Finance Co., 133 Cal.App. 578, 590, 24 P.2d 501, 506. The agreement, not having any specified time of payment set forth therein, must be construed as coming within section 1657 of the Civil Code and is deemed to provide for a reasonable time, and hence, what was a reasonable time was a matter to be left to the determination of the court. Assuming, as contended by defendants, usury did not appear on the face of the agreement, the holding in the Penziner case, supra, 133 Cal.App. page 589, 24 P.2d page 506, applies: "On its face the transaction does not appear usurious. '* * * It is always permissible to show that a transaction, ostensibly lawful, actually constituted a usurious loan and was made with intent to evade the statute. * * *'"

However, the agreement did show that it was usurious. For an extention of the time of payment of the $63,420.91 which amount was then due, defendants were to receive 4% interest per annum plus twenty lots of a fixed minimum sale price, with a power of sale in the trustees to sell all the property at any time. The agreement likewise provided minimum rental values at a sum approximating $35,000 per year more than the required payments on the deed of trust. This, on the face of it, would have paid defendants off in not to exceed three years. Taking the fixed minimum value of the lots, less the encumbrances, plus the interest provided, and dividing the total by three, would immediately show a return to defendants of more than 10% interest per year.

The judgment against Frank G. Norman individually in the sum of $74,850 is reversed. The judgments in favor of Arco Building Co. and Luther Warda are reversed. The judgment in favor of Louis Mazzera, doing business as G. Mazzera Co., sued herein as G. Mazzera Building Materials Co., is affirmed. The judgment as entered against all other defendants is set aside and the trial court is directed to amend the findings and conclusions of law and re-enter judgment in favor of plaintiffs and against all defendants, other than Mazzera and Norman as above, in accordance with the views herein expressed. Plaintiffs shall recover costs on all appeals except as to defendant F. G. Norman on the $74,850 judgment and the defendant Mazzera, each of whom shall recover costs.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.

---

98 Cal.App.2d 240

SANDOVAL v. SOUTHERN CALIFORNIA ENTERPRISES, Inc., et al.

Civ. 17305.

District Court of Appeal, Second District, Division 2, California.

June 27, 1950.

As Corrected July 10, 1950.

Rehearing Denied July 14, 1950.

Hearing Denied Aug. 24, 1950.

Action by Joe Norman Sandoval against the Southern California Enterprises, Inc., a corporation, and others, for damages sustained by plaintiff when ejected from a dance hall of the defendant and for malicious prosecution upon a charge of drunkenness. Judgment for plaintiff in the Superior Court of Los Angeles County, Samuel R. Blake, J., for $2,000 against the corporate defendant for malicious prosecution, for $25,000 compensatory damages for battery and for $10,350 as compensatory damages for the malicious prosecution and the defendants appealed. The District Court of Appeal, Moore, P. J., held that there were no reversible trial errors and that the awards of damages were not excessive.

Judgment affirmed.

1. Evidence 🔑266

If an extrajudicial utterance is offered not as an assertion to prove the truth of a declaration but without reference to the truth of it, the hearsay rule does not apply.

2. Evidence 🔑268

When the mental state of a person at a particular time is material, evidence of such person's declarations at the time indicative of his current mental state are admissible as within an exception to the hearsay rule.

3. Evidence ⚿268

In action for damages for injuries sustained by a musician in ejection from a dance hall, permitting plaintiff to testify to conversations between himself and physician and officers to show he had a recollection of what was said and as part of his proof that he was not intoxicated at the time of the ejection was proper as not within the hearsay rule and was admissible on the ground that plaintiff's power of perception and the accuracy of his deductions and the integrity of his memory might be greatly affected by his sobriety.

4. Witnesses ⚿380(5)

Right to impeach one's own witness is confined to cases wherein a party is taken by surprise on account of the character of the testimony of the witness whom he has himself called under an honest belief as to what his testimony would be. Code Civ. Proc. § 2049.

5. Witnesses ⚿380(5)

Whether a party is surprised at the conduct of his witness so as to authorize impeachment thereof is a fact question for the trial court based upon the demeanor of the surprised person, and a ruling upon an offer made on the ground of surprise is an exercise of discretion. Code Civ.Proc. § 2049.

6. Witnesses ⚿380(5)

There can be no "surprise" authorizing impeachment of one's own witness when witness testifies in conformity with his deposition testimony given in the same action even though he thereafter testifies at the trial unfavorably to the person calling him. Code Civ.Proc. § 2049.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Surprise".

7. Appeal and error ⚿1048(7)
Witnesses ⚿255(3), 380(5)

In action for injuries sustained in ejection from a dance hall where witness testified that he did not see plaintiff throw punches at officer of the hall and defendant sought to show the witness his statement written on the day following the assault, excluding the statement on ground that it was not needed to refresh the recollection of the witness and that it constituted an attempt by the defendants to impeach their own witness was not error and was harmless in any event where the witness testified in court the same as he had at the time his deposition was taken. Code Civ.Proc. § 2049.

8. Witnesses ⚿267

Fixing limits of cross-examination is within the discretion of the trial court.

9. Witnesses ⚿269(15)

Testimony that has a logical tendency to rebut an unfavorable inference which might have been drawn from the direct examination of the witness may be developed by the cross-examiner.

10. Witnesses ⚿269(15)

In action for injuries sustained in ejection from the dance hall where witness on direct had testified as to plaintiff's condition with respect to sobriety and that witness had been told to keep on the lookout for the plaintiff and that the officers were holding him, jury could have inferred that plaintiff was denied admission because he was drunk so that it was proper for witness to testify on cross-examination that plaintiff appeared sober

11. Appeal and error ⚿1048(6)

Where witness testified that he had seen plaintiff going up a walkway it was not harmful error on cross-examination for the witness to testify that the plaintiff did not stagger.

12. Witnesses ⚿269(2)

Where witness had testified on direct examination that he heard an officer yelling while plaintiff was being ejected from dance hall witness could testify on cross-examination as to what he saw.

13. Appeal and error ⚿1048(6)

Fact that alleged inquiries on cross-examination went beyond the proper scope thereof was not prejudicial where it was merely cumulative of other testimony.

14. Witnesses 🔑269(2)

In action for injuries sustained in ejectment from a dance hall, cross-examination respecting conduct of two officers who ejected the plaintiff was proper on the ground that the whole subject was the proper topic of inquiry in view that part of the acts of the officers had been given in evidence on direct examination. Code Civ. Proc. § 1854.

15. Witnesses 🔑268(1)

One of the most important purposes of a liberal range of cross-examination is to elicit from an adversary witness material which has been glossed over or suppressed.

16. Malicious prosecution 🔑55, 64(1)

In action for malicious prosecution on the ground that plaintiff was falsely arrested for drunkenness where it was not alleged that defendant personally made arrest or caused the complaint to issue but evidence showed that he gave information to the prosecuting authority and that plaintiff was arrested and a criminal complaint resulted, proof was sufficient to support the judgment for malicious prosecution and there was no variance.

17. Malicious prosecution 🔑4

It is unnecessary to find against a defendant that he personally made an affidavit required for the issuance of a complaint to make him liable for malicious prosecution but the test is whether defendant was actively instrumental or was proximate cause of maliciously putting law in action.

18. Malicious prosecution 🔑64(2)

In action for a malicious prosecution charging plaintiff with drunkenness after ejection from a dance hall evidence supported finding that defendant instigated the prosecution without probable cause through a police officer for the purpose of concealing the attack made by special officers of the dance hall on plaintiff and as a means of discouraging plaintiff from pressing a civil action for the battery committed by the dance hall officers.

19. Corporations 🔑432(12)
Malicious prosecution 🔑64(1)

In action against a corporation operating a dance hall for injuries sustained by plaintiff in ejection from the dance hall and for malicious prosecution on a false charge of drunkenness evidence justified an award against the corporation on the ground of ratification of the acts of its employees.

20. Corporations 🔑426(7)
Malicious prosecution 🔑42

Retention of employees by a dance hall corporation after full knowledge of facts arising out of the ejection of plaintiff from a dance hall and the prosecution on the charge of drunkenness after the plaintiff had been acquitted of the charge of drunkenness sufficiently supported the inference of ratification of the acts of the employees.

21. Assault and battery 🔑40

Award of $2,000 punitive damages against corporate defendant for a battery of plaintiff arising out of ejectment from its dance hall was not excessive.

22. Trial 🔑295(1)

Instructions as a whole should be given a reasonable interpretation and words employed will be construed in accordance with their natural and ordinary meaning.

23. Trial 🔑296(2)

In action for malicious prosecution arising out of a false accusation of drunkenness instruction that proof that a person has partaken of intoxicants is not in itself proof of intoxication was not error in view of other instructions given.

24. Appeal and error 🔑930(2)

Where jury hears the instructions they are deemed to have understood and applied them to the evidence.

25. Trial 🔑243

Instruction respecting probable cause for instituting prosecution for drunkenness against plaintiff was not error as creating a conflict with other instructions on the burden of proof where the jury were instructed fully as to the meaning of "preponderance of evidence" and that the burden of proof was on the plaintiff.

26. Trial 🔑295(5)

Instruction in malicious prosecution action was not error as directing verdict and failing to include the factor that if plaintiff was guilty of the crime charged he could not recover, when read with the entire charge as a whole, where jury were advised that they could not infer want of probable cause from the acquittal in the criminal action and that whether plaintiff was guilty was a question of fact for their determination from all the evidence.

27. Trial 🔑296(8)

If an element omitted from the formula instruction is fully covered by other instructions and jury is not misled, the omission of one element is not prejudicial.

28. Damages 🔑185(1)

Extent of personal injuries cannot be measured solely by objective signs.

29. Damages 🔑102

As respects award of damages mental suffering will vary in every case with nervous temperament of the individual.

30. Appeal and error 🔑1004(1)

The power of reviewing court to interfere with the amount awarded for damages for personal injuries exists only when the facts are such that the excess clearly appears as a matter of law or suggests at first blush passion, prejudice or corruption by the jury.

31. Assault and battery 🔑40

$25,000 for battery of a musician and singer when forcibly ejected from a dance hall was not excessive in view of multiple bruises and lacerations of the face and neck of the musician and in view of mental suffering.

32. Malicious prosecution 🔑69

$10,350 as compensatory damages in malicious prosecution for false accusation against plaintiff on charge of drunkenness was not excessive in view of confinement and humiliation of plaintiff and necessity of standing jury trial.

33. Appeal and error 🔑1004(3)

Unless the jury be misled by incompetent evidence or be by inflamed passion, their verdict for damages as approved by the trial court, constitutes a finding, and is a firm support for judgment for plaintiff.

Reginald I. Bauder and W. I. Gilbert, Jr., Los Angeles, for appellants.

Zagon, Aaron and Sandler, Los Angeles, Henry F. Walker, Los Angeles, of counsel, for appellant Southern California Enterprises, Inc.

Henry S. Cohen and Bernard B. Cohen, Los Angeles, for respondent.

MOORE, Presiding Justice.

By reason of the loss of two front teeth, lacerations, bruises and contusions of his body, the consequent shock to his nervous system as well as pain and mental anguish, respondent sued the defendants for wanton and malicious attacks upon him and demanded compensatory damages in the sum of $25,000 and punitive damages in the same amount. In a second count he claimed $15,000 compensatory damages for his malicious prosecution by the defendants resulting in injury to his reputation, hurt to his feelings, embarrassment and inconvenience and $350 for counsel fees in defending the charges against him. Also, he demanded exemplary damages in the sum of $10,000. Following a trial, a jury awarded respondent $25,000 as compensatory damages on the first count and punitive damages against defendants as follows: against Veitch, $4,500; against Haley, $1,000; against the corporate defendant, $2,000. On the second count the jury awarded respondent the sum of $10,350 as compensatory damages and against defendant Mooney, $2,500 as punitive damages. Upon such verdicts judgment was duly entered, from which came this appeal.

Respondent is a singer, musician and orchestra leader. About nine o'clock p. m. on November 20, 1947, he appeared at the front entrance of the Palladium, a dance hall on Sunset Boulevard in Los Angeles operated by the corporate defendant. He requested free admission for the purpose of conferring with the orchestra leader concerning employment. After he had been denied free admission by the ticket taker, appellants Veitch and Haley, special officers employed by Palladium, escorted him to the side entrance for the purpose of seeing appellant Mooney, assistant manager of the hall. Having been there denied free admittance, respondent purchased a ticket, but admission was again refused on the ground that he was intoxicated. Thereupon Veitch grabbed respondent by the shoulders and shoved him down the sidewalk. He then called at the rear entrance to demand a refund on his ticket but before his arrival at the ticket office, Veitch and Haley appeared, forced him to accompany them out to Argyle street which extends northward from Sunset. After going some distance, Veitch struck respondent in the face with brass knuckles, knocked him to the ground where he was brutally kicked by both officers. He was then taken back to the rear of the club, kicked and beaten several times enroute and on arrival appellant Mooney appeared. He telephoned for the police and while all were waiting, respondent attempted to rise, whereupon Mooney kicked his legs from under him.

Police Officers Bean and Lloyd of the Hollywood division took respondent in their patrol car to the Hollywood receiving hospital where he was treated for his injuries. Then he was taken to jail and booked and his fingerprints made. Subsequently he was charged with drunkenness, a misdemeanor, but upon a later trial was acquitted.

Respondent's Testimony Concerning the Occurrences at the Receiving Hospital Was Not Prejudicial.

[1–3] In the course of respondent's testimony he was permitted over objection to testify to conversations between himself and the physician and between himself and the police officers for the limited purpose of showing that he had a recollection of what was said and as a part of his proof that he was not intoxicated at the time. The testimony concerned statements made by the doctor in the course of his treatment of respondent and the statements of an officer to the effect that respondent had received a "bum deal" and of another officer who apparently scoffed at respondent's statement that he was a singer and who asked him to sing for the policemen. There was no error in admitting such testimony. If an extrajudicial utterance is offered, not as an assertion to prove the truth of the declaration, but without reference to the truth of it, the hearsay rule does not apply. When the mental state of a person at a particular time is material, evidence of such person's declarations at the time indicative of his current mental state are admissible as within an exception to the hearsay rule. People v. Kynette, 15 Cal.2d 731, 754, 104 P.2d 794; People v. Singh, 19 Cal.App.2d 128, 129, 64 P.2d 1147; Bridge v. Ruggles, 202 Cal. 326, 330, 260 P. 553; Donnelly v. State, 26 N.J.L. 463, 495; same, affirmed, 26 N.J.L. 601, 610. Such testimony was admissible upon the further ground that a person's power of perception, the accuracy of his deductions and the integrity of his memory may be greatly affected by his condition as to sobriety. People v. Salladay, 22 Cal.App. 552, 555, 135 P. 508. The testimony was especially significant in that at the commencement of the trial, appellants' counsel had stated that he had proof that respondent could not remember the names of the people he had seen on the night of his visit to the Palladium, and that he was too drunk to write his name.

No Error in Excluding a Witness' Prior Written Statement on Direct Examination.

[4–7] The witness Christoffer was the ticket taker at the Argyle entrance to the dance hall. After he had testified that he did not see plaintiff "throw punches at Mr. Veitch" appellants' counsel undertook to show the witness his statement written on the day following the tragedy. It was excluded on the theory that it was not needed to refresh the witness' recollection and that it constituted an attempt by appellants to impeach their own witness, he having testified that the statement did not refresh his recollection. Moreover, the witness had testified in court the same as he had at the time his deposition was taken. Appellants contend that under section 2049, Code of Civil Procedure, a party may impeach his own witness by showing prior inconsistent statements. They insist that (1) surprise is not a statutory requirement for the admission of a prior inconsistent statement and (2) if appellate decisions approve of such practice, it is judicial legislation forbidden to the courts, citing Crocker National Bank of San Francisco v. Byrne & McDonnell, 178 Cal. 329, 335, 173 P. 752; III Wigmore on Evidence, 3d Ed., page 383. But regardless of Wigmore's criticisms of the California rule, it is here established that the right to impeach one's own witness is confined to cases wherein a party is taken by surprise on account of the character of the testimony of the witness whom he has himself called under an honest belief as to what his testimony would be. Estate of Relph, 192 Cal. 451, 458, 221 P. 361; People v. Flores, 37 Cal.App.2d 282, 286, 99 P.2d 326; People v. Reynolds, 48 Cal.App. 688, 693, 192 P. 343. Whether a party is surprised at the conduct of his witness is itself a fact to be ascertained by the trial court based upon the demeanor of the surprised person. Therefore, a ruling upon an offer made on the ground of surprise is an exercise of discretion. People v. Jaggers, 120 Cal.App. 733, 738, 8 P.2d 206. Of course, there can be no surprise when a witness testifies in conformity with his deposition testimony given in the same action even though he thereafter testifies at the trial unfavorably to the person calling him. Estate of Dolbeer's, 153 Cal. 652, 661, 96 P. 266, 15 Ann.Cas. 207.

It is also contended that the court erred in permitting respondent over objection to exceed the scope of cross-examination. Christoffer had testified as to his employment, as to having seen respondent walk toward the box office and of his having been stopped by Veitch and Haley who walked respondent to the street as they held him by the arms, but he did not see them after they turned north on Argyle. On cross-examination the witness testified there was a telephone 12 feet from his station; Mooney did not come to the Argyle entrance while respondent and the two officers were on the sidewalk; respondent was not staggering but appeared sober; he did not see respondent attempt to strike Veitch; cars were parked solidly along the Argyle fence; he could not see what happened on the sidewalk; he heard Veitch yelling in the vicinity where last seen; Veitch's voice was the only one heard; the trio returned to the Palladium with Veitch and Haley holding respondent; Mooney did not appear on the scene before the trio had gone behind the Palladium; he heard respondent several times yell "let me go." In support of such contention, they cite People v. Montgomery, 47 Cal.App.2d 1, 18, 117 P.2d 437; and McClung v. Camp, 132 Cal.App. 55, 56, 22 P.2d 238.

[8–13] Fixing the limits of cross-examination is within the discretion of the trial court. Estate of Higgins', 156 Cal. 257, 264, 104 P. 6. It is a familiar principle also that testimony which has a logical tendency to rebut an unfavorable inference which might have been drawn from the direct examination of the witness may be developed by the cross-examiner. 27 Cal. Jur. 103; 108 A.L.R. 168. Since the witness had testified on direct as to respondent's condition and that he had been told to keep on the lookout for respondent and that the officers were holding him, the jury might have inferred that respondent was denied admission because he was drunk and combative. Therefore it was proper for the witness to testify on cross-examination that respondent appeared sober. Also, having testified that he had seen respondent going up the walkway, it was at least not harmful on cross-examination for him to testify that respondent did not stagger. On the witness' testimony that he heard Veitch yelling, it was not out of place on cross-examination for him to testify what he saw. But granting that such inquiries went beyond the scope of proper cross-examination it could not be prejudicial since it was merely cumulative. Roy v. Salisbury, 21 Cal.2d 176, 186, 130 P.2d 706.

[14, 15] Mrs. Guilley, the cashier in the box office, had already given substantially the same testimony. And the location of the telephone had been shown by defendant's exhibit A to have been about ten feet from where Christoffer stood. The cross-examination was proper for the further reason that a part of the act of the two officers having been given in evidence on direct, the whole of the same subject was

the proper topic of inquiry on cross-examination. Code Civ.Proc. § 1854. One of the most important purposes of a liberal range of cross-examination is to elicit from an adversary witness material which has been glossed over or suppressed. People v. Jones, 160 Cal. 358, 364, 117 P. 176. It cannot be said that by allowing the liberal cross-examination of a witness the court exceeded the bounds of reason. Berry v. Chaplin, 74 Cal.App.2d 669, 672, 169 P.2d 453. But even conceding error in the ruling, it cannot be said that a miscarriage of justice resulted.

Appellants contend that it was prejudicial error for the court to refuse to allow them to cross-examine and impeach the witness concerning new material adduced by respondent outside the scope of direct examination. They insist that they should have been permitted to introduce the witness' prior written statement, inconsistent with his testimony on cross-examination, inasmuch as the witness Christoffer upon the new material became respondent's witness and was therefore subject to impeachment on such matter. But for reasons heretofore mentioned, respondent did not exceed the limits of proper cross-examination. To allow the introduction of such document by defendants would have been to impeach their own witness which as above shown was not permissible in the absence of a showing of surprise. The contents of the paper were hearsay and could not have been admitted as proof of the facts contained therein.

The Allegations of Malicious Prosecution are Supported by the Evidence.

[16-18] Appellants contend that the proof does not correspond with the allegations of the count for malicious prosecution. They say that it is alleged that defendant Mooney falsely caused plaintiff to be arrested for drunkenness and caused a complaint to issue charging him with that offense whereas the evidence shows that the criminal complaint was issued by the city attorney and was prosecuted by city officials. However, it is not alleged that defendant Mooney personally made the arrest or caused the complaint to issue and there is evidence to support an implied finding that Mooney gave the information to the prosecuting authorities in such manner that in the orderly course of police procedure respondent was arrested and the criminal complaint resulted. Such proof is sufficient to support the judgment for malicious prosecution. Blancett v. Burr, 100 Cal.App. 61, 62, 279 P. 668. In the latter case it was held unnecessary to find against a defendant that he personally made the affidavit required for the issuance of a complaint in order to make him liable for a malicious prosecution. The test is whether a defendant in such an action was actively instrumental or was the proximate cause of maliciously putting the law in motion. Collins v. Owens, 77 Cal.App.2d 713, 719, 176 P.2d 372. That Mooney was the inducing cause of the arrest and prosecution is shown by the facts that he called the police after he and the special officers had attacked respondent and that he told them when they arrived that respondent had caused a disturbance and was under the influence of liquor. After that, respondent was taken by Officers Lloyd and Bean to the receiving hospital, thence to the jail. There he was booked and Officer Lloyd made the arrest report. In that writing he related plaintiff's condition as of the time of the booking. A criminal complaint was issued by the city attorney's office on the basis of the arrest report which is standard police procedure. Appellants contend that such facts show that Mooney made no arrest and did not participate in the prosecution; that an arrest for a misdemeanor may be made without a warrant at night only when committed in the presence of the arresting officer. Also, they contend that it is presumed that an official duty has been regularly performed and that such presumption has not been rebutted. Code Civ.Proc. § 1963, subd. 15. But the evidence supports the finding that Mooney instigated the prosecution without probable cause through his friend, Officer Bean, for the purpose of concealing the attack by Veitch and Haley on respondent and as a means of discouraging respondent from pressing a civil action for the

battery. That evidence is substantially as follows.

Mooney was friendly with the police officers; had played golf frequently with Bean and had visited in his home; he called the police station specifically requesting Bean and Lloyd to come. He had knocked respondent down to prevent him from running away while they were waiting for the police. He testified that he called the officers because he felt that plaintiff required medical attention, notwithstanding he had first-aid equipment at the club. Also, he could have called the Hollywood jail for assistance without calling specifically for Bean. It was not difficult for the jury reasonably to infer that Mooney's statement to his police friends that respondent was under the influence of liquor was made for the purpose of inducing a prosecution of respondent. Several days thereafter Mooney inquired of Bean what had been done with respondent and later inquired as to the outcome of the trial.

Officer Haynes of the city attorney's office issued the complaint on the basis of the arrest report of Bean and Lloyd. The report stated that plaintiff had a cut on his chin from unknown causes; had been drinking; his gait and speech were fair; attitude cooperative; eyes watery; face pale; coordination good. The name *Palladium* did not appear in any report. Medical and arrest reports contained statements of the lacerations but made no reference to respondent's broken teeth. Mooney testified that he did not call an ambulance because respondent was drunk, but that he had brought respondent back onto the club property in order to give him medical treatment. However, the latter did not receive first-aid at the Palladium.

Appellants contend that Lloyd alone was responsible for the arrest report. But Lloyd testified that it was made on behalf of both officers and he admitted that respondent had informed him that he had been struck by some one. While Bean and the physician at the receiving hospital testified that respondent was belligerent and had to be held down for treatment, Lloyd testified that he was cooperative. While the words "too drunk" had been written on the fingerprint identification sheet over the line for respondent's signature, Lloyd testified that respondent could have written his name, and that he had been told of respondent's broken teeth. The latter fact did not appear in the report. While the physician testified that respondent had a strong alcoholic breath, both Veitch and Haley testified they had noticed none or only a faint odor. The witness at the cafe where respondent ate dinner detected no alcohol on his breath. Although the cashier at the club testified that respondent's speech was somewhat thick, yet both Haley and Mooney understood him perfectly. There is substantial evidence that Lloyd, Bean, jailer Reed and the doctor had been well acquainted for sometime and that the three officers were on friendly terms with Mooney. From the foregoing testimony the presumption was reasonably overcome in the minds of the jury that the officers performed an official duty.

The Evidence Reasonably Warrants the Award of $2000 Punitive Damages Against the Corporate Defendant.

[19-21] Appellants contend that there is no evidence of any ratification by the employer of the acts of its employees. In support of such contention they cite Edmunds v. Atchison, Topeka & Santa Fe R. Co., 174 Cal. 246, 249, 162 P. 1038, and Foley v. Martin, 142 Cal. 256, 71 P. 165, 75 P. 842, 100 Am.St.Rep. 123. These authorities lay down the general rules with reference to the principal's knowledge of the acts of his agent and of his having sufficient opportunity to investigate after gaining knowledge. In both cases proof of ratification by the employer was attended by showing his retention of the employee. In the instant case Mooney was assistant manager of the Palladium and in complete charge on the night of November 20, 1947, the manager being absent. He testified that he saw Veitch and Haley on the Argyle sidewalk and a fight was in progress. Mooney himself knocked the respondent down. Officer Bean testified that Mooney told him of what Sandoval was supposed to have done. Veitch testified that he had told the manager what

had happened. Haley testified that neither Mooney nor the manager had reprimanded or criticized him. Haley continued in the employment of the Palladium for about one year after the incident, and Veitch was still in its employ at the termination of the trial. Such evidence was sufficient to warrant the jury's deduction that Mooney knew what had happened to respondent and that as a consequence his principal, the Palladium management, had ample opportunity for a full investigation. The retention of the employees after full knowledge of the facts, after respondent had been acquitted of the charge of drunkenness, amply supports the inference of ratification. McChristian v. Popkin, 75 Cal.App.2d 249, 256, 171 P.2d 85. The award of punitive damages against corporate defendant is not unreasonable in the light of such evidence. The facts that it operates a popular rendezvous for pleasure seekers in one of the most popular sections of Los Angeles, has two entrances, employs a manager, assistant manager and special officers to preserve decorum are sufficient evidence of the corporation's wealth to warrant a $2000 fine for a malicious and unwarranted battery of a peaceable citizen.

No Error in the Instruction With Reference to Intoxication.

[22-24] Appellants criticize the following instruction: "The proof that a person has partaken of intoxicating liquor is not in itself proof of intoxication or that a person is under the influence of intoxicating liquor." Appellants contend that thereby the court "instructed the jury as a matter of law that proof of consumption of intoxicating liquor does not establish intoxication or that the consumer was under the influence of liquor." But just before the quoted instruction was given, the court advised the jury as to what is meant by being under the influence of intoxicating liquor and also immediately after the quoted instruction the court stated to the jury that whether a person is intoxicated is a question of fact to be determined upon all the evidence in the case. In addition thereto the jury were directed to consider all the instructions as a whole and to regard each in the light of all the others. A reasonable interpretation of the quoted instruction is that the mere fact that a person has consumed alcoholic beverage is not of itself proof of intoxication. The jury having heard the instruction are deemed to have understood and applied it to the evidence. Henderson v. Los Angeles Traction Co., 150 Cal. 689, 697, 89 P. 976. The instructions as a whole should be given a reasonable interpretation and the words employed will be construed in accordance with their natural and ordinary meaning. Barlow v. Crome, 44 Cal.App.2d 356, 361, 112 P.2d 303.

The Instruction on Probable Cause Was Not Erroneous.

[25] Appellants assign the following instruction as prejudicial error: "In determining whether there was probable cause for the defendant Mooney to instigate or cause the prosecution of the plaintiff—if he did—you are instructed that before probable cause can be said to exist, it is not only necessary that you find from the evidence that the defendant Mooney had a suspicion that the plaintiff was drunk or intoxicated, but you must also find from the evidence that such a suspicion, if any, was founded upon circumstances sufficiently strong to warrant an ordinarily prudent person in believing that the plaintiff was drunk or intoxicated. If the circumstances were not sufficiently strong to warrant an ordinarily prudent person in the belief that the plaintiff was drunk or intoxicated, then there was a lack of probable cause for the prosecution of the plaintiff, if any."

Appellants contend that such instruction is contrary to law, citing Grant v. Moore, 29 Cal. 644, 655 and Brock v. Southern Pacific Co., 86 Cal.App.2d 182, 194, 195 P.2d 66. They assert that the burden rested upon respondent to prove want of probable cause, citing Galloway v. United Railroads of San Francisco, 69 Cal.App. 770, 774, 232 P. 491, 493. The latter case was an action for assault and battery in which the defendant pleaded self-defense. The following instruction was there under consideration, to wit, "before you can render a verdict against the defendant the evidence must satisfy your minds by a preponderance thereof. * * * that the act * * * was not done in lawful defense of [the] person." In holding such instruction erroneous, the court said that the effect of the instruction was that the jury were advised that the burden of proof was on the plaintiff, contrary to law. Although other instructions correctly advised the jury the quoted passage simply created a clear conflict in the instructions. Appellants here admit that the jury were properly instructed on the burden of proof but contend that the quoted instruction creates a conflict and is therefore reversible error. But the Galloway decision is not controlling. Much stronger language was used there than in the instruction here under consideration. The Galloway jury were instructed "before you can render a verdict" and "the evidence must satisfy your minds by a preponderance thereof." Such phrases are of doubtful virtue and are not to be found in the quoted instruction on probable cause. Furthermore, as the court pointed out in the Galloway case, instructions were "hopelessly contradictory and conflicting," and on one occasion the jury were told that it could bring in a verdict for either party on the same state of facts in regard to which the instructions were directly opposite. In the case at bar, the jury were instructed fully as to the meaning of "preponderance of the evidence" and that the burden of proof was on the plaintiff. In Burke v. Watts, 188 Cal. 118, 204 P. 578, 583, the jury were instructed that "if you find * * * the defendant * * * communicated to the district attorney * * * all of the material facts known to him * * * and then acted upon the advice of the district attorney, the presumption of malice and want of probable cause is rebutted." The defendants there contended that the instruction implied that there was a presumption of malice. But the court rejected this contention notwithstanding the instruction standing alone might tend to convey an erroneous impression to the jury as prior instructions had repeatedly stressed that the burden was on the plaintiff to prove want of probable cause and malice and that therefore the defendant had suffered no prejudice.

Formula Instruction Not Error.

[26] The following formula instruction was given: "If you find from the evidence that the defendant Mooney caused or instigated the prosecution of the plaintiff on a charge of being drunk or intoxicated, and at that time the defendant Mooney did not have a reasonable ground of suspicion, based upon circumstances sufficiently strong to warrant an ordinarily prudent person in the belief that the plaintiff was drunk or intoxicated, then I instruct you that there was a lack of probable cause for the prosecution of the plaintiff; and if you further find from the evidence that the defendant Mooney acted maliciously in causing the prosecution of the plaintiff, if any, then your verdict must be for the plaintiff and against the defendant Mooney on the alleged malicious prosecution cause of action." Appellants assign this instruction as prejudicial in that it incorrectly directed a verdict since it fails to contain the essential factor which would have precluded recovery by respondent. The absent factor is, they say, that if the jury found that the plaintiff was guilty of the crime charged in the criminal proceedings plaintiff could not recover even though the elements set forth in the instruction were all present. Citing Mazzotta v. Los Angeles Railway Corporation, 25 Cal.2d 165, 170, 153 P.2d 338, in which it was said that a formula instruction may be justified only where it contains all the elements essential to recovery and the absence of any one element may not be cured by the fact that other instructions state the omitted factor. They argue that under the instruction as given if it had been found that Mooney did not have probable cause to investigate respondent's arrest and prosecution even if he had been guilty of intoxication he could recover. Such, they contend, is not the law. Also, they contend that the guilt of the plaintiff in an action may be established in the civil suit and that such guilt is a bar to recovery regardless of a prior acquittal,

citing Restatement of Torts, section 657; Illinois Central Railway Co. v. Anderson, 206 Ky. 600, 268 S.W. 311; Bacon v. Towne, 4 Cush. 217, 58 Mass. 217, 241; Mack v. Sharp, 138 Mich. 448, 101 N.W. 631, 5 Ann.Cas. 109; Sears v. Hathaway, 12 Cal. 277.

[27] Sears v. Hathaway, involving a criminal charge brought by the defendant, was dismissed upon a technicality. The court there said that where the evidence in the civil suit showed plaintiff to be morally guilty he could not recover. But the rule laid down by Prosser on Torts, page 869, is that proof of guilt of the plaintiff is an absolute defense. There was no error in the formula instruction. When read with the entire charge as a whole it is seen that the interests of the defendants were protected. The jury were advised that they could not infer want of probable cause from the acquittal in the criminal action; that whether plaintiff was drunk or not was a question of fact for their determination from all the evidence. Carney v. RKO, Radio Pictures, Inc., 78 Cal.App.2d 659, 667, 178 P.2d 482. In the Carney case it was said that the formula instruction was to be considered not separately but as a part of the entire charge. It has now become the established rule that if an element omitted from the ideal formula instruction is fully covered by other instructions and the jury was not misled, the omission of the one element is not prejudicial. Dawson v. Boyd, 61 Cal.App.2d 471, 483, 143 P.2d 373; Portman v. Keegan, 31 Cal.App.2d 30, 36, 87 P.2d 400.

The Damages Are Not Excessive.

[28] Under the proof it cannot be reasonably said the compensatory damages awarded for the battery of respondent are excessive. It is established that Veitch and Haley forced respondent from the entrance to the Palladium out to Argyle street holding his arms up and behind his back; Veitch struck respondent twice in the mouth with brass knuckles while Haley held the victim; while respondent was on the ground Veitch screamed at and cursed him and kicked all parts of his body for four or five minutes; both men kicked and beat respondent and forced him to accompany them to the rear of the Palladium; respondent was rendered unable to walk without assistance; he was thrown face downward to the ground. After he had been released from jail his appearance was as if he had been in an accident and he was barely able to speak. The physician who rendered him first aid testified that he had multiple bruises and lacerations, swollen lips and jaw and tender Adam's apple; neck movements restricted 50 per cent; bruises on his body; two upper front teeth broken. At the time of his examination respondent appeared to be suffering severe pain in his throat and was nervous and upset. Thirteen months after receiving the injuries there was a definite tenderness of the body and he had a smooth pale scar one inch by three-sixteenths inch on his face for a permanent affliction. On the night of the assault he could not sleep nor eat; the use of his wrist was restricted for five months; he could not sing for six or eight months; he could not shave normally for four to five months; at the trial he was still nervous and upset and had an intermittent twitching in his back. In addition to the physical injuries, pain and suffering and deformities caused respondent he suffered a profound emotional upset and a disruption of the nervous system, which are serious factors that lend support to a judgment where it is attacked on the ground of an excessive award. It is a scientific truism that the extent of personal injuries cannot be measured solely by objective signs. While traumatic injuries may leave few or no outward signs of bruises and contusions, yet a severe concussion of the brain or "injury to the nervous system may result in far greater or more lasting pain and disability than do many types of injuries which are plainly visible." Deevy v. Tassi, 21 Cal.2d 109, 120, 130 P.2d 389; Coleman v. Galvin, 66 Cal.App.2d 303, 305, 152 P.2d 39, 40; Johnson v. Pearson, 100 Cal.App. 503, 506, 280 P. 394.

[29] Moreover, mental suffering will vary in every case with the nervous tem-

perament of the individual. Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 512, 111 P. 534, 139 Am.St.Rep. 134, 31 L.R.A.,N.S., 559. The evidence shows that respondent was a musician and a singer with a highly emotional temperament. When he first viewed his face in the mirror at the hospital he wept bitterly. A dentist testified that he made two sets of caps for respondent's teeth for the reason that a porcelain crown can easily be fractured and such an incident would be highly embarrassing to respondent if unable immediately to replace them while engaged in his occupation. The manner of committing an injury may be such that the principal basis of damages is injury to the feelings. Therefore, when a person of a sensitive nature is brutally beaten the wrong is a shock to the moral sensibilities and tends to vex, disgrace and humiliate the injured party and he experiences extreme fear and emotional disturbance.

There is no showing of passion or prejudice. The jury were fully instructed as to their proper duty and for over four hours they deliberated and several times returned to the court for further instruction and clarification.

[30] The reviewing court is limited in its authority to interfere with the amount of damages awarded for personal injuries. The power to alter the amount exists only when the facts are such that the excess clearly appears as a matter of law or suggests at first blush passion, prejudice or corruption on the part of the jury. Brown v. Boehm, 78 Cal.App.2d 595, 596, 178 P.2d 49; Lahti v. McMenamin, 204 Cal. 415, 419, 268 P. 644.

[31] In support of their contention that the award of $25,000 is excessive compensation for the personal injuries suffered by respondent, appellants cite O'Donnell v. Excelsior Amusement Co., 110 Cal.App. 685, 294 P. 737, 295 P. 86; Robbins v. Roques, 128 Cal.App. 1, 7, 16 P.2d 695; Bellman v. San Francisco High School District, 11 Cal.2d 576, 81 P.2d 894; Mudrick v. Market Street Railway Co., 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533; Hallinan v. Prindle, 17 Cal.App.2d 656, 62 P.2d 1075; Foshee v. Wolters, 86 Cal.App.2d 766, 195 P.2d 930; Kambourian v. Gray, 81 Cal.App.2d 783, 185 P.2d 27; Mondine v. Sarlin, 11 Cal.2d 593, 81 P.2d 903; Gackstetter v. Market Street Ry. Co., 10 Cal.App.2d 713, 52 P.2d 998, and others. But they are either older cases when the price of money was not a factor or they were purely negligence actions or otherwise distinguishable and do not warrant a reduction of the judgment.

[32, 33] Finally, appellants contend that the award of $10,350 as compensatory damages in the malicious prosecution action is excessive. The facts are that plaintiff was restrained of his liberty by his arrest at the Palladium, conveyed in a patrol car to the receiving hospital from which after treatment he was lodged in the city jail for two hours where his fingerprints were taken by the police. On the following day he was arraigned in a court whose clerk had known respondent from high school days. He later stood trial for two days before a jury, all of which humiliated him, to say nothing of the ignominy he suffered by having his wife appear and testify at the trial. The jury is not only the constitutional tribunal for the appraisal of the damages suffered by a litigant, but also by tradition and reason it is the universally acceptable body for determining the value of pain, anguish, mortifiation and chagrin, the value of loss of liberty and annoyance and of injury to reputation. Unless they be misled by incompetent evidence or by inflamed passion, their verdict as approved by the trial court constitutes the findings and is a firm support for the judgment.

In Collins v. Jones, 131 Cal.App. 747, 22 P.2d 39, Collins was awarded $10,000 as damages for having been committed for a psycopathic examination on defendant's charge of insanity. In Russell v. Dennison, 45 Cal. 337, tried in 1873, the plaintiff was allowed $3,500 for being confined in jail five days. Decisions cited by appellants on the issue of a reduction of the amount of the award suggests no extreme variance from the judgment in the cases of Collins and Russell, supra. But in Carroll v. Pacific Coast Automobile Ass'n, 123 Cal. 568, 11 P.2d 660, $5,000 was awarded for being prosecuted on an embezzlement charge which was dismissed at the preliminary hearing. In Diggs v. Arnold Bros., 132 Cal.App. 518, 23 P.2d 71, plaintiff was awarded $3,000 for having been accused of the theft of an automobile. In Singleton v. Singleton, 68 Cal.App.2d 681, 157 P.2d 886, $2,500 was allowed the plaintiff for a malicious charge of grand theft and ten hours in jail and a dismissal at the preliminary examination.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.

CALIFORNIA REPORTER

220 PACIFIC REPORTER

SECOND SERIES

35 Cal.2d 594

Ex parte VALLINDRAS.

Cr. 5116.

Supreme Court of California, in Bank.

June 30, 1950.

Proceeding in the matter of the application of John A. Vallindras for a writ of habeas corpus. The Supreme Court, Edmonds, J., held that imprisonment under order adjudging defendant in contempt of court for willful refusal to pay alimony and support money and committing him to county jail until an unspecified sum should be paid was illegal since order did not meet statutory mandate.

Petitioner discharged.

Prior opinion see 217 P.2d 56.

Divorce 🔑269(13)

Imprisonment under order adjudging defendant in contempt of court for willful refusal to pay alimony and support money and ordering him imprisoned in county jail until unspecified sum should be paid was illegal, since order did not comply with statutory mandate that where a person is to be imprisoned until he performs a certain act, the act must be specified in warrant of commitment. Code Civ.Proc. § 1219.

◆

G. C. Ringole, San Francisco, for petitioner.

Raymond D. Williamson and Vincent Mullins, San Francisco, for respondent.

EDMONDS, Justice.

In an action for divorce, John A. Vallindras was ordered to pay certain amounts for the support of his wife and children and $100 as attorney's fee. Upon an affidavit of his wife, alleging that he had not complied with these requirements, an order to show cause issued. Following several hearings, Vallindras was committed to the county jail. The present proceeding in habeas corpus was brought to obtain his release from that imprisonment.

At the hearing before this court, the Sheriff of the City and County of San Francisco produced an original order, dated April 10, signed by a Judge of the Superior Court, reciting that Vallindras, "having been heretofore adjudged guilty of contempt * * * and ordered to pay $250.00 by this date and said sum not being paid, and the said defendant having admitted that he was in default of the order of said Court heretofore made herein, and the Court having found the said defendant to be in contempt for his wilful failure to pay alimony, and support money for the maintenance of the minor child(ren) of the parties hereto, accruing to the date of the making of plaintiff's affidavit for Order to Show Cause in re contempt, in the amount of ——— and the Court further finding that defendant had and has the ability to pay the said sum as aforesaid and to purge himself of said contempt by complying with said order(s), * * * and this Court having on the 10 day of April, 1950, by its order then duly entered, adjudged and decreed that the said plaintiff, John A. Vallindras, was guilty of contempt of said Court in his wilful refusal and failure to comply with the said order(s) of this Court, he having the ability and means to comply therewith, did order that the said defendant, John A. Vallindras, be punished for his said contempt by imprisonment in the County Jail of the City and County of

San Francisco, there to remain until such time as he shall comply with the decree and order of this Court to pay to the said plaintiff the sum of ——— as aforesaid,

"Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed that the plaintiff, John A. Vallindras, is in contempt of this Court, and the Sheriff of the City and County of San Francisco is hereby ordered to take said defendant into custody * * * to be imprisoned in the County Jail of the said City and County of San Francisco until the sum of ——— shall have been paid * * *."

Counsel agree that neither this order, nor a similar one dated March 29, upon which Vallindras was imprisoned and later released, was filed with the clerk of the superior court as required by section 668 of the Code of Civil Procedure. But regardless of the court's failure to file these judgments and other deficiencies in the procedure leading to the imprisonment of Vallindras, the order of April 10th does not meet the law's requirements. It declares that he shall be punished for his contempt by imprisonment in the county jail until he has paid to his wife "the sum of ———". The sheriff is ordered to take Vallindras into custody to be imprisoned "until the sum of ——— shall have been paid". However, the order fixes no amount which Vallindras must pay to purge him from contempt and secure his release.

Section 1219 of the Code of Civil Procedure provides that when a person is to be imprisoned until such time as he shall perform a certain act, "* * * the act must be specified in the warrant of commitment." As in the case of In re Wells, 29 Cal.2d 200, 173 P.2d 811, the order upon which Vallindras is held by the sheriff does not meet this statutory mandate.

The petitioner is discharged.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

---

35 Cal.2d 577

HARD v. PLUMAS COUNTY et al.

Sac. 5976.

Supreme Court of California, in Bank.

June 29, 1950.

Rehearing Denied July 27, 1950.

Action by Chester Hard against County of Plumas, a political subdivision of the State of California, and others, to restrain defendants from proceeding with a proposed project consisting of resurfacing a county highway under the supervision of E. G. McLain without calling for bids or letting a contract. The Superior Court, Plumas County, James O. Moncur, J., sustained defendants' demurrer to the complaint and rendered a judgment of dismissal, and the plaintiff appealed. The Supreme Court, Carter, J., held that the county supervisors are arbiters of the competency of a person chosen to act as county road commissioner and that he need not be a registered civil engineer.

Judgment affirmed.

Edmonds, Traynor, and Spence, JJ., dissented.

Prior opinion, 210 P.2d 58.

1. Highways 🔑112

Under the statute providing that bids for work on county roads may be rejected and work done under supervision of "road commissioners" in whose district road is situated, phrase "road commissioners" must be read after 1947 to mean a single commissioner for the entire county. Streets and Highways Code, §§ 1029, 1070–1075, 2006.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Road Commissioners".

2. Highways 🔑93

Under the statute providing that county road commissioner may be either a registered civil engineer or a person found to be competent by county board of supervisors, qualifications of commissioner are left to discretion of the board. Streets and Highways Code, §§ 1070–1075, 2006.

3. Highways 🔑112

Under the statute providing that in county employing competent engineer as road commissioner, Board of Supervisors may have work upon highways done under supervision of such engineer without letting a contract, commissioner appointed by county Board of Supervisors and found by board to be qualified and competent need not be a registered civil engineer. Pol. Code, § 2640; Business and Professions Code, § 6700 et seq.; Streets and Highways Code, §§ 1029, 1070–1075, 1331, 2006, 2007, 2009.

◆

Gardiner Johnson and Thomas E. Stanton, Jr., San Francisco, for appellant.

Frank H. McAuliffe, District Attorney, Quincy, McAllister & Johnson and Walter C. Frame, Sacramento, for respondents.

J. F. Coakley, District Attorney (Alameda), Oakland, Richard J. Moore, Deputy District Attorney, Berkeley, Harold W. Kennedy, County Counsel (Los Angeles), Los Angeles, Howard Campen, County Counsel (Santa Clara), San Jose, Robert O. Curran, District Attorney (Mariposa), Mariposa, Louis B. DeMatteis, District Attorney (San Mateo), Redwood City, Leroy McCormick, County Counsel (Tulare), Visalia, Charles J. McGoldrick, District Attorney (Somoma), Santa Rosa, J. Francis O'Shea, District Attorney (Sacramento), Sacramento, Frederick W. Reyland, Jr., County Counsel (Stanislaus), Oakland, Richard W. Stevens, District Attorney (San Benito), Hollister, M. Arthur Waite, District Attorney (Ventura), Ventura, and William R. MacDougall, Sacramento, amici curiæ on behalf of respondents.

CARTER, Justice.

Plaintiff, a taxpayer and resident of defendant county, sought an injunction restraining defendants from proceeding with a proposed project consisting of resurfacing a county highway under the supervision of E. G. McLain, the county road commissioner, without calling for bids or letting a contract. The project will cost over $3,000. McLain was appointed by the county board of supervisors to the position of road commissioner and was found by the board to be "qualified and competent" to handle the road work of the county. He is not, however, a registered civil engineer under the laws regulating that vocation. Bus. & Prof. Code, sec. 6700 et seq. Defendants' demurrer to plaintiff's complaint setting forth the foregoing facts was sustained and judgment of dismissal followed.

The controversy arises from plaintiff's assertion that no road work, the cost of which will exceed $3,000, may be done by a county except by contract let to the lowest bidder unless it is done under the supervision of a road commissioner who has qualified as a registered civil engineer under the law of this state.

[1] One of the methods, authorized by the Legislature, under which a county may perform work on its roads is set forth in sections 1070 to 1075 of the Streets & Highways Code. Thereunder the board of supervisors may determine by a four-fifths vote that public convenience requires the work to be done, and that the expense thereof is too great to be met by the funds of the road district where the work is to be done, and, therefore, such work may be done and charged to the district fund, general fund, or general road fund. Sts. & Hy. Code, sec. 1070. When the board finds that the estimated expense of the work exceeds $3,000, surveys, plans, and specifications, etc., for the work shall be made. Id., sec. 1071. Upon receipt of the surveys, etc., the board shall call for bids for the work. Id., sec. 1072. The contract shall be let to the lowest bidder unless the board finds all of the bids too high and that the work can be done more cheaply by "day labor". In that case, all bids may be rejected and the work done under the supervision of "road commissioners" in whose district the road is situated. Id. sec. 1073. Presumably the road commissioner*s* referred to must now be read to mean a single commissioner for the entire county, inasmuch as a single commissioner system was established in 1947. Stats.1947, Ex.Sess. Ch. 11, secs. 1 and 9.2; Sts. & Hy. Code, secs. 1029, 2006. Apparently the road work here does not come under the provision of section 1073 for it is alleged that the work is to be done without first calling for bids and is pursuant to section 1075. Where the board finds

the work can be done for $3,000, or less, it may let a contract therefor without bids or may buy the materials and do the work by day labor. Id. sec. 1074. Then comes a general provision dealing with letting the work by contract and whether bids must be called for. "In any county employing a competent engineer as road commissioner, the board may have *any work* upon county highways done under the supervision and direction of such engineer. Such work may be done: (a) By letting a contract covering both work and material. In such event the contract shall be let to the lowest responsible bidder as provided in this article. (b) By purchasing the material and letting a contract for the doing of the work. (c) By purchasing the material and having the work done by day labor." Id. sec. 1075. [Emphasis added.] It thus plainly appears that the quoted section qualifies the requirements of the previous sections that, under certain conditions, the work must be done under a contract and let to the lowest bidder. Under section 1075, the work, *regardless of its cost,* may be done without letting a contract for all or any part of it, and hence necessarily eliminating the necessity for bids. Id. sec. 1075(b), (c). If, however, it is decided that both labor and materials are to be included in one contract to be let, then there must be a call for bids. Id sec. 1075(a).

The condition under which the procedure under section 1075 may be followed and thus avoid the requirement of advertising for bids is that the county road commissioner be a "competent engineer". That provision in section 1075 is the same as it was when made a part of the Streets & Highways Code in 1935, Stats.1935, Ch. 29, and prior thereto. Pol.Code, sec. 2640, prior to 1935. In 1947, the Legislature adopted a new provision stating that counties must employ a single road commissioner for the entire county, and as to his qualifications, stated that he "shall be a registered civil engineer except that an unregistered person may be employed as road commissioner if approved by the board of supervisors as qualified and competent to handle the road and highway work of the county. * * * The county surveyor may be appointed, if a registered civil engineer, or if found by the board of supervisors to be properly qualified. * * *" Sts. & Hy.Code, sec. 2006; Stats.Ex.Sess.1947, Ch. 11, sec. 1. It is upon that new section that plaintiff bases his claim that work cannot be done without a contract let pursuant to a call for bids under section 1075 unless the road commissioner is a registered civil engineer, and the attorney general rendered an opinion to that effect in 1948. 11 Ops.Atty. Gen. 93. We cannot agree with that contention or opinion.

[2] Section 2006 provides that a road commissioner may be either a registered civil engineer *or* a person *found to be competent by the board of supervisors.* Thus the qualifications of a road commissioner is left to the discretion and determination of the board. One, but only one, absolute test of competency is registration as a civil engineer. Comprehensive regulations are established for the registration or licensing of persons practicing civil engineering. Bus. & Prof.Code, sec. 6700 et seq. Otherwise, the qualifications determined by the board are the test and not those established by the state law, providing for the registration of civil engineers, or its administrators. It is clear, therefore, that the board of supervisors are the arbiters of the competency of the person chosen to act as county road commissioner to handle the road work of the county.

[3] Fitting that conclusion into section 1075, it must mean, together with other factors, that a person who is found competent as road commissioner by the supervisors is also a "competent engineer". It is to be noted that when section 2006 was adopted, section 1075 was not amended to provide for a "registered civil engineer" being selected as road commissioner. The term "competent engineer" was retained, and at the same time section 2006 was adopted, section 1331 was amended and provided that the road commissioner should have charge of bridge construction if a "competent engineer", nothing being said about such road commissioner being a "registered" civil engineer. Furthermore, in the situation where bids have been called

for and rejected as "too high", the work may be done under the supervision of a road commissioner. Sts. & Hy.Code, sec. 1073, supra, and certainly such commissioner need not be a registered civil engineer under section 2006, yet he will be performing precisely the same supervisory engineering work as when the work is done under section 1075. Since county road work is generally done under the supervision of a road commissioner appointed by the board of supervisors, Sts. & Hy.Code, secs. 2006, 2007, 2009, it would seem logical that his competency should be ascertained by the board. It is not to be supposed that in the single instance of work referred to in section 1075, he must be a registered civil engineer and in all others not.

Much stress is laid upon the claim that if nonregistered persons are permitted to supervise the work under section 1075 of the Streets & Highways Code, they will be practicing civil engineering in violation of the state law providing for the licensing of civil engineers, Bus. & Prof.Code, sec. 6700 et seq., and thus the statutes should not be construed to permit such persons to do so. There are many answers to that assertion. In addition to the factors heretofore discussed, including the failure of the Legislature to require that road commissioners be registered civil engineers, and in fact particularly refraining from adopting such requirement, it is pertinent that, although the licensing act refers to persons engaged in a public or private capacity, it was adopted prior to section 2006 of the Streets & Highways Code which clearly places in the board of supervisors the power to fix the qualifications of road commissioners. This evinces a clear intent that their qualifications are not those prescribed by the licensing regulations. Indeed, as heretofore seen, if the Legislature intended any such result, they could have said so. Rather, they carefully refrained from going that far. The argument proves too much. If road commissioners for the purpose of section 1075 must be registered civil engineers, then it would mean they would have to be such in all cases. That follows by reason of the broad scope of their duties in road construction and maintenance in addition to those authorized under section 1075. It cannot be supposed that the Legislature in such a devious and uncertain manner intended to require all road commissioners to be registered civil engineers. Indeed, they have declared a contrary intent by vesting in the supervisors the power of determining who is competent for the position of road commissioner without requiring that he be a registered civil engineer. It may well be that the Legislature felt that many rural counties could not obtain the services of a registered civil engineer at the price they could afford to pay their road commissioner. Certainly it was not intended to single out those counties alone as disqualified to proceed under section 1075, which might be the situation if they were required to select a registered civil engineer as their road commissioner.

The judgment is affirmed.

GIBSON, C. J., and SCHAUER, J., concur.

SHENK, Justice.

I concur in the judgment of affirmance and in the reasons on which it is based, with the following additional observations.

Section 1075 of the Streets and Highways Code has been the law of this state since 1921. The statutory requirements for registration and licensing of civil engineers did not appear until 1929. Before 1929 the term "competent engineer" was therefore not used to designate a "registered engineer." After 1929 a registered engineer might well be deemed a competent engineer, but both before and after 1929 an engineer could in fact be a competent engineer and not be registered. The requirement of registration of civil engineers is purely statutory and applies generally to those who desire to practice that profession. Likewise the requirements with reference to the construction of roads and highways are matters of legislative control.

In 1947 the legislature enacted section 2006 of the Streets and Highways Code. That section provides for the appointment of a single road commissioner in each county and that the road commissioner so appointed be a registered civil engineer, with the specific exception "that an unregistered person may be employed as road commissioner if approved by the board of supervisors as qualified and competent to handle the road and highway work of the county." It is section 6730 of the Business and Professions Code which requires that all who practice or offer to practice civil engineering be registered. This is a general provision. Section 2006 of the Streets and Highways Code as above noted contains the special provision. Under familiar rules of statutory construction the special provision controls the general. Pursuant to the special statute an unregistered person found by the board of supervisors to be qualified and competent to supervise the road and highway work of the county may be employed. The policy and desirability of employing only registered civil engineers in connection with highway construction is for the legislature and not for the courts to determine. The petitioner does not dispute the qualifications of the road commissioner employed in this case on any ground other than that he is not a registered civil engineer. But when he has been appointed as provided in section 2006 of the Streets and Highways Code he is entitled to act and the registration requirements are not applicable to him.

In this case the District Court of Appeal of the Third Appellate District arrived at the same result in a well considered opinion. Hard v. County of Plumas, Cal.App., 210 P.2d 58.

EDMONDS, Justice (dissenting).

Although under section 2006 of the Streets and Highways Code "an unregistered person may be employed as road commissioner if approved by the board of supervisors as qualified and competent to handle the road and highway work of the county", such a person is not "a competent engineer" within the meaning of section 1075 of the same code. To say that an unregistered person employed as a road commissioner has "legal authorization" to practice civil engineering by supervising the building of a highway by day labor seems to be directly contrary to the intention of the Legislature as expressed in the phrase "competent engineer", and to the requirement for the registration of engineers as stated in section 6730 of the Business and Professions Code.

Sections 1070 to 1075 of the Streets and Highways Code provide the method by which a county may perform highway work. When the estimated cost of such work exceeds $3,000, the board of supervisors must direct the preparation of profiles, cross-sections, plans, and specifications, Sec. 1071; publish notices for sealed bids, Sec. 1072; publicly open all bids received and award the contract for the work to the lowest responsible bidder, unless the bids are too high and the work can be done more cheaply by day labor, Sec. 1073. Only if the estimated expense of the proposed project is $3,000 or less may the board of supervisors let a contract for the work without calling for bids, or purchase the materials and do the work by day labor. Sec. 1074.

However, under specified circumstances, section 1075 relaxes the general requirements as to specifications, bids, and contracts for work estimated to cost in excess of $3,000. "In any county employing a competent engineer as road commissioner, the board may have any work upon county highways done under the supervision and direction of such engineer. Such work may be done: * * * (c) By purchasing the material and having the work done by day labor." Sec. 1075.

At the time of the enactment of the statute which is now section 1075 of the Streets and Highways Code, Stats.1921, p. 1683, it is obvious that by the use of the term "competent engineer" the Legislature required some degree or standard of professional ability. As then in effect, section 2640 of the Political Code contained provisions relating to the method of performing road work which were substantially the same as those of sections 1070 to 1075 of the Streets and Highways Code. The last portion of section 2640, after providing for plans and specifications, calling for bids, and letting of contracts, read as follows: "Provided, however, that in those counties employing a competent engineer as road commissioner, the board of supervisors may have any work to be done upon highways of the county done under the supervision and direction of said engineer, either * * * 3. By purchasing the material and having the work done by day labor. * * *"

Although the terms "competent engineer" and "engineer" were used by the Legislature in 1921, it did not set up any professional standard for such person until 1929, when a licensing statute was enacted. Stats.1929, Ch. 801, p. 1645. After 1930, it became "* * * unlawful for any person to practice as a civil engineer in this state, unless such person has been duly registered or specifically exempted as required by the provisions of this act." Stats.1929, Ch. 801, sec. 1, p. 1645. Since that time, the only person who is entitled to practice civil engineering is one who has received a license from the "state board of registration for civil engineers". The fact that only the designated board may authorize a person to practice civil engineering or any of its branches is emphasized by the 1939 enactment of section 6734 of the Business and Professions Code which provides: "No one shall represent himself as, or use the title of, registered civil engineer, or any other title whereby such person could be considered as practicing or offering to practice civil engineering in any of its branches, unless he is qualified by registration under this chapter."

The manifest purpose of the licensing act for civil engineers, now chapter 7 of the Business and Professions Code, is to require that no person may be considered or held out to be such an engineer who has not "* * * been duly registered as required by the provisions of this chapter or specifically exempted therefrom". Bus. & Prof.Code, sec. 6730. It necessarily follows that, at least since 1929, the appointment of a person as road commissioner does not ipso facto give him the status of an "engineer" or "competent engineer" within the meaning of section 1075 of the Streets and Highways Code.

Any doubt concerning the above conclusion was effectively removed by the enactment of section 2006 of the Streets and Highways Code. By that statute the board of supervisors may appoint as road commissioner either a registered civil engineer or a person qualified and competent to handle the county's road work. But the right to appoint an unregistered person does not mean that by doing so the county may authorize road work to be done by day labor which the statute specifically requires may be performed only under the supervision and direction of a competent engineer. Such a construction of the statute would mean that a person who does not have the qualifications entitling him to be registered as a civil engineer, because of his appointment as road commissioner may do those things which are contrary to the public policy of the state.

The Legislature has stated that policy in no uncertain terms. "In order to safeguard life, health, property and public welfare", it declared, "any person, either in a public or private capacity, [with certain exceptions not here applicable] who practices, or offers to practice civil engineering in any of its branches in this State, shall submit evidence that he is qualified to practice, and shall be registered by the board [of Registration for Civil Engineers]." Bus. & Prof.Code, sec. 6730. The wide scope of the legislation is found in another section which reads: "Civil engineering embraces that branch of professional engineering which deals with * * * highways * * * [and] also includes city and regional planning in so far as any of the above features are concerned therein * * *." Bus. & Prof. Code, sec. 6731. In addition to these strict requirements, the Legislature declared that every person is guilty of a misdemeanor who "* * * practices or offers to practice civil engineering in this State according to the provisions of this chapter without legal authorization." Bus. & Prof. Code, sec. 6787.

These statutes are all inclusive. They directly negate any intention to give the county boards of supervisors the power to determine the qualifications of a civil engineer for any purpose, or to divest the State Board of Registration for Civil Engineers of its functions. By their terms, only a county which employs as road commissioner a person who is legally authorized by chapter 7 of the Business and Professions Code to practice civil engineering may construct or repair a county highway by purchasing the material and using day labor if the cost of such work exceeds $3,000, without directing the preparation of plans and specifications and advertising for bids on the project.

For these reasons, I would reverse the judgment.

TRAYNOR and SPENCE, JJ., concur.

Rehearing denied, EDMONDS, TRAYNOR, and SPENCE, JJ., dissenting.

98 Cal.App.2d 292

FRANKLIN v. SUPERIOR COURT IN AND FOR SAN FRANCISCO COUNTY.

Civ. 14435.

District Court of Appeal, First District,
Division 2, California.
July 6, 1950.

Richard J. Franklin, Sr., sought a writ of prohibition to prevent further prosecution of an action in the Superior Court in and for the County of San Francisco, in which he was a defendant and Elsie Barker the plaintiff, on the ground that court had no jurisdiction over his person. The District Court of Appeal, Dooling, J., held that where petitioner came into state and sought custody of his son from maternal grandmother, but spent eight days in state before commencing a habeas corpus proceedings to secure child, reasonable inference was that petitioner's controlling purpose in coming into state was to avoid litigation, and therefore petitioner was not exempt from service of process in another action.

Alternative writ discharged and petition denied.

1. Process 🔑118

Generally, parties, and witnesses coming from outside the state to participate in hearing of litigation in a court of state are exempt from service of process in another action for a reasonable time in coming, attending court and leaving jurisdiction, and this privilege extends to parties plaintiff.

2. Appeal and error 🔑914(1)

In determining whether trial court properly ruled that a party was not exempt from service of process, District Court of Appeal was bound by rule that all intendments are in favor of action of trial court, and that burden is on petitioner to satisfy District Court of Appeal that lower court is acting in excess of its jurisdiction.

3. Process 🔑118

The privilege of exemption from service of process to persons coming into jurisdiction for purpose of attending court does not extend to persons voluntarily coming within jurisdiction of court for purpose of consulting with attorney, investigating transactions, or otherwise attending to matters which may become subject of litigation or which may eventually reach a trial.

4. Process 🔑119

If controlling purpose of a party coming into state is to file an action, and this is done within a reasonable time after arriving, party is exempt from service of process in another action.

5. Process 🔑119

Where petitioner came into state and sought custody of his son from maternal grandmother, but spent eight days in state before commencing habeas corpus proceedings to secure custody, reasonable inference was that petitioner's controlling purpose of coming into state was to avoid litigation, and therefore petitioner was not exempt from service of process in another action.

◆

Cresswell & Davis, Oakland, for petitioners.

Emmett Lucey, J. Joseph Sullivan, San Francisco, for respondents.

DOOLING, Justice.

Petitioner, a resident of Missouri, seeks a writ of prohibition to prevent the further prosecution of an action in the superior court in which he is defendant and Elsie Barker is plaintiff on the ground that the court has no jurisdiction of his person.

Petitioner was married to Elsie Barker's daughter and has by her one son, Richard J. Franklin, Jr. In May, 1948, petitioner's wife took the son to California and the two lived in San Francisco with Elsie Barker until the wife's death on June 15, 1949. Thereafter petitioner made efforts through his attorneys in California to have Elsie Barker deliver the custody of his son to him. Elsie Barker demanded compensation for the support given to the wife and son by her in San Francisco. On September 5, 1949, petitioner came to California. On September 13 petitioner filed a petition for habeas corpus in the superior court to obtain custody of his son and on September 16 the court issued a writ of habeas corpus directing Elsie Barker to deliver the son to petitioner at 5 p. m. on September 17.

Armed with this writ petitioner went to the home of Elsie Barker on September 17 to get his son and while there he was served with a summons and complaint in an action by Elsie Barker to recover from him the reasonable value of the support given by her to the wife and child.

Petitioner appeared specially and moved to quash the service of summons. In his supporting affidavit petitioner averred among other things: "That on September 5, 1949, petitioner entered the State of California for the sole purpose of obtaining custody of his said son and with the intention of instituting whatever legal proceedings as should be required to accomplish this objective; that despite repeated requests the said Elsie Barker failed to deliver over custody of said child to petitioner and petitioner was required to and did file his petition for a Writ of Habeas Corpus * * * on September 13, 1949 * * *." Then follows a recital of the order of September 16 granting the writ, its service on Elsie Barker on September 17 according to its terms and the service of the summons and complaint on petitioner at that time.

[1] It is the general rule that parties and witnesses coming from outside the state to participate in the hearing of litigation in a court of the state are ordinarily exempt from the service of process in another action for a reasonable time in coming, attending court and leaving the jurisdiction; and (while a minority of courts have held otherwise) by the great weight of authority this privilege extends to parties plaintiff. 42 Am.Jur., Process, sec. 144 pp. 125–126; Stewart v. Ramsay, 242 U.S. 128, 37 S.Ct. 44, 61 L.Ed. 192; Diamond v. Earle, 217 Mass. 499, 105 N.E. 363, 51 L.R.A.,N.S., 1178, Ann.Cas.1915D, 984; State ex rel. Coe v. District Ct., 73 Mont. 265, 235 P. 766; Fisk v. Westover, 4 S.D. 233, 55 N.W. 961, 46 Am.St.Rep. 780; In re Healey, 53 Vt. 694, 38 Am.Rep. 713; Sofge v. Lowe, 131 Tenn. 626, 176 S.W. 106; Minch & Eisenbrey Co. v. Cram, 136 Md. 426, 110 A. 204; Moseley v. Ricks, 223 Iowa 1038, 274 N.W. 23. It is petitioner's contention that the facts recited in his affidavit bring him within this rule.

[2] In assaying this claim we are bound by the rule that all intendments are in favor of the action of the trial court and that the burden is on petitioner to satisfy this court that the lower court is acting in excess of its jurisdiction.

Examining petitioner's affidavit with these rules in mind it appears on petitioner's own averment: "That on September 5, 1949, petitioner entered the State of California for the sole purpose of obtaining custody of his said son and with the intention of instituting whatever legal proceedings as should be required to accomplish this objective * * *." It further appears that he was in the state for eight days before filing his petition in habeas corpus, the only explanation for this delay being, "that despite repeated requests the said Elsie Barker failed to deliver over custody of said child to petitioner."

It is a fair inference from these averments that petitioner came to California for the purpose of obtaining the custody of his child from Mrs. Barker without legal action if possible, and of taking legal action if, and only if, his negotiations failed.

[3] The privilege of exemption from service of process which petitioner claims is limited to persons coming into the jurisdiction for the purpose of attending court, attending on the court and leaving. "It is not to be extended so far as to exempt all persons voluntarily coming within the jurisdiction of the court from being served, merely because they may come to consult with attorneys, investigate transactions, or otherwise attend to matters which may become the subject of litigation, or which may eventually reach a trial." 42 Am.Jur., Process, sec. 148, p. 129; 50 C.J., Process, sec. 237, p. 554. "This exemption from service of process is, of course, in derogation of the right which every creditor has to collect his debt by subjecting his debtor to suit in any jurisdiction where he may find him. Since this is so, the privilege should not be extended beyond the reason of the rule upon which it is founded." Murrey v. Murrey, 216 Cal. 707, 710, 16 P.2d 741, 742, 85 A.L.R. 1335.

[4] Petitioner asserts that while he can find no authority for his position the privilege should be extended to a suitor who comes into the state for the purpose of filing an action. If this is his controlling purpose and he files his action with reasonable promptness after arriving in the state this may be so. But here the trial court was entitled to infer that petitioner's primary purpose was to get his son without legal action if possible and only secondarily to resort to the courts if negotiation failed. If Mrs. Barker had delivered his son to petitioner during the eight day period while he was in the state before filing his petition he could not have claimed an exemption on the ground now urged, that he was in the state attending on a court thereof.

[5] The controlling purpose of the visit to the jurisdiction must be the suitor's attendance on the court and, while he may engage in other subordinate activities while in the state, he waives the privilege if he occupies an unreasonable time in coming or going. Gerard v. Superior Court, 91 Cal. App.2d 549, 552, 554, 205 P.2d 109. Here on petitioner's own showing he spent eight days in California before commencing any legal proceedings and the inference is reasonable that his controlling purpose in coming into the state was to avoid litigation if possible, rather than to prosecute it. These factors seem decisive and we need not consider respondent's contention that the subject matter of Mrs. Barker's suit is so intimately connected with the right to custody involved in the habeas corpus proceeding as to bring this case within the rule of Von Kesler v. Superior Court, 109 Cal.App. 89, 292 P. 544.

The alternative writ is discharged and the petition denied.

NOURSE, P. J., and GOODELL, J., concur.

98 Cal.App.2d 305

PEOPLE v. LLOYD.

Cr. 4431.

District Court of Appeal, Second District,
Division 2, California.
July 6, 1950.

Rehearing Denied July 18, 1950.

Hearing Denied Aug. 3, 1950.

Charles Milton Lloyd was convicted of murder in the Superior Court of Los Angeles County, W. Turney Fox, J., and he appealed. The District Court of Appeal, Moore, P. J., held that circumstantial evidence sustained conviction, that jury was properly instructed, and that defendant was not denied due process because of the fact that deputy sheriff who was appointed to guard the jury was not sworn as a bailiff and because jury was separated at hotel where jury went to sleep.

Judgment of conviction and order denying motion for new trial affirmed.

1. Criminal law 🔑407(2)

When police officer accused defendant of murder, a denial of such accusation by defendant was called for.

2. Homicide 🔑250

Circumstantial evidence sustained murder conviction.

3. Criminal law 🔑494

The weight to be given to testimony of experts in a criminal prosecution depends on the reasons that the experts assert.

4. Criminal law 🔑494

A conviction cannot be based on the testimony of experts unless the jury is convinced of the correctness and credibility of the experts.

5. Criminal law 🔑1144(13)

When on appeal the unreasonableness of a verdict is the basis on which a reversal is demanded, the criterion by which the verdict under consideration is to be measured is whether a jury of reasonable men could have derived such verdict, assuming the existence of every fact which could reasonably have been deduced under correct instructions.

6. Homicide 🔑308(5)

Where facts in murder prosecution proved nothing short of murder in the first degree, failure of court to charge on second-degree murder was not error.

7. Criminal law 🔑814(2)

Court in charging a jury should be guided by the facts proved.

8. Homicide 🔑308(5)

If the evidence in a murder prosecution is of such nature as to warrant a verdict for no lesser crime, if defendant is guilty at all, the court should refuse to instruct as to crimes included within first-degree murder.

9. Criminal law 🔑1174(1)

Fact that part of the jurors were placed in custody of a deputy sheriff who had not been sworn as a bailiff to guard them as provided by statute, was not reversible error, where deputy sheriff did not speak in the presence of any member of the jury concerning any fact or evidence presented in the prosecution. Pen.Code, §§ 1128, 1440.

10. Criminal law 🔑1039

Counsel of a defendant has the duty in a prosecution to render such assistance as within his power to enable the court to avoid error, and when counsel remains silent while the court does or allows an unauthorized act, counsel waives the right of reversal by reason thereof, especially in the matter of the court's failure to swear a bailiff to attend a jury during its deliberations. Pen.Code, §§ 1128, 1440.

11. Constitutional law 🔑250

Defendant in murder prosecution was not deprived of equal protection of the law because of separation of jury when jury was required to separate into two groups in order to reach 11th floor of hotel, and when women jurors were taken to separate rooms for sleeping. Pen.Code, § 1440.

12. Criminal law 🔑1163(6)

The presumption of prejudice by reason of a separation of jurors during their deliberations is rebutted when the prosecution shows by satisfactory evidence that no prejudice has resulted.

◆

Richard E. Erwin, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Gilbert Harelson, Deputy Attorney General, for respondent.

MOORE, Presiding Justice.

Having been convicted of murder upon purely evidential circumstances appellant demands a reversal upon the grounds of insufficiency of the proof, error in not properly instructing the jury, denial of due process and equal protection of the law under state and federal constitutions. While serious questions are raised as to the evidence of both motive and identity, the question for decision is whether the jury could fairly have convicted the accused upon the facts established at the trial

Deceased, Faxon A. Robinson, resided alone in a cottage on Clark street in El Monte, a suburb of Los Angeles. He spent his days in bookmaking, i. e. selling bets on horse races and had his headquarters at Gay's Inn, a saloon in El Monte, where he conducted operations daily from 11 a. m. to 7 p. m. His habit of carrying on his person from $200 to $400 was known to appellant who had been his friend for about a year prior to February 18, 1949, and who had from time to time placed bets with and borrowed sums of money from him. On the evening of the day last mentioned, deceased left Gay's about 6 p. m., dined at a nearby cafe with the witness Letha Toth who accompanied him in a taxicab to his home about a mile distant. He was drunk upon their arrival. She observed him place on the dresser a stack of currency about three-fourths of an inch in thickness, including two $20 bills. Also, he checked up on his day's receipts on a small scratch pad on which he listed four checks, $300 cash, and the figures "$79." Concerning the last item there was no evidential explanation. With Miss Toth's assistance he donned his night shirt, repaired to his bed and was soon in slumberland. Thereupon, his companion took $1.75 of his money; left a note that she had done so; turned off the lights and departed by the back door which she left unlocked. His body was found at 11 a. m. on the following day by Charles Kneedler.

On February 18 appellant was a plumber and was usually employed. He was indebted to Gay's Inn in the sum of $45 and to his employer in the amount of $75. For the preceding week ending February 12 he had received $45.12 as wages. On the afternoon of February 18 he arrived at Gay's Inn about 4:30 o'clock. For about three hours he loitered there in the enjoyment of his cups. During that period he wore blue denim clothes, a jacket and a cap. When he left at 8 p. m. he paid for his drinks with small bills which he removed from a front pocket. He returned at 8:30, sat at the lunch counter, ate and drank until 9:00. He then went out into a cold, foggy night. A figure similar to his was at the scene of the crime shortly after 9 p. m. according to the testimony of a Mrs. Evans who resided in the block adjoining that in which deceased lived. She testified that as she drove north on Clark street she saw a tall, thin man in work clothes walking from the Robinson home across the lawn toward the street; that his build was similar to that of appellant's.

On his return to the saloon about 11:30 his hair hung over his forehead, he wore no cap as he had done prior to nine o'clock; had much dirt on his clothes; "looked like he had been wallowing in the dirt." This, he explained, resulted from his having had trouble with his car in that it would not start. He sat around for a while, drank and paid for drinks with money taken from a wallet carried in his hip pocket. Prior to that time the bartender had never seen him take money from that part of his clothing. The stack of bills removed was three-eighths of an inch in thickness. He paid first with a $20 bill. About 15 minutes later he paid someone a loan and ordered more drinks for several persons present and said, "I am going to have to give you another $20 bill." He left Gay's Inn about 12:15 a. m. and directed his course toward the home of deceased. About 12:40 a. m. an automobile resembling his was parked about 350 feet from the Robinson home.

Approximately 10 a. m. on the 19th witness Kneedler arrived at Gay's saloon for the purpose of placing a bet with Robinson. To calm the fears of Mr. Westerman who had been Robinson's associate, Kneedler drove to the home of deceased and on getting no response to his knocking attempted entrance at the back door. After telephoning to Westerman from a neighboring station he returned to the house, observed the broken screen on the bedroom window open, unhinged and hanging out. On entering the house he found deceased and blood stains in profusion.

The police having been informed arrived at noon and entered through the window at the broken screen, all doors being locked. Officer Ervin found a ring on the finger of deceased, a setting containing no stones, but he observed three small pieces of onyx in the bed covers and a gold initial letter "R" in the bed. On the dresser he found some checks and appellant's watch, but no stack of bills. While the official inspection was in progress Harold Westerman entered. When he thereafter returned to Gay's Inn, appellant said to him, "You rode down to Frankie's house with Harris in my car didn't you?" "Yes," answered Westerman. Then appellant inquired, "Is he dead?" Prior to that dialogue neither Westerman nor Harris had told anyone of the conditions at the Robinson home.

The autopsy disclosed that death was due to a "cerebral hemorrhage and contusion due to multiple fractures of the skull." Such fractures had been caused by more than 30 blows administered by a plumber's auger. The pattern of the head wounds showed that they were caused either by the auger taken from appellant's car or by one identical with it. Also, the ring on Robinson's finger had been struck by appellant's auger. This is an instrument used by appellant in his plumbing trade "for drilling holes through floor and ceiling joints to run 2″ vent pipes." In the car with the auger the officers found a cap and jacket similar to those he wore to work on the preceding day.

Blood was found in several places in appellant's automobile and a large stain on the inside of the door just below the window was human blood. Appellant's cap was "rather dirty and * * * the stain was not covered with dirt, which would indicate that * * * the cap had not been worn since it was put on and had not been in any place where it could get dirty." Scrapings taken from the underside of appellant's right hand were found to contain blood. When officer England exhibited to appellant a red-like substance on the auger the morning of the 20th, the latter replied, "I suppose you are going to tell me that's blood."

A metal analysis was made of decedent's ring. It contained 42 per cent gold, 45 per cent silver, the balance, copper, lead and nickel. A similar examination was made of the auger for the purpose of ascertaining whether it had contacted the ring. A small dent and an adjacent marred area were found. A spectographic analysis of samples taken from the marred area and from the bottom of the dent showed aluminum, gold, silver, copper and a trace of lead. That analysis compared exactly with the analysis of the ring, with the addition of aluminum which came from the auger. The witness' opinion was that decedent's ring had come into contact with the auger and had caused the two wounds above and to the left of the left eye. The foregoing facts were established by three experts learned in chemistry and skilled in chemical analyses.

Appellant was taken to the police station about midnight on February 19 for questioning. When officer England showed him the auger he said to the prisoner, "I believe you killed Frankie Robinson. In fact, I am sure you did." No reply. "You are a cold blooded murderer," continued the officer, and some seconds elapsed in silence. When asked whether he could explain the presence of blood under his fingernails, appellant said that he could not do so.

[1-5] The only motive ascribed to appellant was his dire need for money. His choice of Robinson as the source of a new supply was encouraged by his knowledge that deceased usually carried from $200 to $400 on his person. He was in debt; drank intemperately and reveled in such society as commonly frequents the barroom. His own money had been squandered on drink prior to his leaving Gay's Inn. When he returned he was flush with a new supply. In a brief time he had broken two $20 bills. Not only do the facts established to the satisfaction of the jury show motive and opportunity for the crime but the murder weapon, peculiarly formed, was traced to appellant's possession, and his claim of innocence of murder required him to deny the accusation and to resent the accuser. People v. Simmons, 28 Cal.2d 699, 712, 715, 172 P.2d 18. Although he was accused on the 19th he did not deny his guilt until the 21st. Now on this appeal he arrays a list of persons who, he says, had the knowledge of deceased and of the latter's possession of money. He asserts they had motives for the crime and contends that the jury should have exonerated him under the doctrine governing circumstantial evidence. But those very things were before the jury whose duty was to determine whether any of the parties named by appellant had an equally burning motive to take Robinson's life, as full knowledge of his pecuniary possession and as intimate a knowledge of the route to his door. Whether the evidence of any circumstance was a necessary link in the chain of proof was essentially a question for the jury. People v. Watts, 198 Cal. 776, 799, 247 P. 884. Since their finding of his guilt is not unreasonable it cannot be said that the evidence is insufficient.

Appellant complains that the critical area of the evidence consists of expert analyses of blood and metals and that there was room for reasonable doubt in the minds of a reasonable jury. Such crimes as murder for money are done in solitude and often in darkness. For that reason the state finds it unavoidable to resort to the microscope, to chemistry and to finger prints to find its way to the identity and the heart of a criminal. Such methods and facilities are not arbitrary but are customary. The weight to be given the testimony of such experts depends upon the reasons they assert. People v. Martin, 87 Cal. App.2d 581, 584, 197 P.2d 379. The reasons they give and the opinions they assert are expressed in intelligible and simple language. But however wise and learned they appear, a conviction cannot be based upon their testimony unless the jury are convinced of their correctness and their credibility. People v. Murray, 91 Cal.App.2d 253, 256, 204 P.2d 624. When on appeal the unreasonableness of a verdict is the basis upon which a reversal is demanded the criterion by which the verdict under consideration is to be measured is whether a jury of reasonable men could have derived such verdict, assuming the existence of every fact which could reasonably have been deduced under correct instructions. See People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. The trial court's approval of a verdict by denying a motion for a new trial is further proof of the reasonableness of the evidence adduced.

The Jury Were Properly Instructed.

Appellant contends that since there were no witnesses to the crime and since he denied all knowledge of the deed, the court presumed malice and premeditation instead of submitting those issues to the jury. No basis for such contention exists. He argues that "by reason of the fact that no second degree instruction was given it is fair to say that the presumption or implication was made by the judge, for the jury had no choice in the matter."

[6-8] Appellant intended to say that the court prejudiced the prisoner by not charging on second degree murder and in not preparing a blank verdict accordingly. The facts established by the prosecution witnesses prove nothing short of murder in the first degree. Since appellant denied *in toto* such testimony, denied his presence on the premises of the deceased on the night of the murder, why should the court have confused the sole issue of murder in the first degree with instructions concerning, and definitions of, crimes included in the crime charged? In charging a jury, the court should be guided by the facts proved. When a person is accused of murder in the first degree, if the evidence is of such nature as to warrant a verdict for no lesser crime, if the defendant is guilty at all, the court should refuse to instruct as to crimes included within first degree murder. By so doing the court does no violence to the constitutional inhibition against instructing with respect to matters of fact. People v. Watts, 198 Cal. 776, 793–794, 247 P. 887. Thus, the court below was wholly justified in not charging with respect to second degree murder or any less savage offense since there was no evidence tending to show such milder crimes. 198 Cal. at page 794, 247 P. at page 887. The same question was raised in People v. Sameniego, 118 Cal.App. 165, 171, 4 P.2d 809, 5 P.2d 653, wherein the appellant accused of first degree murder contended that the court erred in not instructing the jury as to the law of murder in the second degree in order that the jury might return a verdict for the lesser offense. The contention was rejected for the reason that all the evidence proved that the homicide was a

murder of the first degree. Just as in the Watts case, supra, there was no evidence in mitigation, justification or excuse; and as in the case at bar the totality of their efforts was devoted to establishing an alibi.[1]

Due Process Not Denied

[9] Appellant alleges prejudicial error in that after the cause had been submitted to the jury they were separated and that during the period of separation a part of them were in the custody of Margaret Castellaw, a deputy sheriff who had not been sworn as a bailiff to guard them as provided by statute. While it is true that the Penal Code, sections 1128 and 1440, requires that an officer must be sworn to keep the jury "together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor to do so himself, unless by order of the court," yet no prejudice is shown to have been suffered by appellant by reason of the presence of Deputy Castellaw. The court's regular male bailiff, Berna Oliver, was sworn to take charge of the jury after the instructions had been given on August 11 and he continued in the performance of such duty until the verdict was returned. Two hours after deliberations had commenced, Miss Castellaw was assigned to assist in the care of the jury. The customary oath provided for by section 1440, supra, was not administered to her until 5:30 p. m. on August 12. In the interim she entered the jury room but once when bailiff Oliver was absent. The purpose of that visit was by direct order of the court to determine the extent of the illness of Mrs. Cooper, a jurywoman. On another occasion while the jury were at the hotel, it was necessary to convey half of them on one elevator, while the remainder were lifted by the second elevator to the eleventh floor where they all convened again. At no time prior to 5:30 on the 12th did she speak in the presence of any member of the jury concerning any fact or evidence presented in the trial of appellant. From the foregoing resumé of the evidence upon the subject of the irregularity in Miss Castellaw's not having been sworn prior to her caring for and guarding the jury, it is readily apparent that the want of due process is not ground for reversal in the absence of a showing that appellant was prejudiced by any act of the unsworn bailiff or that such officer did not faithfully perform her official duties. People v. Pompa, 192 Cal. 412, 423, 221 P. 198.

[10] Moreover, appellant is in no position to gain advantage from the court's neglect promptly to swear the female officer. It was his duty to request the court to swear the lady when she was called into court for the purpose of assisting in the care of the women jurors. It is the duty of counsel in every trial of a person charged with crime to render such assistance as is within his power to enable the court to avoid error; and when he remains silent while the court does or allows an unauthorized act, he waives the right of reversal by reason thereof. This is especially true in the matter of the court's failure to swear a bailiff to attend a jury during its deliberations. Dreyer v. People, 188 Ill. 40, 58 N.E. 620, 59 N.E. 424, 58 L.R.A. 869.

[11, 12] The contention that appellant was deprived of equal protection of the law because the jury were separated in the period of their deliberations has no support in authority or in reason. They could not reach the eleventh floor of the hotel except by going on two elevators or by climbing the stairway. To do the latter would have been impracticable. The necessity for the women to have their separate rooms for sleeping was likewise a practical solution of the problem presented by section 1440 of the Penal Code which requires the bailiff to keep the jury together. Every statute enacted for the purpose of prescribing the mechanics or machinery of a court or the handling of a jury must be given a reasonable interpretation. When error is assigned by reason of a separation of the jurors during their deliberations, the presumption of prejudice is rebutted when the prosecution shows by satisfactory evidence that no prejudice has resulted. People v. Mar-

---

[1] See 8 Cal.Jur. p. 378 where the editor sets forth an extensive array of authorities and includes an intelligent section (410) in support of the doctrine.

tin, 87 Cal.App.2d 581, 590, 197 P.2d 379; People v. Truesdell, 124 Cal.App. 360, 12 P.2d 476.

The cases cited by appellant, People v. Cross, 64 Cal.App. 443, 221 P. 684; People v. Brannigan, 21 Cal. 337; People v. Hawley, 111 Cal. 78, 43 P. 404; People v. Maughs, 149 Cal. 253, 86 P. 187; People v. Adams, 143 Cal. 208, 76 P. 954, 66 L.R.A. 247, 101 Am.St.Rep. 92, are clearly distinguishable.

The judgment and order denying the motion for a new trial are affirmed.

McCOMB and WILSON, JJ., concur.

---

98 Cal.App.2d 386

In re TOLAND'S ESTATE.

TOLAND v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 17539.

District Court of Appeal, Second District, Division 2, California.

July 11, 1950.

Proceeding in the matter of the estate of Gregg W. Toland, deceased, wherein Helene H. Toland, on behalf of her daughter, Lothian Toland, filed a petition to require Bank of America National Trust & Savings Association, executor, to pay a family allowance for the use and benefit of Lothian Toland. The Superior Court, Los Angeles County, Alfred E. Paonessa, J., entered an order requiring the executor to pay such family allowance from and after June 1, 1949, and from the trial court's subsequent denial of her petition to modify the order granting the family allowance, Helene H. Toland appealed. The District Court of Appeal, Wilson, J., held that it was an abuse of the trial court's discretion not to have granted the allowance from the date of testator's death in as much as the trial court had granted the testator's widow a family allowance from the date of the testator's death and there was nothing in the record to indicate that the needs of the testator's daughter, Lothian Toland, were any less during period between death of testator and effective date of allowance made to daughter than they were after such effective date.

Modified and affirmed.

1. Trial 🔑388(1)

Findings of fact, unless waived, are required on all material issues raised by pleadings.

2. Executors and administrators 🔑194(5½)

Where sole question presented by petition for family allowance for daughter of testator was amount to be awarded for support of such child, and executor's counsel stated that if trial court determined award could be made there would be no objection to amount thereof, there was no trial of any contested issue which would necessitate filing of findings of fact by trial court.

3. Executors and administrators 🔑178

Amount of family allowance to be granted is within sound discretion of trial court.

4. Executors and administrators 🔑194(7)

Trial court's action in making family allowance will not be disturbed upon appeal unless abuse of discretion is clearly shown.

5. Executors and administrators 🔑194(1)

Matter of granting family allowance from date of death rests in discretion of court. Probate Code, § 680.

6. Executors and administrators 🔑178

Where there was nothing in record to indicate that needs of testator's daughter were any less for period preceding entry of order granting her family allowance than for period after that date, and court had granted testator's widow family allowance from date of testator's death, it was abuse of discretion for trial court to discriminate against daughter by not also making her family allowance effective from date of testator's death. Probate Code, § 680.

Lyman A. Garber, Beverly Hills, for appellant.

Riccardi, Webster & Donahue, Pasadena, for respondent.

WILSON, Justice.

Gregg W. Toland died on September 28, 1948, leaving surviving him his widow and three minor children one of whom, Lothian Toland, is his daughter by a prior marriage. Appellant, who is the mother of Lothian Toland, filed on her behalf a petition for family allowance. On June 2, 1949, the court ordered the executor to pay the sum of $175 a month to appellant for the use and benefit of Lothian Toland, payment to commence forthwith and to continue for a period of not to exceed one year. Thereafter appellant filed (1) notice of intention to move to vacate decree and enter different decree; (2) request to the court to sign written findings of fact and conclusions of law; (3) petition to modify family allowance granted to Virginia Toland, decedent's widow; (4) petition to modify family allowance granted to Lothian Toland. Appellant's motions and petitions having been denied, she has appealed from the order denying such motions and petitions and from "so much of the Order entered June 2, 1949, * * * as fails to grant to the said minor a family allowance of $175 from October 1, 1948, to and including June 1, 1949."

As grounds for reversal appellant contends (1) that the court failed to make written findings of fact, and (2) that the court abused its discretion in fixing the amount and duration of the family allowances.

[1, 2] The rule is that findings of fact, unless waived, are required on all material issues raised by the pleadings, Wilcox v. Sway 69 Cal.App.2d 560, 564, 160 P.2d 154; Saracco Tank & Welding Co. v. Platz, 65 Cal.App.2d 306, 320, 150 P.2d 918, but they are required only where issues of fact have been raised by the pleas and denials of the respective parties. Waldecker v. Waldecker, 178 Cal. 566, 567, 174 P. 36. No written objections to appellant's petition were filed and the sole question before the court was the amount to be awarded for the support of the minor child. When the cause came on for hearing respondent's counsel stated that if the court determined an award could be made at that time "there will be no objection to the amount." There was, therefore, no trial of any contested issue which would necessitate the filing of findings of fact.

[3, 4] The amount of family allowance to be granted is within the sound discretion of the trial court, Estate of Coffin, 16 Cal. App.2d 532, 534, 61 P.2d 81, and its action in making the allowance will not be disturbed upon appeal unless an abuse of discretion is clearly shown. Estate of Lux, 100 Cal. 593, 605, 35 P. 341; Estate of Mason, 76 Cal.App. 315, 317, 244 P. 629. In view of the wide range of discretion vested in the trial court in granting a family allowance it does not appear from the record herein that there has been any abuse in the amount awarded.

[5, 6] Appellant asserts that since the trial court had granted decedent's widow a family allowance from the date of death, the allowance to Lothian Toland should also have been granted from October 1, 1948. The matter of granting an allowance from the date of death rests in the discretion of the court. Prob. Code, sec. 680. However, since the court found that the minor was entitled to $175 a month, and inasmuch as the court had granted the widow a family allowance from the date of death, the discrimination constitutes an abuse of discretion, there being nothing in the record to indicate the needs of the minor, Lothian Toland, were any less for the period from October 1, 1948, to June 2, 1949, than they were after that date.

The second paragraph of the order of June 2, 1949, is amended to read as follows: "It is Ordered, Adjudged and Decreed by the Court that Bank of America National Trust and Savings Association, as executor of the estate of said deceased, is hereby authorized and directed to pay the sum of $175 per month to said guardian, for the use and benefit of Lothian Toland, minor child of said deceased, commencing October 1, 1948, and to continue for a period of not to exceed one year from the date hereof." As so amended the order is affirmed without prejudice to the right of the guardian of the minor to apply on behalf of said minor for and the power of the court to grant an allowance for an additional period. Order of June 30, 1949, denying appellant's motions and petitions affirmed.

MOORE, P. J., and McCOMB, J., concur.

98 Cal.App.2d 334

In re MUESELER'S ESTATE.

Civ. 17472.

District Court of Appeal, Second District, Division 3, California.

July 7, 1950.

Proceeding in the matter of the estate of Augusta Mueseler, deceased. From a portion of order of Superior Court of Los Angeles County construing decedent's will and ordering distribution, Arthur P. Mueseler appealed and Robert L. Mueseler and another, as executors of decedent's will, moved to dismiss the appeal. The District Court of Appeal, Shinn, P. J., held that written dismissal of attorneys terminated their authority to act for appellant and that notice of appeal signed and filed by attorney after such dismissal was ineffective to lodge an appeal and could not be made effective by attempted ratification after death of appellant by executrix of his estate.

Appeal dismissed.

1. Executors and administrators 🔑314(12)

Evidence sustained referee's findings that dismissal of attorneys and waiver of right to appeal from order construing a will and ordering distribution was voluntarily executed and not procured by fraudulent misrepresentation or concealment of facts.

2. Attorney and client 🔑76(1)

Written dismissal of attorneys terminated their authority to act for client.

3. Attorney and client 🔑76(1), 103

Notice of appeal signed and filed by attorneys after their written dismissal by client was ineffective to lodge an appeal and could not be made effective by attempted ratification after client's death by his widow as executrix of his estate, particularly where time for appeal had expired before executrix was appointed.

Hon & Jarrett, William Ellis Lady, H. C. Millsap, all of Los Angeles, for appellant, Eva Tressa Mueseler.

Arthur W. Kennedy and A. T. Folsom, Los Angeles, for respondents George C. Smith and Robert L. Mueseler.

SHINN, Presiding Justice.

Robert L. Mueseler and George C. Smith, as executors of the will of Augusta Mueseler, deceased, have moved the court to dismiss an appeal purportedly taken by Arthur P. Mueseler from an order entered June 8, 1949, construing the will of said decedent, determining certain other issues, and ordering partial distribution. The motion was made upon the ground that on June 13, 1949, Arthur P. Mueseler signed a writing directed to his attorneys, William Ellis Lady and H. C. Millsap, discharging them as attorneys and waiving his right to appeal from the order; that said attorneys were served with copies of said writing and thereafter, purporting to act for Arthur P. Mueseler, filed a notice of appeal from parts of said order; and that no other notice of appeal was filed. Arthur P. Mueseler died July 28, 1949, leaving a will. Eva Tressa Mueseler as executrix of his estate resists the motion. An order was made appointing a referee to take evidence with respect to the validity and effect of the writing designated "Dismissal of Attorneys and Waiver Rights of Appeal," executed by Mr. Mueseler, to make findings and conclusions upon the issue referred, and to return the same with the evidence taken to this court. The referee has filed his report. The findings are that said writing was executed by Arthur P. Mueseler voluntarily, that he was of sound mind and understood the nature and purport of said instrument, that the same was duly served on William Ellis Lady on July 13, 1949, by leaving a copy thereof with his secretary at his office, and on said day was filed; that on July 19, 1949, William Ellis Lady signed and filed a notice of appeal from a portion of the order entered June 8, 1949; that Arthur P. Mueseler died on or about the 28th day of July, 1949, without having any contact or communication with said William Ellis Lady or H. C. Millsap after they were dismissed. The conclusion of the referee was that the attorneys were discharged and their authority terminated on July 13, 1949.

Eva Tressa Mueseler has filed exceptions to the findings and conclusions of the referee, specifying insufficiency of the evidence to support the finding that the writing in question was voluntarily executed by Arthur P. Mueseler, and asserting that the evidence shows the writing to have been procured by fraudulent representations and concealment. It is contended that the evidence discloses that George C. Smith, one of the executors of the estate, represented to Lawrence Williams, an intimate friend of Arthur P. Mueseler, that the discharge of the attorneys and waiver of right of appeal would be necessary to enable the executors to make payment of funds to Arthur P. Mueseler from the estate of Augusta Mueseler; that immediately upon the execution of said instrument a sum of money would be paid and unless said instrument was executed said Mueseler would lose all right to receive money from the estate, and that the said Lawrence Williams would likewise fail to receive reimbursement for sums he had advanced to Arthur P. Mueseler, secured by assignments of the latter's interest in the estate; that said representations were fraudulently made, were repeated to said Arthur P. Mueseler by Williams; that said executor concealed from said Lawrence Williams and Arthur P. Mueseler the fact that the executors then had in their possession the sum of $5,388.37 which was then payable to said Arthur P. Mueseler, according to the terms of the order of June 8, 1949; that the executor concealed from Arthur P. Mueseler the fact that if the appeal should be dismissed he, Arthur P. Mueseler, would lose the right to receive approximately $80,000, and would receive only the income from one-third of that amount; and that Arthur P. Mueseler was deceived by said representations and concealment and acting thereunder executed the instrument in question. Mr. Williams testified before the referee that he had advanced substantial sums of money to Mr. and Mrs. Mueseler and had told them he was unable to advance any more; that Mr. Smith urged him, Williams, to induce Mueseler to discharge his attorneys and waive his right to appeal; that Smith dictated to him the form of an instrument to be signed, told him that if an appeal was taken the executors would contend that Mueseler had, by opposing the will, forfeited his interest in the estate, although it had been held by the court that up to that time his actions had not been such as to bring into operation a disinheriting clause of the will; Smith represented that it would take two years for the appeal to be disposed of, and that Smith did not advise him that there was any money on hand payable to Mr. Mueseler. He testified that he repeated Smith's representations to Mueseler, and told him that it looked to him as if he, Mueseler, was liable to be cut off with $1; that he advised Mueseler that he, Williams, could not carry them any longer and he thought the proper thing for Mueseler was to sign a dismissal; that Mueseler replied that it appeared to be the only thing he could do, and thereupon signed the dismissal, saying that his money was all tied up in the estate and he was unable to get any money from it. Mrs. Mueseler corroborated the testimony of Williams as to statements made to Mr. Mueseler, adding that she and Mr. Mueseler had no money except sums advanced by Williams and that Mr. Mueseler said to Williams that he would sign the paper if it meant he would get some money.

[1] The interests of Robert L. Mueseler, one of the executors, and a beneficiary under the will, were opposed to those of Arthur P. Mueseler. The interpretation of the will under the order of June 8, 1949, was favorable to Robert L. Mueseler and it would have been to his advantage to have the appeal dismissed. However, there was

no evidence that he was active in the matter, or even had knowledge of the statements made to Mr. Williams, by the co-executor, George C. Smith. The latter testified as a witness before the referee and his testimony generally confirmed that of Mr. Williams with respect to their conversations. He denied, however, that he directly or impliedly represented that no money would be available for distribution to Mr. Mueseler unless the appeal were dismissed. It is clear from the testimony of both Mr. Williams and Mr. Smith that for more than four years the estate had been in litigation instituted by Mr. Mueseler; that an issue had been raised as to whether the activities of Mr. Mueseler were such as to bring into operation a disinheriting clause of the will and that, although this issue had been determined in Mr. Mueseler's favor by the order of June 8th, the executors or other interested parties would probably appeal from that portion of the order, and from other portions favorable to Arthur P. Mueseler, if he prosecuted an appeal from all or any part of the order. In this connection Mr. Smith and Mr. Williams discussed the possibility of a decision on appeal adverse to Mr. Mueseler with respect to the disinheriting clause, under which Mr. Mueseler would be cut off with $1 and Mr. Williams would lose the sums he had advanced to Mr. and Mrs. Mueseler. The referee found there was no misrepresentation or concealment of fact in the statements made by Mr. Smith to Mr. Williams or in the statements made by Mr. Williams to Mr. Mueseler. These findings meet with our approval and are adopted as our own. It is true that when the order of June 8th should become final Mr. Mueseler would have been entitled to immediately receive the sum of $5,388.37 but his right to receive a substantial sum of money was shown on the face of the order and was known to him and his attorneys. They made no inquiry of the executors as to the exact amount that would be payable and no fact concerning the same was concealed by the executors. There was, in our opinion, no substantial evidence that Mr. Smith was guilty of fraud, or the use of undue influence, or that he acted in bad faith. Mr. Mueseler was an old man and in a precarious state of health. It was not at all unreasonable that he should have wished to put an end to the litigation, even at some cost. Mr. Williams was desirous of being repaid his advances and was active in procuring a dismissal of the attorneys. Even if he acted under a misapprehension of the facts his good faith is not open to question.

[2, 3] The written dismissal of the attorneys ended their authority. See 3 Cal. Jur. 628, 635. Mrs. Mueseler, as executrix, could not ratify the acts of the attorneys. They were not effective to lodge an appeal and could not be made so by attempted ratification. Moreover, the time for appeal had expired before the executrix was appointed. Title Insurance & Trust Co. v. California Development Co., 168 Cal. 397, 143 P. 723; Sullivan v. Dunne, 198 Cal. 183, 244 P. 343.

The appeal is dismissed.

WOOD and VALLÉE, JJ., concur.

---

98 Cal.App.2d 367

FERERIA v. NUNN et ux.

Civ. 14377.

District Court of Appeal, First District,
Division 2, California.

July 10, 1950.

Rehearing Denied Aug. 9, 1950.

Hearing Denied Sept. 7, 1950.

M. M. Fereria brought action against William D. Nunn and Beatrice Nunn (his wife) to recover on a quantum meruit for work and labor performed by the plaintiff in constructing a home for defendants. The Superior Court of Contra Costa County, Homer W. Patterson, J., rendered a judgment for the defendants, and the plaintiff appealed. The District Court of Appeal, Dooling, J., held that evidence sustained finding that

home was constructed under a written contract and not on a quantum meruit basis.

Judgment affirmed.

1. Contracts ⚷28(3)

In action by building contractor who constructed a home for owners of realty, to recover on a quantum meruit for work and labor in constructing the home, evidence sustained finding that home was constructed under a written contract, as contended by owners of realty, rather than on a quantum meruit basis.

2. Trial ⚷393(1), 404(1)

Contention of plaintiff that finding of trial court that all allegations contained in certain paragraphs of complaint were not true, was in the form of a negative pregnant was hypercritical, and finding was required to be given a reasonable construction to support judgment for defendants.

◆

Nathan G. Gray, Berkeley, attorney for appellant.

John D. Harloe, San Francisco, attorney for respondents.

DOOLING, Justice.

Plaintiff appeals from a judgment in favor of defendants. Plaintiff is a building contractor who constructed a home for defendants. He sued on a quantum meruit for work and labor in the sum of $8967.62. Defendants alleged that the home was constructed under a written contract for an agreed price of $4797. On this issue the trial court found in favor of defendants and plaintiff's main contention is that the evidence does not support this finding.

The evidence shows that defendants had seen a home in Orinda of which they obtained the plans and a home in Richmond which they also liked. Plaintiff at their request examined the Richmond home and drew plans for a house not quite identical, but similar. Defendants were uncertain which house to build and plaintiff submitted in the form of an unsigned letter, on his letterhead, alternate bids, which letter was signed by defendant Beatrice Nunn. Defendants instructed plaintiff to construct according to the Orinda plans but after the foundation was staked it was discovered that the stakes extended beyond the boundary of the lot and the parties agreed to build according to the plan drawn by plaintiff from the Richmond house. As to that plan the writing provided:

"Plan No. 1 on same as Richmond House with 2 car garage 18 x 20, the house floor area of 1066 ft. No tile work and finish of all sidewalks or cement floors also front to rear porches are included in this bid of $4797.00 with one furnace."

The house as planned called for a detached garage, but as built the house was raised so as to have a basement in which the garage was placed. Mrs. Nunn testified as to this change in plan:

"Well, he (plaintiff) showed me plan number one and asked me if that's what I wanted, and I said, 'Well, we'll have to do it on this lot.' * * * so he suggested that we would put the garage under our house, which I didn't want to do. But he said it would save me money. He said it would save for all the rest of the things in the basement—finish the basement, put a sidewalk in the front and extra things I had asked about, because he said a double garage would take a roofing, siding, two windows and an extended longer driveway. So by putting it under the house it would make it cheaper for me, which we agreed upon doing."

Plaintiff testified that by reason of this and other changes demanded by defendants he informed defendants that he could not build for the agreed price but would have to charge on a cost-plus basis. This was flatly denied by Mrs. Nunn, who testified:

"No sir, no change of price. Nothing was ever mentioned of a cost plus job. I didn't even know of a cost plus job. * * *"

"Q. Did he ever during the construction of the building ever inform you that he was doing it on a cost plus basis?

"A. Never at any time."

[1] Enough has been quoted to support the finding that the house was built pursuant to the agreement. Plaintiff points out that

the area of the house as built is somewhat larger than called for and that extras were added in the course of construction. No evidence was given of the value of these changes, plaintiff electing to stand on his theory that there had been a novation by which the entire construction was done on a cost-plus basis. If plaintiff had tried his case on the theory that he was entitled to additional compensation above the contract price for changes and extras and had introduced evidence of their reasonable value he might have been entitled to compensation therefor, but he cannot complain that this was not allowed in the state of the record presented.

[2] The court found as to certain paragraphs of the complaint: "That all of the allegations contained in Paragraph * * * are not true." Plaintiff's claim that these findings are in the form of a negative pregnant in hypercritical. He would give to a finding that "all are not true" the meaning "not all are true." The court's intention to negative all of the allegations referred to is clear and the findings must be given a reasonable construction to support the judgment. (2 Cal.Jur. 871.)

Plaintiff's criticisms that it does not appear that the finding that plaintiff agreed that he would build a house for defendants for the sum of $4797 "in any manner relates to the claim of plaintiff as alleged in his complaint"; and that the finding that defendants paid to plaintiff the sum of $3200 contains "no indication whether this payment was on account of the contract referred to in the preceding paragraphs or on account of the indebtedness alleged in the complaint" are only mentioned to show that we have not overlooked them. The lack of substance in these criticisms is too obvious to warrant futher discussion.

Plaintiff apparently made a very bad bargain, but the court's finding that he did make it is supported by the evidence and he is bound to it.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

In re WALTERS' ESTATE.

SACKS v. RAUCH.

Civ. 17167.

District Court of Appeal, Second District, Division 3, California.

July 7, 1950.

Hearing Granted Aug. 31, 1950.*

Proceeding in the matter of the estate and guardianship of Allie Walters, also known as Allie Walters Sacks, wherein L. C. Rauch was appointed guardian. The Superior Court, Los Angeles County, Newcomb Condee, J., made an order adjudging Allie Walters an incompetent person and appointing a guardian of her estate and a separate guardian of her person, and also made an order directing the guardian to exercise his powers during pendency of an appeal. Allie Walters Sacks, individually and by and through her guardian ad litem, Morris Lavine, appealed. The District Court of Appeal, Shinn, P. J., held that the act of the judge in ordering the case off the calendar terminated the proceeding and divested the court of the jurisdiction it had originally obtained by personal service.

Orders reversed.

1. Insane persons ⚿8

Where citation was personally served upon alleged incompetent on June 2nd directing her to appear on June 11th, but she did not appear, and matter again came up on June 14th, but no continuance was duly had, and court thereafter ordered case off the calendar, proceeding was terminated, and court was divested of jurisdiction it originally obtained over person of alleged incompetent. Probate Code, § 1461.

2. Insane persons ⚿13, 33(1)

Giving of notice provided for in guardianship proceedings is jurisdictional, and without it court has no power to adjudicate question of incompetency of person before it charged with being incompetent or to appoint guardian of estate of such person. Probate Code, § 1461.

3. Insane persons ⚿30

Generally, adult has right to control his own person and affairs, and that right should not be taken away except on showing of statutory grounds warranting restriction of his liberty of action for his own protection.

---

* Subsequent opinion 231 P.2d 473.

4. Insane persons ⚿14, 33(1)

Appearance of alleged incompetent in court did not constitute a waiver of personal notice required by statute to be served upon her in proceeding for appointment of guardian. Probate Code, § 1461.

5. Insane persons ⚿33(1)

If person be not in fact incompetent, his agreement that he is incompetent does not make him so, and statute authorizes appointment of guardian on such ground only where upon notice after full hearing and examination it appears from testimony that person is in fact incapable of caring for himself and managing his property.

6. Insane persons ⚿33(1)

Attorney for alleged incompetent cannot give consent to appointment of guardian since attorney's authority is limited by capacity of his client.

7. Insane persons ⚿2

Person is presumed competent at time of trial of proceeding for appointment of guardian of person and property and prior thereto. Probate Code, § 1461.

8. Insane persons ⚿2

In proceeding for appointment of guardian of person and property of alleged incompetent, evidence of transactions several years past was admissible only for its bearing upon alleged incompetent's competency at time of hearing. Probate Code, § 1461.

9. Courts ⚿202(5)

Where property of alleged incompetent had been under first class management of agent appointed by alleged incompetent who had exhibited good business judgment and had cooperated with agent, and there was no evidence of written loss or injury, and order of appointment of guardian was void for lack of personal service of notice upon alleged incompetent, order directing guardian to take possession of property of alleged incompetent pending disposition of appeal would be reversed.

Bodkin, Breslin & Luddy, S. V. O. Prichard, Morris Lavine, all of Los Angeles, for appellant.

Ralph R. Sleeper and Harold A. Slane, Los Angeles, for respondent.

SHINN, Presiding Justice.

Appeal by the alleged incompetent personally and by her guardian ad litem from an order dated March 3, 1949, adjudging appellant to be an incompetent person and appointing a guardian of her estate and a separate guardian of her person. Appeal from an order, dated April 22, 1949, directing L. C. Rauch, the appointed guardian, to exercise his powers during the pendency of the then pending appeal by taking into his possession all of the real and personal property of appellant, to collect the rents and to pay to the appellant only a portion of the income.

This case originated in the Superior Court of Los Angeles County in July, 1946, with the filing of a petition for the appointment of a guardian of the estate and person of Allie Walters, also known as Allie Walters Sacks, an alleged incompetent. During the period from 1946 until the present time it has been before the appellate courts of this state on several occasions. Sacks v. Superior Court, 79 Cal.App.2d 806, 180 P.2d 922; Guardianship of Walters, 81 Cal.App.2d 684, 184 P.2d 684; Sacks v. Superior Court, 88 Cal.App.2d 808, 199 P.2d 396; Guardianship of Walters, 93 Cal.App.2d 208, 208 P.2d 713; Sacks v. Superior Court, 31 Cal.2d 537, 190 P.2d 602. A detailed statement of the facts giving rise to the controversy will be found in Guardianship of Walters, 93 Cal.App.2d 208, 208 P.2d 713.

Inasmuch as we have determined that the trial court was without jurisdiction over the person of the alleged incompetent, Allie Walters Sacks, and thus had no power to make the orders appealed from, only those facts pertinent to that question will be set forth herein. It is unfortunate that we are unable, because of the jurisdictional defect, to decide the case on the merits and endeavor to end the long history of litigation.

The record shows that Mrs. Sacks was personally served on June 2nd, 1948, with a citation requiring her to appear on June 11, 1948, and show cause why she should not be adjudged an incompetent person and why one L. C. Rauch should not be appointed guardian of her person and estate. Mrs. Sacks did not appear in court on June 11, 1948, and over the objection that the court had no jurisdiction to proceed without her, a witness was sworn and, after brief testimony, the case was adjourned to June 14, 1948. On June 11th, a bench warrant was issued commanding appellant to be present in court on June 14th, but there is no showing that it was ever served on Mrs. Sacks. On June 14th, 1948, the court was served with an alternative writ of prohibition issued by Division Two, Second Appellate District, District Court of Appeal, which provided that the superior court desist and refrain from proceeding further in said matter, and that it refrain from hearing, determining, passing upon, trying or deciding any matter in said proceeding until further order of the District Court of Appeal. Mrs. Sacks was not present in court on June 14th. The hearing was continued in open court from time to time until November 10th, at which time the petition for appointment of guardian was ordered off calendar by Judge Kauffman.

On November 24, 1948, the District Court of Appeal, Second Appellate District, Division Two, vacated the alternative writ of prohibition and denied a peremptory writ on the ground that an alleged incompetent person could not defeat the jurisdiction of the superior court by a mere refusal to respond to a citation which had been personally served upon her. Sacks v. Superior Court, 88 Cal.App.2d 808, 811, 199 P.2d 396. A petition for hearing in the Supreme Court was filed by appellant and denied by that court on January 20, 1949.

At some time subsequent to June 11, 1948, and prior to February 21, 1949, the case was ordered "off calendar" by Judge Kauffman. On January 24, 1949, Judge Condee ordered that the hearing and trial of the matter be resumed on the 7th day of February, 1949. The record shows that a copy of this order was served on appellant's attorneys on the 27th and 28th days of January. No copy of the order was served, and no citation was issued or served, on Mrs. Sacks, the alleged incompetent. The matter was apparently continued until February 21, 1949, and Mrs. Sacks was present in court during the trial which culminated in the orders appealed from. At the commencement of the hearing on February 21st before Judge Condee, Mrs. Sacks' attorney objected to proceeding with the hearing upon the ground that no new citation had been issued or process served upon Mrs. Sacks, and that the court was therefore without jurisdiction, to which the court replied: "I think it is more tidy to keep these matters going by continuance. That was my policy. On the other hand, I think Judge Kauffman's position is probably more orthodox; that is where a matter if pending under an alternate writ of prohibition, all matters cease, and then the writ is dissolved where it is, it starts on any question where it left off, so I don't think that is a serious objection. As I say, I think the method of continuing on the calendar is a more tidy method, but it may be wrong." The question involved in the procedure that was followed strikes deeper than this. Below the surface lay the undiscovered question of jurisdiction.

The question which confronts us is whether, under the foregoing facts, the alleged incompetent received the notice provided for by section 1461 of the Probate Code. That section then read, in part, as follows: "Thereupon the clerk shall set the same for hearing by the court and issue a citation directed to said alleged insane or incompetent person setting forth the time and place of hearing so fixed by him. *Said citation shall be personally served on the alleged insane or incompetent person* in the same manner as provided by law for service and summons at least five days before the time of hearing. Such person, if able to attend, must be produced at the hearing, and if not able to attend by reason of physical inability, such inability must be evidenced by the affidavit and certificate of a duly licensed physician or surgeon * * *." Amend.Stats.1943, Ch. 473, sec. 1. (Emphasis added.)

[1-3] We are of the opinion that the act of Judge Kauffman in ordering the case "off calendar" terminated the instant proceeding and divested the court of the jurisdiction it had obtained over the person of Mrs. Sacks by the service of the citation upon her on June 2, 1948. The only citation ever served upon Mrs. Sacks directed her to appear on June 11, 1948. When the matter came up again on the 14th, no continuance was "duly had" as was the case in Guardianship of Peterson, 84 Cal.App.2d 541, 191 P.2d 98, and in Vigne v. Superior Court, 37 Cal.App.2d 346, 99 P.2d 589. It has been consistently held in this state that the giving of the notice provided for in guardianship proceedings is jurisdictional and that without it the court has no power to adjudicate the question of the incompetency of a person before it charged with being incompetent, or to appoint a guardian of the estate of such person. Estate of Eikerenkotter's, 126 Cal. 54, 58 P. 370; McGee v. Hayes, 127 Cal. 336, 59 P. 767, 78 Am.St.Rep. 57; Estate of Schulmeyer, 171 Cal. 340, 153 P. 233; Grinbaum v. Superior Court, 192 Cal. 528, 221 P. 635; Snyder v. Superior Court, 206 Cal. 346, 349, 274 P. 337; In re Pozzo's Guardianship, 104 Cal. App. 11, 285 P. 330; Sacks v. Superior Court, 79 Cal.App.2d 807, 180 P.2d 922; Guardianship of Peterson, 84 Cal.App.2d 543, 191 P.2d 98; 14 Cal.Jur. 354, 355; 7 Cal.Jur. 10 Yr. Supp. 59; see, also, annotations, 23 A.L.R. 594; 152 A.L.R. 1247. A guardianship proceeding is a serious matter because, generally speaking, an adult person has the right to control his own person and affairs and that right should not be taken away from him except upon a showing of the statutory grounds warranting a restriction of his liberty of action for his own protection. Estate of Schulmeyer, supra; Estate of Watson, 176 Cal. 342, 168 P. 341.

[4-6] The appearance of Mrs. Sacks did not constitute a waiver of the notice required by the Probate Code, sec. 1461. In McGee v. Hayes, 127 Cal. 336, 338, 59 P. 767, 768, 78 Am.St.Rep. 57, it was said that the presence of the incompetent could not meet the requirement of the statute that he should be served with notice of the hearing; and that "he was incapable, by reason of his incompetency, to consent to the jurisdiction of the court, or waive any of the steps necessary to confer jurisdiction upon the court, or to make any request that the petition be granted." If the person be not in fact incompetent, his agreement that he is incompetent does not make him so, and the statute authorizes the appointment of a guardian on this ground only where, upon notice, after full hearing and examination, it appears from the testimony that the person is in fact incapable of taking care of himself and managing his property. Guardianship of Sullivan, 143 Cal. 462, 77 P. 153; McGee v. Hayes, supra; Snyder v. Superior Court, supra. Neither can the attorney for the alleged incompetent give any such consent, for his authority is limited by the capacity of his client. Guardianship of Sullivan, supra; Sacks v. Superior Court, 79 Cal.App.2d 806, 180 P.2d 922.

[7] It is earnestly insisted that the order should be reversed for insufficiency of evidence. With minor exceptions, it is said, the evidence on the issue of incompetency related to transactions between appellant and her husband in 1944 and 1945, and not to her ability to manage her affairs as of the time of the hearing; some four years have elapsed since this proceeding was instituted; if it be granted that appellant at one time needed a guardian to protect her from the machinations of her husband, it was shown that the occasion no longer exists since appellant's property is being well managed and her husband is attentive to her and has been proven over a period of years to have no disposition or intention to take advantage of her. All the substantial evidence, it is contended, was to the effect that appellant is a well informed and experienced woman and competent, despite her age and past mistakes, to conserve her property interests and make prudent use of her money. See Estate of Watson, 176 Cal. 342, 345, 168 P. 341; Guardianship of Waite, 14 Cal.2d 727, 731, 97 P.2d 238. We appreciate the force of the argument. Appellant was presumed to be competent at the time of the trial and prior thereto. Estate of Gordon, 142 Cal. 125, 75 P. 672;

Estate of Dolbeer, 149 Cal. 227, 86 P. 695, 9 Ann.Cas. 795; Nourse v. Azvedo, 185 Cal. 47, 195 P. 669; Estate of Perkins, 195 Cal. 699, 235 P. 45; American Trust Co. v. Dixon, 26 Cal.App.2d 426, 78 P.2d 449; California Bank v. Bell, 38 Cal.App.2d 533, 101 P.2d 724; Clark v. Abrams, 49 Cal.App. 2d 497, 121 P.2d 750; Wilson v. Sampson, 91 Cal.App.2d 453, 205 P.2d 753.

[8] Evidence of transactions several years past was admissible only for its bearing upon appellant's competency at the time of the hearing.

However desirable it may be to end this prolonged litigation we think it would be inappropriate to pass upon the sufficiency of the evidence, in view of our holding that the hearing and order were void proceedings. We do not doubt that if further proceedings are had evidence will be developed fully as to appellant's competency at the time of the trial.

[9] The appeal from the order of April 22, 1949, directing L. C. Rauch to take into possession, as guardian, the property of Mrs. Sacks, pending disposition of the present appeal, is governed by the decision in 93 Cal.App.2d 208, 208 P.2d 713, in which we held there was no evidence of any threatened loss or injury to the property of Mrs. Sacks. It was pointed out that since August, 1947, the real property had been under first class and competent management of R. A. Rowan & Co., that in appointing this agent and in cooperating with her agent Mrs. Sacks had exhibited good business judgment, and that in the absence of evidence of threatened loss or injury the order was in excess of the jurisdiction of the court in probate. Supersedeas was issued to stay proceedings under the order. For the reasons stated in that opinion and also because of our holding that the order of appointment was void, the order of April 22, 1949 must be reversed.

The orders appealed from are reversed.

WOOD and VALLÉE, JJ., concur.

---

98 Cal.App.2d 400

SHELLER v. BLUE DIAMOND CORPORATION et al.

Civ. 17454.

District Court of Appeal, Second District, Division 1, California.

July 12, 1950.

Action by Emily Sheller against the Blue Diamond Corporation, a corporation, and Turner Homer Tims, for death of plaintiff's son resulting from injuries when run over by truck of defendants. The Superior Court, Los Angeles County, Charles A. Paulsen, J., entered a judgment for the defendants and the plaintiff appealed. The District Court of Appeal, Doran, J., held that the question of negligence of truck driver was for the jury.

Judgment affirmed.

1. Automobiles ⟹245(4)

In action for death of plaintiff's son resulting from injuries received when run over by truck of defendants, which was making turn while deceased was standing on curb near corner, negligence of driver of truck was for the jury.

2. Automobiles ⟹242(2)

In action for death of plaintiff's son resulting from injuries received when run over by truck of defendants which was making turn while deceased was standing on curb near corner, doctrine of res ipsa loquitur was not applicable.

3. Automobiles ⟹246(4)

In action for death of plaintiff's son resulting from injuries received when run over by truck of defendants which was making turn while deceased was standing on curb near corner, instruction that trucking equipment was entitled to use all roadway up to and to the edge of sidewalk was proper.

4. Automobiles ⟹246(22)

In action for death of plaintiff's son resulting from injuries received when run over by truck of defendants which was making turn while deceased was standing on curb near corner, instruction on unavoidable accident rule was proper.

Landon Morris, Los Angeles, McIver & Snow, Montebello, for appellant.

Betts, Ely & Loomis, Forrest A. Betts, Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from the judgment; a jury found for the defendants.

It is contended on appeal that, "The evidence was insufficient to justify the jury's verdict in favor of defendants"; that "The trial court erred in the giving of certain instructions requested by defendants, and in modifying and refusing to give certain instructions requested by plaintiff."

As recited in appellant's brief, "The evidence, all of which was without conflict, showed that on March 5, 1947, the date of the accident, Donald Ferguson, plaintiff's son, was 18 years of age, and was employed at a 'drive in' restaurant located on the southeast corner of Olympic Boulevard and Soto Street, in the City of Los Angeles.

"On the date of the accident, plaintiff's son had been working at the restaurant. He left the restaurant sometime around 5 p.m., and, after a short conversation with a Los Angeles Transit Lines traffic man, about 25 feet south of the southeast corner of Qylmpic and Soto, walked to the southeast corner. While standing there, on the sidewalk, he bent his head to light a cigarette. At that moment, the defendant Turner Homer Tims was making a right turn with the truck and trailer off of Soto Street onto Olympic Boulevard (he having been proceeding north on Soto Street). Tims' truck and trailer was the type commonly used for delivery of sand and gravel. The overall length of truck and trailer (including connecting bar) was approximately forty-four feet. The trailer does not 'track' with the truck when making a turn. That is, the trailer 'cuts in' and does not follow in the path of the truck itself. If the truck and trailer is making a right hand turn, the trailer will 'cut in' more to the right than the truck itself. In order to prevent the trailer from striking the curb or going up over the sidewalk, while making a right hand turn, the driver must head the truck in a more or less straight course to the center line of the street he is going to turn into, and then turn the wheels to the right, thus making allowance for the 'cutting in' to the right (towards the sidewalk) of the trailer. At the time of the accident herein, the defendant Turner Homer Tims was executing the right hand turn as above described.

* * * * * *

"When Donald Ferguson straightened up after lighting the cigarette, the front wheel (of the set on the rear axles of the trailer) were just a fraction to his left and brushing the curbing. He put out his hands in a pushing motion as though to fend off the wheel. As his hands touched the trailer wheel, it rolled him over the top of it and then threw him under it, carrying him out into the street. At the time he was struck he was standing with both feet on the sidewalk. He died in the street from the injuries thus received."

The body of the trailer did not extend beyond the wheels; the outside of the wheels was about two feet beyond the side of the body. The evidence shows that the outside wheel "brushed" the curb but did not go over the curb.

[1] Obviously the question of negligence was for the jury to determine and a careful reading of the evidence reveals it to be sufficient to support the verdict. It could well be, in the light of the record, that the jury reached the conclusion as contended by respondent that, "the most that could be said for the defendants' activities, in justice and charity to one who had passed on, would be to conclude that neither the defendants or plaintiff was negligent."

[2] The court's failure to apply the doctrine of res ipsa loquitur in the circumstances and to instruct the jury accordingly, appears to be well supported by the authorities.

[3] It is argued by appellant that "The court erred in instructing the jury that the trucking equipment was entitled to use all the roadway up to and to the edge of the sidewalk, because it is negligence for the operator of a motor vehicle to drive so close to a sidewalk or safety zone as to strike a pedestrian standing there, and it was error

for the court to refuse to give plaintiff's instruction embodying the correct rule."

[4] It is also argued that the court erred by giving an instruction on the unavoidable accident rule. Other instructions given and refused are also claimed as error.

Without going into detail it is sufficient to note that the instructions sufficiently and fairly covered all of the valid controversial issues; there was no prejudicial error in the failure to give requested instructions nor does any error appear from an examination of the instructions given.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

In re SPRAGUE.

Civ. 3899.

District Court of Appeal, Fourth District, California.

July 10, 1950.

Rehearing Denied Aug. 1, 1950.

Hearing Granted Sept. 7, 1950.*

Proceeding in the matter of Elizabeth Sprague, wherein respondent, having been restored to sanity, filed a petition for writ of error coram nobis to set aside adjudication of insanity. From an order of the Superior Court of San Bernardino County, Martin J. Coughlin, J., denying her petition, petitioner appealed. The District Court of Appeal, Barnard, P. J., held that the evidence failed to show extrinsic fraud or any improper conduct of attorney which would invalidate adjudication of insanity.

Order affirmed.

1. Insane persons 🔑2

Evidence sustained jury's finding of insanity.

2. Insane persons 🔑25

In proceeding for writ of error coram nobis to set aside previous adjudication of insanity, evidence failed to show extrinsic fraud or any improper conduct of attorney which would invalidate adjudication.

3. Insane persons 🔑25

Sanity of a person previously adjudged insane does not tend to prove that a different condition did not exist some years earlier.

4. Insane persons 🔑25

Subsequent proof that insanity was caused by husband's mistreatment and an adrenal insufficiency did not alter the fact as to existence of insanity at time of adjudication thereof.

Elizabeth Sprague, in propria persona.

Jerome B. Kavanaugh, District Attorney, Theo. G. Krumm, Deputy District Attorney, San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying petition for a writ of error coram nobis.

On August 1, 1941, the appellant was adjudged insane by a jury and sent to Patton State Hospital. She was released on parole April 1, 1943, and was discharged as recovered on May 27, 1943. In October, 1947, she filed a coram nobis petition. A hearing thereon was delayed for about a year, largely at her request. In the meantime in another proceeding a jury, on August 26, 1948, found that she "is sane at the present time."

The petition for the writ alleged that there was no real trial before the jury in 1941 since no witnesses were called for her, although some were available; that certain facts with reference to her husband, which occurred in Florida and in Texas in 1939 and 1940, could have been proved; that the opinions of the medical experts who testified were based upon a belief that her expressed fear of her husband was unfounded, and some of them have since changed their minds; and that extrinsic fraud was "practiced upon the witnesses for the prosecution in that they were given false and untrue information" upon which to base their opinion.

---

* Subsequent opinion 230 P.2d 633.

The appellant here contends that she actually had no trial at all because of the extrinsic fraud of her attorney, appointed by the court, since he presented no witnesses for her, not even her daughter; since he failed to cross-examine the witnesses; and since he forced her to seem to verify the testimony against her by allowing her to tell only what had recently occured, without letting her give the background as to why she had reason to fear her husband.

[1] The transcript of the original hearing, in August, 1941, contains 36 pages. In addition to appellant's testimony, four police officers and another witness testified as to her actions immediately before the proceeding was initiated. Four doctors also testified two of whom had acted on the preliminary commission, and the others having observed her condition during the nine days she had been at Patton. Her attorney asked the appellant to give her version of the incident that led to the filing of the charge. She replied at length, and then answered other questions. The record shows no request or refusal to go into the background, nothing with respect to the availability of other witnesses, and nothing to indicate that further cross-examination would have been of value. There can be no question that the jury's finding was amply supported by the evidence received, including her own testimony.

This is confirmed by the record of the hearing on October 25, 1948, on the application for this writ, the appellant being represented by counsel of her own choice. In addition to numerous affidavits and exhibits, the testimony of the appellant and her daughter takes up 80 pages of the transcript. Their testimony explains the reasons for appellant's condition in 1941, but tends to support, rather than throw doubt upon, the jury's finding at that time. The appellant also testified that at the original hearing she did not ask her attorney to bring out anything, as she thought he knew his business. She admitted that she had made no request of him with which he did not comply, although she said that she had previously asked him to call her daughter as a witness. She also admitted that at the time of the hearing she did not ask him about her daughter, and there is no evidence that anyone connected with the hearing knew where the daughter then was.

Written statements, made in 1947 by three of the doctors who testified at the 1941 hearing, were also introduced. Two of these indicate that the writers were then willing to accept some of the appellant's statements about her husband's conduct as being supported by proof she had since produced. The third was to the same effect and further stated that the appellant now conceded that another belief she had expressed, that she had been overcome by gas for which her husband was in some way responsible, could have been caused by her "now known condition of adrenal insufficiency." While some of the doctors who testified may have changed their minds, with respect to certain factors, it does not follow that the medical testimony at the original trial was based entirely upon mistaken information.

[2] The voluminous evidence introduced at the hearing on this writ was not sufficient to establish the allegations of the petition as to extrinsic fraud or otherwise, and the record discloses neither fraud nor improper conduct on the part of her attorney.

[3, 4] It is further contended that the fact that a jury found her sane in 1948, shows that the first jury would have so found had the facts been fully presented. Her condition in 1948 would in no way prove that a different condition did not exist some years before. The record amply shows that she was mentally ill in 1941, that she needed care and treatment, and that this was successful. The fact that her condition was caused by her husband's previous continued and tragic mistreatment, and the fact that it was later discovered that an adrenal insufficiency was also a cause, could not affect the existence of the condition. While the evidence which she contends should have been produced would have disclosed one of the reasons for that condition, it would merely have emphasized it, and would not have shown that it did not exist.

Fortunately, appellant has recovered and has since held important positions and has looked after herself and her children in a manner deserving the highest commendation. In so doing, she has already cleared her name, her sole purpose in this proceeding in what is not only the best but the only way it could be done. Her former mental illness, the result of causes now known and for which she could not be blamed, is not a disgrace and will not be held against her or her children by right-thinking people. While her desire to change the formal record is understandable, the facts are not sufficient to warrant, or to permit, this to be done.

The order is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

98 Cal.App.2d 314

In re BLACKMUN'S ESTATE.

DUFNER et al. v. FOX.
Civ. 17599.

District Court of Appeal, Second District,
Division 3, California.
July 6, 1950.

Proceeding in the matter of the estate of Katherine J. Blackmun, also known as Katherine J. Fox, deceased, upon the petition of Laura Dufner and others to determine heirship, which was contested by Mary Fox. The Superior Court of Los Angeles County, Alfred E. Paonessa, J., entered a decree in favor of contestant and petitioners appealed. The District Court of Appeal, Wood, J., held that decedent's holographic will was properly construed as making general and not specific bequests of all of decedent's property except $3.00 to contestant.

Decree affirmed.

Wills 🔑756

Holographic will, bequeathing to named sister stated number of shares of stock of named corporations, which testatrix owned when will was made but had sold before her death, and all other stocks in her name, all contents of specified safe deposit boxes, all jewelry and money in specified savings accounts indicated intention of testatrix to give sister all her property except three dollars bequeathed to relatives of predeceased husband and bequests to sister were properly construed as general and not specific bequests. Probate Code, § 161(1).

◆

Meserve, Mumper & Hughes and Robert A. Stewart, Jr., Los Angeles, for appellants.

Harry Hirsh, Los Angeles, for respondent.

WOOD, Justice.

Katherine J. Blackmun made a holographic will on October 4, 1944. She died on November 29, 1947. By her will she gave various things to her sister Mary Fox, and she gave one dollar to each of three relatives of her deceased husband, but she did not give anything to any other person. Another sister of testatrix, a brother, and five children of a deceased brother, filed a petition to determine heirship.

In their amended petition they alleged that the bequests to Mary Fox were bequests of specific property and were intended as specific legacies; that on the death of the decedent none of the property bequeathed to Mary Fox was among the assets of decedent's estate except jewelry, 8 shares of Blair & Co. stock, and certain other securities of no value; that said property, the subject of the legacies to Mary Fox, had been disposed of by decedent prior to her death and said legacies were thus adeemed; that among the assets undisposed of by the will are: "Balance of cash," and certain real property in Los Angeles. They alleged that petitioners and Mary Fox were entitled to said property according to the laws of succession.

The court decreed "that the bequest is general" and all the property in said estate should be distributed according to the terms of the will, to wit: "All of said estate to the sister Mary Fox," except one dollar to each of three relatives of the deceased husband of the testatrix. The petitioners appeal from said decree determining heirship.

The will was as follows:

"October 4th 1944
Realizing the uncertainties of life and the certainty of death, and being of sound and disposing mind, I hereby make, execute and sign, all in my own handwriting, my last will and testament.
I give and bequeath to Mary Fox
1036-1/2-Blaine St. Los Angeles, Calif.
I give and bequeath—
100 Shares Breeze stock
50 Shares Automotive Fibers Stock
215-1/2 Shares Transamerica Stock
43 Bank of America Stock
25 Anglo Bank S.F
102 Byron Jackson Stocks
All other stocks in my name that I have not listed here.
All contents of Safe deposit box #5404 Wells Fargo Bank
San Francisco—where all stocks are—
(All jewelry—2 diamond rings—five stick pins—onax
and diamonds—one jade also jade ring etc) also money in #21901
Savings account at Crocker Bank San Francisco—and Savings at
(over)
Security-first National Bank Los Angeles—
#229860
Sixth and Spring Office.
I give and bequeath to Lucian Blackmun —(one) dollar
I give and bequeath to Agnes E. Blackmun (one) dollar
I give and bequeath to Altha Brown—(one) dollar.
I give Mary Fox power of attorney to collect note due me, from
Lucian Blackmun also John Gartner—in any way she sees fit.
I hereby appoint (Mary Fox) executor of my will to act without bonds.
Witness my hand and seal this the fourth day of October 1944.
John Byron Holly. [a witness]
Katherine J. Blackmun"

After the will was made the testatrix sold all of the shares of stock, except 8 shares of Blair & Co. and certain worthless shares, and she withdrew the money from the bank accounts. About two months before her death she purchased a house and lot in Los Angeles, but she had not occupied the house because she was having it repaired and she was stricken with illness. That real property is the principal asset of the estate.

Appellants (petitioners) contend that the bequests to Mary Fox were specific bequests, and that, by decedent's disposition of the subject of the bequests in a manner inconsistent with the will, the bequests to Mary Fox were adeemed.

The principal question on appeal is whether the bequests to Mary Fox were specific or general bequests. Section 161, subdivision (1) of the Probate Code provides that "A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator." If the bequests to Mary Fox are specific the decree appealed from should be reversed. If they are general the decree should be affirmed. The controlling factor in determining whether a bequest is specific or general is the intent of the testator as expressed in the will considered as a whole and in light of the surrounding circumstances. Estate of Jones, 60 Cal.App.2d 795, 798, 141 P.2d 764. It was said in the case just cited, 60 Cal.App.2d at page 798, 141 P.2d at page 765: "The intention to be determined is whether the testator intended to give a specific thing, and that alone, or whether he intended to give a bequest that, in any event, should be paid out of his general estate. In determining this intent, the courts have held that there is a strong presumption that the bequest was intended to be general and not specific, and, in cases of doubt, the courts will presume that the testator intended to give a general bequest rather than a specific one." The intention to be determined is whether the testator intended unconditionally to confer a benefit upon the legatee or whether he intended to confer a benefit only in the event that he should remain the owner of the bequeathed property at the time of his death.

Appellants argue that the testatrix "listed all the stock of any value that she had, referred to it as stock 'in my name' and as being in a certain safe deposit box"; that the stock belonged to the testatrix and was distinguished from all other stock of the same kind; and that the bank accounts were likewise specific bequests. It has been held that the words "my," "in my name," or similar qualifying words indicate an intention to make a specific bequest, see Estate of Jones, supra, 60 Cal.App.2d at page 799, 141 P.2d at page 764. Such words, however, do not necessarily indicate such an intention. In the will herein it is stated that the testatrix gives to Mary Fox a certain number of shares of stock of six different corporations designated by the names of the corporations. As to those shares of stock, it appears that the words "in my name" or similar qualifying words were not used directly in connection with the description of those shares. In the will, immediately following the disposition of those shares, it is stated: *"All other stocks in my name that I have not listed here."* It therefore appears that the words "in my name" were used directly in describing "other" stocks not listed in the will. It also appears that by the use of the words "other stocks in my name" the shares which were listed in the will were indirectly described as shares "in my name." Stated in another way, the words "in my name" apply directly to stocks which were not listed in the will, and they apply indirectly to the stocks which were listed (which according to appellants' brief were the stocks of value). A clear intention upon the part of a testator must appear in order to make a legacy specific. Estate of Jones, supra, 60 Cal.App.2d at page 800, 141 P.2d at page 765. Since the stocks which were listed were not described directly as stock in the name of the testator, but were described indirectly as such stock, it seems that the testator did not intend to and did not, by such indirect method of description, "distinguish" the listed (valuable) stock from all other stock of the same kind.

In the will, following the disposition of the stocks not listed, it is stated: "All contents of safe deposit box #5404 Wells Fargo Bank San Francisco—where all stocks are." The words "where all stocks are" do not distinguish the stock from all other stock of the same kind. Those words were added at the end of a provision wherein all the contents of the safe deposit box were given to Mary Fox, and the said provision followed provisions in the will wherein the stock had already been given to Mary Fox. The words "where all stocks are" indicate an intention only to state the location of the stocks.

In Estate of Jones, supra, it was stated, 60 Cal.App.2d at page 798, 141 P.2d at page 766: "'A gift of a certain number of shares of stock, bonds, and the like, described by the corporation * * * but not indicating any specific lot of such securities, is a general legacy; even if testator owned the exact number of such securities * * *.'" The testatrix herein apparently owned the exact number of shares of stock listed in the will, but, as above shown, those shares were not distinguished in the will from all other shares of the same kind. Apparently the stocks listed in the will herein were stocks listed on public stock exchanges. Where there is a bequest of a certain number of shares of stock described merely by the name of the corporation, and where the stock of the corporation is listed on public stock exchanges, such public character of the shares bequeathed is evidence of an intent to make a general bequest. See Estate of Buck, 32 Cal.2d 372, 374, 196 P.2d 769,—wherein it was held that where there are bequests of shares of a closely held corporation the nonpublic character of the shares bequeathed is evidence of an intent to make specific gifts.

In the will, after bequeathing the shares of stock, she gave all jewelry to Mary Fox. Then she gave to Mary Fox the money in savings accounts in two banks, describing the accounts by number. The fact that she stated such numbers does not necessarily mean that she intended to confer a benefit in the amount of said accounts only in the event that she retained the accounts until her death. The record does not show that, at the time the will was made, the testatrix owned any property other than that listed and referred to in the will. It is true there was no residuary clause in the will. The form and language of the will, however, indicate that the testatrix intended to dispose of her whole estate by mentioning particularly various items of property and by using the word "All" in referring to other property. It is to be noted that she mentioned certain stocks particularly and then she mentioned "All" the other stocks. She then gave "All" the contents of the safe deposit box. Then she gave "All" jewelry, and then she mentioned particularly various items of jewelry. Then she gave the money in the two savings accounts. Apparently she made testamentary disposition of all property owned by her at the time she made the will. In view of the language of the will considered as a whole and in light of the surrounding circumstances, it appears that it was the intention of the testatrix to give Mary Fox all her property, except the $3.00 given to her husband's relatives.

Some of the surrounding circumstances are that Mary Fox nursed the husband of testatrix for a year prior to his death in San Francisco in August, 1943; in September of that year testatrix came to Los Angeles where she and Mary Fox resided together until the testatrix died; she made the will about a year after she came to live with Mary Fox; the testatrix was not on friendly terms with her brother and her other sister; and Mary Fox was the only relative of testatrix in Los Angeles and they were very friendly. It appears further that she purchased the house and lot involved herein, about two months before she died, intending that she and Mary Fox should reside there. In March, 1947, the testatrix sold the stocks listed in the will for approximately $10,000; and she paid about $7,200 for the house and lot, which property is the principal asset of her estate.

The trial court did not err in decreeing that the bequests to Mary Fox were general bequests.

Appellants contend that the trial court erred in admitting testimony regarding alleged oral declarations of the testatrix made about three years after the date of the will. That testimony was to the effect that during the two months prior to her death testatrix had told witnesses that she had made a will; she had sold her stock and purchased a home; she wanted Mary Fox to have everything; she did not want anyone "back home" to have anything; and she did not want her brother to have a cent. By reason of the above conclusion, regarding general bequests, it is not necessary to determine this last mentioned contention of appellants.

The decree is affirmed.

SHINN, Presiding Justice.

I concur in the judgment. There were six bequests of stocks, all but one in odd lots, followed by a general bequest to the same beneficiary of "all other stocks in my name that I have not listed here," and still other bequests, both specific and general. Testatrix then owned the described stocks. If the will had consisted only of the bequests of the stocks there would have been, in my opinion, six specific bequests and one general. But, except for three bequests of one dollar each, Mary Fox was left the entire estate, and this clearly expressed intention of testatrix should prevail over isolated and less positive provisions which, alone, would indicate a contrary intention as to portions of the estate. I do not regard any of the California cases as closely in point.

VALLÉE, J., did not participate.

CASON v. GLASS BOTTLE BLOWERS ASS'N OF UNITED STATES AND CANADA et al.

Civ. 17326.

District Court of Appeal, Second District, Division 1, California.

June 30, 1950.

Rehearing Denied July 13, 1950.

Hearing Granted Aug. 24, 1950. *

Alfred B. Cason brought action against The Glass Bottle Blowers Association of the United States and Canada, an unincorporated association, James McDonald, as salaried local representative of said international labor union, in California, William Endicott, President of Local Union No. 190, an unincorporated local union affiliated with The Glass Bottle Blowers Association of The United States and Canada, Anthony Frederick, Secretary of such Local Union No. 190, and others, for writ of mandate directing plaintiff's reinstatement in national union and as president of Local Union No. 190 and to recover damages for his improper suspension. A judgment in favor of the plaintiff was entered by the Superior Court of Los Angeles County, A. W. Ashburn, J., and the named defendants appealed. The District Court of Appeal, White, P. J., held that evidence established that hearing before national convention of the national labor union upon plaintiff's appeal for reinstatement in national union and as president of affiliated local union, at which plaintiff was denied the right to appear personally and plead his cause, did not constitute a fair and impartial hearing as contemplated by rules of natural justice.

Judgment affirmed.

1. Mandamus ⚷125, 131

Mandamus is a proper proceeding by means of which to compel reinstatement to membership and to protect property rights of members of unincorporated associations in all proper cases, and in such a proceeding the same rules are followed, so far as applicable, as applied to incorporated bodies of the same character.

2. Trade unions ⚷4.12

Damages may be awarded to one who has been illegally expelled from a duly organized labor union, which is an unincorporated association, for wages lost on account of having been deprived of opportunity to work or to obtain employment, including compensation for mental suffering and humiliation caused thereby, and which flows proximately from the wrongful suspension or expulsion.

3. Judgment ⚷660

The judgment of a competent court, when properly pleaded, is conclusive between same parties for same thing although it be palpably erroneous.

4. Judgment ⚷590(4)

Where former suit by present plaintiff was instituted to obtain injunctive relief against enforcement of plaintiff's suspension by president of national labor union, an unincorporated association, while present suit was for issuance of writ of mandate directing national labor union to reinstate plaintiff to its membership and his position as president of one of its affiliated local unions, and question of reinstatement was not involved in prior suit, judgment in the prior suit was not "res judicata" barring relief in present suit.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Res Judicata".

5. Associations ⚷10

Courts have no right to interfere with decisions of tribunals of unincorporated associations with respect to expulsion of members unless decision arrived at was contrary to natural justice, the rules of the association were not observed, or the action of the association was malicious and not bona fide.

6. Trade unions ⚷4.9

The tribunals of labor unions established for dealing with matters relating to discipline of members are not fettered by rules of evidence as applied in courts of law but may proceed upon and be guided by evidence in which men transact the ordinary business of life.

7. Trade unions ⚷4.9

The decisions of tribunals of labor unions established for dealing with matters relating to discipline of members, including suspending or expelling members, are of a quasi judicial character, and proceedings before tribunals must be consonant with principle of natural justice, thoroughly and honestly administered in accordance with laws of the union and laws of the land.

---

* Subsequent opinion 231 P.2d 6.

8. Trade unions ⚿4.7

As an incident to his membership in a labor union, one consents to be suspended or expelled in accordance with constitution and rules of the union, administered by its appropriate officers or tribunals, acting in good faith and in conformity with natural justice.

9. Trade unions ⚿4.10

The policy of the law is to leave labor unions and kindred organizations the right to discipline or expel their members but exercise of such right is not plenary or without its limitations, and courts will review the rulings of the tribunals of such organizations when it is made to appear the decision rendered therein is contrary to natural justice.

10. Trade unions ⚿4.10

The holder of a membership in labor union, an unincorporated association, is entitled to be protected in enjoyment of such membership and its benefits against any unauthorized act or proceeding on part of his fellow members, either as individuals or in their official or collective capacity, by which members' enjoyment of such right will be impaired or destroyed.

11. Trade unions ⚿4.2, 4.9

The right of member of labor union, an unincorporated association, to retain his membership, is subject to terms and conditions contained in the constitution or bylaws, which constitutes a contract between the organization and its members, but when it is sought to deprive one of his membership he has a right to insist that any proceedings taken against him shall be instituted and conducted in accordance with principles of natural justice.

12. Mandamus ⚿168(4)

Evidence established that hearing before national convention of national labor union, an unincorporated association, upon plaintiff's appeal for reinstatement in national union and as president of affiliated local union, at which plaintiff was denied the right to appear personally and plead his cause, did not constitute a fair and impartial hearing as contemplated by rules of natural justice, and, hence, plaintiff was entitled to writ of mandate directing his reinstatement and recovery of damages for his improper suspension.

◆

V. P. Lucas, Los Angeles, for appellants.

George D. Higgins, Los Angeles, for respondent.

WHITE, Presiding Justice.

The Glass Bottle Blowers Association of the United States and Canada, an unincorporated association (hereinafter referred to as National Association); James McDonald, Local Representative in California of said National Association; William Endicott, President of Local Union No. 190, of Maywood, Los Angeles County, California, affiliated with said National Association, and Anthony Frederick, Secretary of the said Local Union No. 190, and the aforesaid Local Union No. 190, chartered by and affiliated with the aforesaid National Association, appeal from a judgment directing the issuance of a peremptory writ of mandate commanding the aforesaid defendants to immediately reinstate plaintiff, "to full, complete and unrestricted membership in said unions, the Glass Blowers Association of the United States and Canada, and the said Local Union #190", and that plaintiff recover of the aforesaid National Association the sum of $16,429.32 by way of damages.

By his second amended complaint, plaintiff alleged that there existed between the National Association and Maywood Glass Company of Maywood, California, a closed shop contract; that according to the provisions of Article V, section 1 of the constitution of the National Association, the president thereof "shall have power to suspend any local union officer or member of the association for any violation of its laws or insubordination of any lawful command of himself and shall immediately report the same to the trade"; that on

May 20, 1945, the president of the National Association, "without any charges being placed or made against plaintiff, without notice of trial, or any trial whatever", suspended plaintiff from membership in the National Association, "deprived him of his office as president of said Local Union No. 190, ordered seized and suspended the plaintiff's union card in said union, and suspended him from membership in said union". That on the 20th day of May, 1945, the president of the National Association sent a telegram to the Maywood Glass Company directing, "under and by virtue of the said closed shop agreement" that plaintiff be discharged from his position with said glass company, and that he was so discharged. That pursuant to a judgment rendered in a previous action filed in the Superior Court of Los Angeles County, and which judgment had become final, the aforesaid suspension of plaintiff was "adjudged to be illegal, null and void". That by reason of having been deprived of his union membership and union card as aforesaid, plaintiff has been unable to procure employment at his trade.

That plaintiff "in pursuance of said judgment has exhausted his remedies in all of the tribunals of the G.B.B.A., (National Association) in an effort to be reinstated in said labor union, but all to no avail". "That plaintiff has instituted actions both at law and in equity in the Superior Court of Los Angeles County, California, and has thus far been granted partial relief only therein. That plaintiff has been awarded damages for loss of wages from May 20th, 1945 to December 17th, 1945, and also (was awarded) judgment that the said suspension was in violation of the law and is null and void."

It is further alleged, "that within thirty days following said suspension the plaintiff filed written notice of appeal to the Executive Board of the G.B.B.A. but after long delay, and needless postponement by the defendants against the will and wishes of the plaintiff, the hearing was set in Atlantic City, New Jersey, which is approximately three thousand miles from the plaintiff's home and place of residence as aforesaid, and approximately ten months after said suspension, and the plaintiff was notified by James Maloney (President of National Association) of the wrong date of the hearing of said appeal, to-wit: that said hearing would be held on March 22, 1946, but said hearing was held instead on March 2, 1946, and was decided against this plaintiff in his absence. That thereafter, and within the time prescribed by the constitution of the G.B.B.A. (National Association) the plaintiff served notice upon the proper officer that he appealed to the National Convention of the G.B.B.A. but to no avail, the plaintiff was denied a fair hearing and/or trial before said convention, and was denied reinstatement in said labor union, the G.B.B.A. That the defendants, and each of them, are actuated by actual malice and hatred toward and of the plaintiff".

The second, third and fourth causes of action are as stated by the trial judge, "but restatements of the same cause of action (the first) with varying allegations of damages".

The trial court found that plaintiff is a skilled operator of glass container blowing machines, and "that he depends for his livelihood upon his earnings at the said trade". That plaintiff was employed at his trade for more than three years prior to May 20, 1945 by the aforesaid Maywood Glass Company. That for more than thirty years plaintiff had been a member in good standing of the National Association, and for some two years prior to May 20, 1945 had been President of defendant Local Union #190, which is affiliated with the National Association. That the constitution of the National Association does contain the aforesaid provision with reference to the power of the president thereof to suspend any local union, officer or member of the association.

The court further found that it was true that on May 20, 1945 defendant president of the National Association, "without any charges being placed or made against plaintiff, without notice of trial, or any trial whatever", suspended plaintiff from membership. That such suspension was accomplished through a telegram dispatched to plaintiff by defendant National Association president, reading as follows:

> "I am informed by our National representatives that regardless of instructions contained in my telegram of May eleven the plant of the Maywood Glass Company is not in operation today Sunday STOP I am holding you as President of Local one ninety responsible for this condition of affairs and by the authority vested in me as President do hereby suspend you from membership in our Union the Glass Blowers Association of the United States and Canada."

That pursuant to telegraphic directions from said president of the National Association, Maywood Glass Company did discharge plaintiff from its employ and thereafter refused to re-employ him.

The court also found "that it is true *that said labor unions and the above named defendants without right treated said suspension as an expulsion* and have refused to have any dealings with, or to recognize the plaintiff as a union man, or a member of the G.B.B.A. or in any manner whatever. That it is true that the plaintiff is not able to obtain work at his trade unless he is a member of the G.B.B.A. having in his possession a clear union card in the defendant union the G. B.B.A." (Emphasis added.) That said suspension "was without just cause and was wholly illegal, that said suspension was adjudged to be unlawful by the Superior Court of Los Angeles County, State of California, in a judgment entered on the 20th day of March, 1946, in action No. 502,689, in which action Alfred B. Cason the plaintiff herein, was the plaintiff, and James Maloney and the Glass Bottle Blowers Association of the United States and Canada, et al., were the defendants. That said judgment is a final adjudication, and operates as an estoppel as to the fact that the suspension was unlawful and that it was the proximate cause of damage to the plaintiff."

The court found that "it is true that ever since the said suspension the plaintiff herein has sought and endeavored to secure his reinstatement in said union, the G.B.B.A. and likewise reinstatement as a member of said Local Union #190, and has made application and sought to obtain employment of and with the said Maywood Glass Company, and many other glass manufacturing plants, but did not succeed. That it is true that he, the plaintiff, in pursuance of said judgment has exhausted his remedies in all of the tribunals of the G.B.B.A., in an effort to be reinstated in said labor union, but all to no avail. That the defendants refused to grant to the plaintiff a fair trial of his appeal to the convention. That the plaintiff has been denied and is still denied reinstatement in the said union, the G.B.B.A. and that he has been refused and is still refused employment at and with the Maywood Glass Company, and other glass manufacturing companies, because the plaintiff was denied by the defendants a union card in the said G.B.B.A. That in said action No. 502,689, the plaintiff has been awarded damages for loss of wages from May 20th, 1945, to December 17th, 1945, and also judgment that the said suspension was in violation of the law as aforesaid. The Court finds that said judgment is final and operates as a bar to the recovery of wages lost by plaintiff during the remainder of the period of unlawful suspension."

With reference to plaintiff's efforts to exhaust his remedies before the tribunals set up within the National Association, the court found "that within thirty days following said suspension the plaintiff filed written notice of appeal to the Executive Board of the G.B.B.A. That the hearing thereof was set in Atlantic City, New Jersey, which is approximately three thousand miles from the plaintiff's home and place of residence, on March 2nd, 1946, approximately ten months after date of said suspension. That the defendant, James Maloney, sent a proper telegram to plaintiff, advising of date of said hearing, but Mr. Cason received a telegram with a wrong date, due to mistake of the Western Union Telegraph Company, but that plaintiff was not misled by said mistake. That said hearing was held on March 2nd, 1946, and was decided against plaintiff in his absence. That the Court further finds that it is true that thereafter, and within the time prescribed by the Constitution of the G.B.B.A. the plaintiff served notice upon the proper officer that he appealed to the National Convention of the G.B.B.A. but to no avail; *the plaintiff was denied a fair hearing or trial before said convention or before the Appeals and Grievance Committee of said Convention,* and was denied reinstatement in said labor union, the G.B.B.A. *The Court finds that this denial of reinstatement constituted an expulsion.* That the defendants, and each of them, except Local Union #190, James McDonald, William Endicott and Anthony Frederick were actuated by actual malice and hatred of and toward the plaintiff in their denial to plaintiff of a fair hearing before said Committee or before the Convention and in their refusal to reinstate plaintiff." (Emphasis added.)

The court further found that plaintiff "has no legitimate cause for complaint" as to the place where the hearing before the Executive Board was held", Atlantic City, N. J., as that was the usual and customary place of meeting for said Executive Board. Also, that plaintiff was not prejudiced because he was financially unable to attend the meeting nor by the mistake made by the telegraph company in transmitting the telegram regarding the date of hearing.

It was found by the court that it was untrue that defendants caused plaintiff's name to be placed upon an ineligible list, commonly called a "black list" or that all union members were by defendant president of National Association, directed, "not to work, associate or correspond with the plaintiff, or have any deals with the plaintiff whatever". That while it was true that defendants "have wrongfully and unlawfully", prevented plaintiff from obtaining employment at his trade, that it was not true "that this was accomplished through misrepresentation or through any type of discrimination, coercion or intimidation, except that which accompanied and emanated from the fact that plaintiff had been suspended or expelled from union membership and was not in possession of a union card showing him to be in good standing with the G.B.B.A.; that this fact did prevent employers from hiring or retaining plaintiff in their employment because of a well-founded fear on their part that their doing so would precipitate a strike or other labor difficulty in the employer's business. It is not true that defendants have blacklisted the plaintiff in violation of the laws of the State of California". But that it is true that because of his aforesaid suspension plaintiff has been unable to obtain employment at his trade except for short intervals.

The court further found, "that it is true that at the time of said suspension no charges had ever been made against Alfred B. Cason, and that he had been suspended without any, that the Court held and adjudicated in Superior Court action #502,-689, that reasonably specific charges are one of the essentials of a lawful suspension proceeding.

"Referring to the hearing before the Committee of Appeals and Grievances, and the hearing before the Convention, the Court finds that it is true that prior thereto or at the time thereof Mr. Cason had never been and was not presented with any specific charges against him. Plaintiff was put to inference and conjecture as to what faced him and as to what he must defend against or what he must attack and he was put to his showing in advance of his accusers; he was excluded from the hearing during presentation of charges against him.

"Referring further to the hearing before the Appeals and Grievance Committee the Court finds that it is true that there are two basic elements which are inherent in due process of law and which, so far as voluntary tribunals such as labor unions, are concerned, are inherent in the American sense of fair play, namely, that one whose rights, whose property, whose right to make a living at the trade in which he is skilled is challenged, shall first know what is the charge against him; and secondly, shall have the opportunity to confront his accusers. Those things lie at the basis of all hearings of all kinds which involve a man's right to liberty or his property. Neither of these fundamentals had been accorded to the plaintiff in the hearing before the Committee or before the Convention."

The court further found that statements made by Lee W. Minton, President of National Association during the hearing of plaintiff's appeal on the floor of the National Convention with reference to the decision rendered in the former case above referred to, were and "are false and untrue, and that Mr. Minton at that convention did deliberately misrepresent this Court's opinion and ruling in the former case, and that the normal tendency of that misrepresentation was to mislead the delegates and to make them think that the Court had upheld Mr. Maloney (defendant herein) on the merits."

The court further found that the acting chairman of the convention at which plaintiff's appeal was heard ruled that plaintiff was not entitled to be present and to have a hearing before the convention, and that without plaintiff's consent and contrary to his expressed desire he was refused admission to the convention hall during the presentation of his appeal.

With reference to those who espoused plaintiff's cause upon the floor of the convention, during the hearing of plaintiff's appeal, the court found that such delegates were not representatives of plaintiff but "were there as his friends doing their best to sustain him, doing their best to get him into the convention hall where he could have a hearing. They were not his delegated representatives authorized to appear in his place and stead." The court further found that at no time was plaintiff confronted by his accusers, afforded an opportunity to cross-examine them, to know what the charges were and to refute them. That because plaintiff "was denied his basic rights by the Committee, he was entitled to the floor of the convention, and that it was a gross denial of his basic rights when he was excluded by order of the chairman."

The court further found that the suspension of plaintiff was wrong from its beginning, but that it could have been ended by the Executive Board or Grievance Committee at its meeting in the month of March, at which meeting plaintiff could have been restored to his rights. That the same is true of the action of the convention, and that until the convention had acted upon plaintiff's appeal the latter was suspended, not expelled, "but as that suspension was not limited in point of time, the refusal to lift it, the refusal by the last appellate tribunal to do so, constituted an expulsion * * * it is a new and independent wrong and gives rise to a new and independent cause of action * * * this being a wrongful expulsion rather than a suspension and being a new wrong it was not involved in or adjudicated by case #502,689 (hereinbefore referred to as the former case). The plea of *res adjudicata* is not well taken and the statute of limitations has not run. Mr. Cason (the plaintiff) was not entitled, much less obligated, to reopen the case #502,689."

The court further found, "that said hearing before the convention was unjust, un-American, fraudulent, oppressive, malicious and a travesty upon justice". There is a further finding that the judgment rendered in the foregoing case #502,689, which had become final at the time of trial of the instant case, "conclusively determined that the suspension of plaintiff was unlawful". The court found that when the convention refused to lift the suspension on August 5, 1946, and expulsion was effectuated, that "plaintiff could have recovered in his first action damages for the entire suspension period and hence is barred from recovering for any of that period in the present proceeding. Plaintiff will recover no damages for the portion of the suspension period extending from December 17, 1945 to August 5, 1946." (The date of the convention.)

The court further found that plaintiff's inability to procure work except for short periods of time "was proximately caused by defendants expelling plaintiff from the G.B.B.A. and Local Union No. 190 and their lifting and withholding his union card, thus making it impossible for him to convince prospective employers that they could hire him without precipitating trouble with the union * * *".

The judgment directing the issuance of the peremptory writ of mandate commanding the reinstatement of plaintiff in the union as aforesaid and for $16,429.32 damages followed. The court computed the damages on the basis of $9,026.82 for loss of wages to the 31st day of January, 1949, for the additional sum of $576.10 as wages for the seven weeks from January 31, 1949 to the 21st of March, 1949; for loss of wages for one year from date of judgment the sum of $4,326.40; for mental suffering, humiliation, physical injury, loss of health, damages in the sum of $2,500.00.

[1, 2] Appellants' contention that the remedy of the writ of mandate is not available against any unincorporated association is without merit. It has long been the law of this state that mandamus is a proper proceeding by means of which to compel the reinstatement to membership and to protect the property rights of members of unincorporated associations in all proper cases. In such a proceeding, the same rules are followed, so far as applicable, as apply to incorporated bodies of the same character. Damages may also be awarded to one who has been illegally expelled from a duly organized association for wages lost on account of having been deprived of the opportunity to work or to obtain employment, including compensation for the mental suffering and humiliation caused thereby, and which flows proximately from the wrongful suspension or expulsion, Otto v. Journeyman Tailors etc. Union, 75 Cal. 308, 313, 17 P. 217, 7 Am.St.Rep. 156; Smetherham v. Laundry Workers Union, etc., 44 Cal. App.2d 131, 135, 111 P.2d 948; St. Louis Southwestern Ry. Co., v. Thompson, 102 Tex. 89, 113 S.W. 144, 19 Ann.Cas. 1250; Schneiders v. Local Union No. 60, 116 La. 270, 40 So. 700, 5 L.R.A.,N.S., 891, 114 Am. St.Rep. 549, 7 Ann.Cas. 868; Ellis v. American Fed. of Labor, 48 Cal.App.2d 440, 120 P.2d 79; Code Civ.Proc. § 1095; Nissen v. International Brotherhood, etc., 229 Iowa 1028, 295 N.W. 858, 872, 141 A.L.R. 598.

Appellants rely on the case of Elevator Operators, etc., Union v. Newman, 30 Cal. 2d 799, 186 P.2d 1, but that case is not helpful to them for it merely decides that mandamus does not lie where there is no cause of action for reinstatement to a position, but merely a claim for damages for breach of contract. Such is not the situation in the instant case. Other cases cited by appellants are equally distinguishable from the one at bar.

Appellants' next contention concerns the doctrine of *res judicata* and consequent estoppel. In this regard they contend that by the pleadings of the respective parties in the so-called and heretofore referred to prior case, all of the questions and issues, both of fact and law, which are or were presented to the court for determination in the instant proceeding were, or could have been in said previous case, presented to the superior court, and that the judgment of said court rendered March 15, 1946 (which has become final) is binding and conclusive upon the parties hereto.

[3] Undoubtedly, it is the law that the judgment of a competent court, when properly pleaded, is conclusive between the same parties for the same thing, although it be palpably erroneous, Wolverton v. Baker, 86 Cal. 591, 593, 25 P. 54; Price v. Sixth District Agricultural Ass'n, Los Angeles County, 201 Cal. 502, 509, 258 P. 387; Estate of Clark, 190 Cal. 354, 212 P. 622.

[4] But are the causes of action stated in the previous proceeding and the one at bar the same, and were the points, matters and issues presented in the first suit the same as are now tendered? While in some respects it may appear that the issue presented in the instant case is but a recast of that tendered in the former proceeding, a critical examination of the two lawsuits discloses that the former was instituted to obtain injunctive relief against the enforcement of the suspension of respondent by the President of National Association, while the cause now engaging our attention prays for the issuance of a writ of mandate directing appellant National Association to reinstate respondent to its membership and his position as President of Local Union No. 190. The parties are not the same, and the question of reinstatement, which is one of the principal, if not the principal question involved in the instant proceeding, was not determined by

the court in the prior action, the court holding in that proceeding that while the suspension of the respondent was unlawful and void, that he had taken "an appeal from said suspension within the time and in the manner provided by the G.B.B.A. (National Association) constitution, which appeal is still pending before the internal administrative tribunal provided for and prescribed by said constitution"; that because of the appeal pending before the national association tribunal, "the court will not order plaintiff's immediate restoration to membership". It must therefore, be held that appellants' plea of *res judicata* can not be sustained.

Since the final judgment rendered in the prior action determined that the suspension of respondent by the president of National Association was unlawful and void, we can not concern ourselves with such suspension but are confined to a determination of whether the hearings before the executive board, the appeals and grievance committee and the National Convention, were had in good faith and in accordance with the laws and rules prescribed by the National Association's constitution. If such laws and rules are not in violation of the laws of the land, the laws of natural justice or any inalienable right of the member, and are followed in good faith, then the judgment pronounced by such tribunals is conclusive.

[5] With reference to the expulsion of members from associations of the character here in question it has been held that the courts have no right to interfere with the decisions of the tribunals of the associations except in the following cases: "First. If the decision arrived at was contrary to natural justice, such as the member complained of not having an opportunity to explain misconduct. Secondly. If the rules of the club have not been observed. Thirdly. If the action of the club was malicious and not bona fide." Otto v. Journeyman Tailors, etc. Union, supra, 75 Cal. at page 314, 17 P. at page 219, 7 Am.St.Rep. 156.

In the instant case the trial court held that upon respondent's appeal to the National Association tribunals from the order suspending him, "the plaintiff was denied a fair hearing or trial before said convention or before the Appeals and Grievance Committee of said convention, and was denied reinstatement in said labor union, the G.B.B.A. (National Association)". The court also determined that the denial of reinstatement "constituted an expulsion".

We are persuaded however, that reasonable and ordinary construction of the language used in the constitution of the National Association compels the conclusion that the words "suspend" and "expelled" are used synonymously, and that there is no intention manifested that suspension means one thing and expulsion means another. That the action of the president in suspending a member of a local union or an officer thereof is final and complete in itself and not a temporary thing that requires approval is strengthened by reference to section 1 of Article V of the constitution, reading as follows: "He (the president) shall decide all questions of law, disputes or questions in controversy however arising; all his decisions being subject to appeal, first to the executive board, and then the biennial convention." The decision of the president of National Association is somewhat similar to a judgment of a trial court. It is effective in itself unless reversed on appeal. Under the constitution of National Association, no action of the executive board or convention was required to give efficacy to the act of the president in suspending respondent. Such suspension remained in effect unless, upon appeal by respondent to the executive board or biennial convention it was reversed. This was recognized by the court in the prior proceeding when it relegated respondent to the exercise of his right of appeal to the forums of the National Association before the civil courts could intervene.

That respondent's suspension was unlawful and that he was entitled to damages from the date of such suspension until the decision of the prior case has been judicially determined and is final. But this suspension was the act alone of the president of the National Association.

We are therefore confronted solely with the question of whether the proceedings on respondent's appeal to the executive board and biennial convention were so unfairly conducted, contrary to natural justice, malicious, and not bona fide, so as to authorize the courts to assume jurisdiction and decree the reinstatement of respondent in the national union and as president of Local Union No. 190, and to award him damages for the wrong allegedly done him.

A review of the record herein discloses that the president of National Association is authorized by the constitution thereof to decide all questions of law, disputes or questions in controversy, however arising, all his decisions being subject to appeal, first to the executive board, and then the biennial convention. The national president is authorized to remove any local union officer, or representative, for incompetency or for nonperformance of duties, or for failure to carry out the provisions of National Association's constitution, the rules therein contained, and the by-laws and agreements of the local union, or for putting into effect or allowing to be put into effect any practice, rule, agreement, by-law, or policy not having the approval of National Association. A portion of Article V, section 1, of the constitution of National Association, having to do with the national president thereof, reads as follows: "He shall have power to suspend any local union officer or member of the association for any violation of its laws or insubordination of any lawful command of himself and shall immediately report the same to the trade."

It is conceded that at the time of the suspension of respondent by the national president there was and had been in existence a union shop agreement and working rules entered into by National Association and Maywood Glass Company of Maywood, California; that by the terms of said agreement it was provided that the same should continue in full force and effect until August 31, 1945. That among other things in said agreement, it was provided as follows:

"Hours of Work

"*Section 1.* Six days or six nights shall constitute a week's work, but operators and machine upkeep men will be required to work on Sunday when necessary to put their machines in order for the coming week. Starting and quitting time shall be left to the option of the different factory managers and the Local Union."

"Duration of Agreement

"*Section 1a.* This agreement shall be in full force and effect until August 31, 1945, and thereafter unless changed by mutual agreement."

* * * * * *

"No Work Stoppage

"*Section 13.* There shall be no cessation of work in any factory, pending the adjustment of any disputes or differences between the firm and Local Union, unless on instructions of the Executive Board of the Glass Bottle Blowers Association."

The record further reveals that prior to the 20th day of September, 1944, a controversy had arisen between respondent herein and his employers, Maywood Glass Company; that the Vice-President of the National Association, in conjunction with William Gable, local representative and agent in California of the National Association, endeavored to effect a settlement of said controversy. That thereafter it was referred to a United States Commissioner of Conciliation for Labor Matters; that thereupon an agreement in writing was entered into which said agreement was assigned by respondent herein among others. By the terms of said agreement it was provided that on condition the national president reinstate certain suspended members of local unions involved, including respondent, that such members would return to work pending further negotiations. Apparently, no final settlement interpreting the agreement between National Association and Maywood Glass Company was arrived at and on May 5, 1945 respondent herein advised the Manager of Maywood Glass Company that, as President of Local Union No. 190, he (respondent) would not permit the Maywood Glass Company plant to operate on Sunday, May 6, from 8 a. m. to 8 a. m. on Monday, May 7, and that said plant would be shut down each Sunday thereafter until certain wage demands were met. That respondent as President of said local, refused to permit upkeep men or operators to put machines in order on Sunday for the ensuing week. That said plant was closed down on Sunday, May 6, but that foremen of said Maywood Glass Company kept said machines in order and fired so that they would be ready for operation on Monday, May 7. However, on Monday, May 7, because the aforesaid foremen had kept the machines in order for operation on Monday, respondent refused to permit members of his local union to operate said machines and declared another 24-hour shutdown.

Thereupon, Howard V. Fulton, Manager of Maywood Glass Company, sent President of National Association a telegram reading as follows:

"President A. B. Cason Local 190 advised me Saturday that our plant would not operate on Sunday May 6 from 8:00 a. m. to 8:00 a. m. Monday May 7. Also that we would be down every Sunday until we met certain demands of wages. Cason also refused to allow upkeep men or operators to put their machines in order for the coming week. The foremen were allowed to do the necessary maintenance work. Monday 8:00 a. m. part of the machines were ready and hot. Cason refused to allow the operators to go to work because glass had been put into the machines. This policy had been the practice on former startups and Cason admits he should have warned us. Cason declared another 24 hour shut-down and says he will only allow the machines to be turning over and the drop ready to make ware at 8:oo a. m. Tuesday. Then the operators and upkeep men can start work. His refusal to allow the operators and upkeep men to put their machines in order for the coming week is a direct violation of the manufacturers contract with your organization. Please advise us your plans to break up this revolution by Local 190 against your organization and your organizations agreement with the manufacturers. Cason also advised that the president and secretary of the Latchford Marble, Glass Containers, Owens-Illinois and Maywood locals are forming the policies that are being followed in this revolt. Cason also admits being the leader of this group."

On May 11, 1945, after receipt of the aforesaid telegram National President Maloney dispatched and sent to Local 190, through its president, respondent herein, a telegram reading as follows:

"For sometime I have been trying to arrange a wage conference with manufacturers on shift differential premium payments. Stop. Supreme Court decision dissolving Glass Containers Association has caused delay. However I am meeting committee of two from the manufacturers Tuesday May 15th what their decision will be I am unable to say at this time. Stop. The action of Local Union One Ninety in refusing to keep the Maywood plant in operation on Sunday for reasons you are all familiar with is a violation of our conference agreement and as president of our association I must instruct you to comply with these provisions of our wage contract and keep that plant in operation seven days per week the same as all other plants throughout the industry I trust you will comply with this ruling."

On May 20, 1945, President of National Association dispatched to respondent a telegram substantially in words and figures as follows:

"I am informed by our national representatives that regardless of instructions contained in my telegram of May Eleventh the plant of the Maywood Glass Company is not in operation today Sunday. Stop. I am holding you as president of Local One Ninety responsible for this condition of affairs and by authority vested in me as president do hereby suspend you from membership in our union the Glass Bottle Blowers Association of the United States and Canada."

Again, on May 24, 1945, said president of National Association dispatched to respondent Cason, a telegram as follows:

"My recent telegram suspending you from membership in our organization was primarily because you refused as president of Local 190 to permit our upkeep men to come in the factory on Sunday May 6 for the purpose of placing machines in condition to work the following Monday a violation of Section One of our wage contract Second because the Maywood Glass Company opened their machines with foremen you stopped the plant for twenty four hours by not allowing the operators to work in violation of Section Thirteen of our wage contract."

On May 26, 1945, the President of National Association forwarded a telegram to respondent Cason reading as follows:

"I have your telegram informing me all members of Local #190 are ready to return to work under our national working agreement. The constitution and the law of the state of California. However I must direct you to our constitution and call your attention to the fact that the president of the Association is authorized to decide all questions of law, disputes or questions in controversy, however arising. I trust your telegram means that you will call off this illegal strike and return to work under our wage contract."

It is therefore apparent that respondent's contention on appeal that he was suspended by the president of National Association "without any charges being preferred against" him is not borne out by the record. It is manifest from the foregoing telegrams sent to respondent by the national president, dated May 20, and 24, 1945, that the former was suspended upon the following charges: "because you refused as President of Local 190 to permit our upkeep men to come in the factory on Sunday May 6 for the purpose of placing machines in condition to work the following Monday a violation of Section One of our wage contract Second because the Maywood Glass Company opened their machines with foremen you stopped the plant for twenty four hours by not allowing the operators to work in violation of Section thirteen of our wage contract."

We come now to a consideration of respondent's efforts to exhaust his remedies before the tribunals set up in the constitution of National Association. In that regard, as the trial court found, respondent filed a timely notice of appeal to the Executive Board of National Association, was advised of the date of hearing thereof, did not attend said meeting, and his appeal was decided against him in his absence. Thereupon, respondent appealed to the Bi-ennial Convention of National Association.

We are forced to the conclusion that the trial court's finding that in the hearings before the appellate tribunals of National Association, respondent "was not presented with any specific charges against him * * * was put to inference and conjecture as to what faced him and as to what he must defend against * * *" is not sustained by the evidence. As heretofore pointed out, the telegrams with reference to respondent's suspension contained specific charges against him and fully informed him of the ground upon which such suspension was based.

This brings us to a consideration of whether the proceedings before the national convention in considering respondent's appeal were violative of natural justice, unfair, malicious and not in good faith.

[6, 7] The tribunals of labor unions established for dealing with matters relating to the discipline of members, and for securing the good government and welfare of the organization are not fettered by the rules of evidence as applied in courts of law. They may proceed upon and be guided by evidence on which men transact the ordinary business of life. The decisions of such tribunals suspending or expelling members are of a quasi-judicial character, and proceedings before them must be consonant with the principle of natural justice, fairly and honestly administered in accordance with the laws of the union and the laws of the land.

[8] As an incident to his membership in a labor union, one consents to be suspended or expelled in accordance with the constitution and rules of the union, administered by its appropriate officers or tribunals, acting in good faith and in conformity with natural justice.

Respondent first appealed to the Executive Board, was advised of his right to be personally present at the meeting when his appeal was to be considered, but did not attend for financial and other reasons hereinbefore narrated. The trial court found for various reasons heretofore stated, that respondent was not prejudiced because of his inability to attend the executive board meeting at which his appeal was considered in view of the fact that he was afforded an opportunity to attend. Under these circumstances, it cannot here be held that the decision of the Executive Board, made in respondent's absence, denying his appeal, was violative of the laws of natural justice and was not in good faith, or that he was denied a fair hearing or opportunity to present his case.

Respondent next appealed to the national convention from the adverse decision of the Executive Board.

Pursuant to the rules of the National Association, respondent's appeal to the convention was referred to the Appeals and Grievance Committee thereof. This committee held a hearing at which respondent was present and presented his case. There were offered to this committee some eight resolutions, adopted by local unions of National Association, located at Los Angeles, Downey, Maywood, Huntington Park, and Long Beach, all in Los Angeles County. The purport of these resolutions was that the charges and accusations made against respondent "were groundless and untrue", that respondent "was suspended in an unlawful manner" and without justification. The resolutions demanded that "to bring harmony and good will back into our ranks", and "to renew the faith and regard", for National Association "among the membership", that respondent "be completely exonerated and reinstated in the Glass Bottle Blowers Association (National Association) with full restitution for any and all pecuniary losses due to said suspension". After presentation of the foregoing resolutions, respondent, who was personally present before the Appeals and Grievance Committee, was permitted, without interruption, to present his appeal, and the reasons why his suspension was unlawful and without justification. In this regard, respondent testified that "I went back to the '44 convention of which I was a delegate representing Local 190, and I pointed out to them that on three days of the 1944 convention in Cleveland that President Maloney had reiterated several times on three different days of the convention that it was entirely optional with the men in any glass plant whether they worked on Sunday or not". At the hearing, respondent produced the minutes of proceedings had at the 1944 convention from which he read portions. Included therein we find the following:

"Delegate Welch, Local Union 78, asked if it was the intention of this section that men must work on Sunday if the manufacturer requires them to.

"President Maloney: I have ruled, Delegate Welch, as you know, that it is optional with the men in the plant whether they work on Sunday or not. That question came up during the Indianapolis convention and I ruled as per the wage contract that it was up to the men themselves as to whether they should work or not. That decision was protested by the company and taken to the wage conference in Atlantic City. It created a great deal of discussion. The community took a very definite stand and insisted that the section in the wage contract as it is written be amended in one particular word, that if the company felt they had to keep the plant in operation on Sunday the men were compelled to work under our wage contract and on the ruling on the section covering this particular question. They made a very determined fight at the wage conference. As a matter of fact, I believe it was brought up in a couple of conferences, and the conference, I am happy to say, upheld the position that I have taken, that it was optional with the men as to whether they would work on Sunday or not.

"I do not know what is in the minds of the committee, but as far as the president of the organization is concerned, the ruling would be the same, that it is optional with the men."

Before the Appeals and Grievance Committee respondent read at great length from the 1944 convention proceedings in an effort to show that the president of National Association at the 1944 convention had ruled that under the laws of National Association, six days or six nights would constitute a week's work and that Sunday work was, as respondent contended, optional with the union workers. Respondent then brought before the committee the working agreement under which the members of his local union were operating, testifying, "Then I referred them to the working agreement, stating that, 'I am bringing the working agreement before you now after President Maloney's ruling in the convention to show that we are merely sustaining President Maloney in the action that he took in the convention.' And then the Section 1 of the working agreement was read to them."

At the trial in the court below respondent further testified as follows:

"Q. And then what did you state with reference to the working agreement as to how you regarded your action and the action of your committee and your Local Union?

"A. I told the Grievance Committee, according to the minutes of the previous meeting and the working agreement that myself as president of Local 190 I acknowledged a motion to come to Local 190 to the extent that the men did not want to work on Sunday and the motion was seconded and voted upon and it was voted unanimously that they didn't want to work on Sunday."

Respondent then presented to the grievance committee a copy of the memorandum opinion rendered by the trial judge in the prior case, wherein it was judicially ruled that his suspension was illegal and unlawful. He then presented the foregoing resolutions of protest together with one signed by the individual members of his own local union No. 190. Respondent was then permitted to argue his case, during which he asked, "How could I be suspended under those circumstances? I was merely sustaining their President in the action that he took in the previous convention." The Appeals and Grievance Committee then took the matter under submission to make its report to the convention.

The proceedings of the 1946 convention, at which respondent's appeal was considered, reflect that the Appeals and Grievance Committee, through its chairman, presented its report to the convention on respondent's appeal. The report was signed by all the members of the committee. After the foregoing protests from the various local unions were read, the report and recommendation of the Appeals and Grievance Committee was as follows:

"We of the Appeals and Grievance Committee, reporting on the expulsion of Alfred B. Cason, acting on the resolutions from Local Unions Nos. 100, 114, 122, 125 and 148, do not concur.

"We feel, under Article 5, Paragraphs 8 and 9, of the G.B.B.A. Constitution, that President Maloney was acting within his duty under the laws of this Association."

According to the convention proceedings, "A motion was made and seconded to adopt the report of the committee." Then followed a spirited and acrimonious discussion by several delegates who espoused the cause of respondent. Officers of the national convention, including the then president who had succeeded appellant president Maloney in that office, defended the action of former president Maloney in suspending respondent and urged adoption of the Appeals and Grievance Committee report. During the discussion much invective was indulged in by both respondent's supporters and those favoring adoption of the committee report. The decision and memorandum opinion of the trial judge in the prior case was referred to and quoted from. During the heated discussion on the floor of the convention, a delegate pleaded for respondent "to have a word and a hearing here on the convention floor". The presiding officer denied this request on the ground that Section 5 covering appeals and grievances provides that when an appeal is presented to the national secretary it is his duty "to notify all parties interested to appear before the Grievance Committee, either in person or by counsel". The ruling of the chair was thus stated: "So he is not entitled to the floor of this convention."

A delegate thereupon moved the previous question. The question before the convention being on the adoption of the foregoing report of the Appeals and Grievance Committee, the presiding officer stated: "All in favor of the committee's report, which upholds President Maloney in the suspension of A. B. Cason (respondent herein), will please say, 'Aye'. Those opposed will say, 'No'."

The committee report was adopted with but two negative votes.

We come now to a consideration of the efforts made by respondent to be permitted to appear and plead his cause before the national convention. In this regard, there is evidence in the record that about an hour before his appeal was to come before the convention, respondent contacted Chairman Hubbard of the Appeals and Grievance Committee, who asked respondent if he "was expecting to go before the convention to lay my case before the convention", to which respondent replied, "I most assuredly am". Subsequently, Chairman Hubbard told respondent that he "didn't think they were going to admit me to the convention". Without repeating the testimony it is sufficient to say that respondent made every effort to gain admission to the convention in order to present his appeal in person but was steadfastly refused such opportunity, and in fact, was prevented from entering the convention hall by one of the guards at the door thereof.

[9–12] We are unable to reconcile ourselves to the view that the treatment of respondent at the national convention was at all in accord with the principles of natural justice or the ideals of fairness that should characterize hearings of a quasi-judicial character such as this was.

We are not unmindful of the policy of the law to leave to labor unions and kindred organizations the right to discipline or expel their members. But the exercise of this right is not plenary or without its limitations. Courts will review the rulings of the tribunals of such organizations when it is made to appear that the decision rendered therein is contrary to natural justice. Included in the principle of natural justice is the right of a member to have an opportunity to defend against or explain misconduct charges against him. The holder of a membership in an organization such as the one here under consideration, is entitled to be protected in the enjoyment of such membership and its benefits against any unauthorized act or proceeding on the part of his fellow-members, either as individuals or in their official or collective capacity, by which the member's enjoyment of said right will be impaired or destroyed. True, the right of a member to retain his membership is subject to the terms and conditions contained in the constitution or by-laws, which constitute a contract between the organization and its members, but nevertheless, when it is sought to deprive him of his membership he has a right to insist that any proceedings taken against him shall be instituted and conducted in accordance with the principles of natural justice. That a fair trial shall be accorded him in accordance with the meaning and intent of justice and fairness as far as possible within the bounds of average human ability, attended by its unavoidable imperfections and frailties. Natural justice and concepts of fairness guarantee a member the right to present his case. That does not simply mean the right to appear in person before a subordinate committee, but the right to appear before those who are to pass upon and determine his right to retain his membership —in the instant case, the delegates to the biennial convention. To hold under the circumstances here present that respondent was accorded that fair and impartial hearing before the convention contemplated by the rules of natural justice would simply be to ignore actualities. If the constitution of the National Association contemplates a hearing before the convention upon an appeal from an order for suspension, such as was given in the instant proceeding, then it is not the precepts of natural justice that must yield, but in accordance with the latter, courts will intervene for the purpose of protecting the rights of the member, and the constitution of the organization must yield, to the end that such constitution may not be made a pretext for oppression and wrong.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

MALLOY v. FONG et al. (two cases).

Civ. 13539, 13583.

District Court of Appeal, First District, Division 2, California.

July 7, 1950.

Hearing Granted Aug. 31, 1950.*

Clinton Malloy, a minor, by James I. Malloy, his guardian ad litem, brought action against William Peter Fong, Wilbur J. Antisdale, The Presbytery of San Francisco, and others, to recover for injuries sustained by the plaintiff in automobile accident. The Superior Court, City and County of San Francisco, Sylvain J. Lazarus, J., denied the motions of Fong and Antisdale for judgment notwithstanding the verdict and granted that of the Presbytery and granted the motion of Antisdale for a new trial, and the plaintiff appealed. The District Court of Appeal, Goodell, J., held that there was no agency relation between Fong and the Presbytery so as to render the Presbytery liable for alleged negligence of Fong in operation of automobile. That the Presbytery could not be held liable for the plaintiff's injuries under doctrine of respondeat superior, that envelope donations by plaintiff's parents as contributions at bible school were not compensation within meaning of automobile guest law, and that granting of new trial was not an abuse of discretion.

Judgment affirmed.

Dooling, J., dissented in part.

1. Judgment 🔑199(3.2)

On motion by defendant for judgment notwithstanding verdict for plaintiff, evidence was required to be viewed in light most favorable to the verdict.

2. Automobiles 🔑193(3)

Where minister at Presbyterian Church which was partially subsidized by certain Presbytery, became sick and was unable to continue with summer bible school for children, and bible student volunteered to take the place of the minister, and bible student was merely a well-intention volunteer and gratuitous helper, there was no agency relation between bible student and Presbytery which would render the Presbytery liable for injuries sustained by one of the children because of the alleged negligent operation of an automobile by the bible student while taking children to playground for physical recreation.

3. Religious societies 🔑30

Presbytery of Presbyterian Church could not be held liable under the doctrine of respondeat superior for injuries sustained by child at bible school at Presbyterian Church because of alleged negligence of the minister of the church in operation of his automobile.

4. Automobiles 🔑181(3)

Fact that minister conducting bible school for children handed out envelopes to the children with the idea that they would obtain money at home and bring the envelopes with money to be used for the upkeep of the bible school did not make the envelope donations "compensation" within meaning of automobile guest law so as to warrant recovery for injuries sustained by a child at bible school because of alleged negligent operation of automobile by minister. Vehicle Code, § 403.

5. New trial 🔑39

Where jury was given six or seven instructions on subject of willful misconduct in addition to those on the subject of negligence in injury action, though willful misconduct was not pleaded, and court in the willful misconduct instructions failed to give automobile guest statute either literally or in substance and effect, court did not abuse its discretion in granting a new trial. Vehicle Code, § 403; Const. art. 6, § 4½.

---

* Subsequent opinion 232 P.2d 241.

Healy & Walcom, M. Mitchell Bourquin, Jacobs, Blanckenburg & May, all of San Francisco, for appellant.

Clarence A. Linn, San Francisco, Robert W. Macdonald, Oakland, Dan Hadsell, San Francisco, Roscoe D. Jones, Oakland, Raymond L. Hanson, San Francisco, of counsel, for respondent Presbytery of San Francisco.

Cooley, Crowley & Gaither, San Francisco, Cal., for respondent Antisdale.

GOODELL, Justice.

The plaintiff recovered a verdict for $41,500 against the defendants Fong, Antisdale and The Presbytery of San Francisco, each of whom moved for judgment notwithstanding the verdict. The motions of Fong and Antisdale were denied and that of The Presbytery was granted. Respondent Antisdale's motion for a new trial was granted. These appeals are from the latter order and from that part of the judgment which denies a recovery as against The Presbytery. Fong did not appeal.

During the summer of 1943 the San Mateo Presbyterian Church, of which Antisdale was the pastor, conducted a daily vacation bible school at its church. Antisdale was ill and away for a few days and in his absence Fong, a 19 year old divinity student, volunteered to teach at the school. Appellant, a lad of 13, was attending the school, and on July 1, 1943 a physical education period was held during which some of the boys and girls in attendance were conveyed in two automobiles from the church to a nearby playground. Antisdale had returned only that morning, and he drove his Chevrolet coach while Fong drove a Ford station wagon. Appellant road on the left running board of Fong's station wagon, another boy rode on its right running board, while on the Chevrolet one boy rode on the left and one on the right running board.

Twenty-eighth Avenue in San Mateo runs in an easterly and westerly direction, with one lane for vehicular traffic in each direction; Isabelle Avenue intersects 28th Avenue at approximately a right angle. Defendant Eleanor Holmes was driving a Chevrolet sedan in a northerly direction on Isabelle Avenue, and at the intersection her Chevrolet collided with Fong's car. Appellant, on its left running board, lost his left leg below the knee in the accident and sustained injuries to his right leg as well.

Negligence of the three drivers was charged, but by its verdict the jury exonerated defendant Eleanor Holmes.

In the first count the complaint alleges that Fong was the agent of Antisdale and The Presbytery, acting within the scope of his agency and employment; that appellant was a passenger in the Fong car and that his injuries were the proximate result of the negligence of defendants Fong and Holmes. The second count pleads that Antisdale was the agent of The Presbytery, acting within the scope of his agency and employment, and that he negligently failed to give way to the right to permit the Fong car to pass, but increased his speed with the result that both the Fong and Antisdale cars ran abreast into the intersection, causing and precipitating the collision between the Fong and Holmes cars. It also charged negligence of Fong in attempting to pass the Antisdale car at and near the intersection.

Antisdale answered, denying negligence and pleading that the proximate cause of the accident was the negligence of defendant Holmes, and pleading appellant's contributory negligence as well.

Fong by a separate answer denied negligence, alleged that the proximate cause of the accident was the negligence of defendant Holmes, and pleaded appellant's contributory negligence.

The Presbytery by a separate answer denied that Fong was the agent of Antisdale, that either of them was its agent, or that appellant was Fong's passenger. It pleaded three defenses (1) that appellant was guilty of contributory negligence, (2) that the proximate cause of the accident was defendant Holmes' negligence, and (3) that it is engaged solely in the propagation of religion and "does not contemplate the distribution of gains, profits or dividends to its members" and that it has always "exercised due and reasonable care in the selection of its servants and agents."

By amendment a third count was added to the complaint which alleged that Fong and Antisdale were instructors in the school attended by appellant and other children, and had charge and control of them; that in such capacity they transported the children from the classroom to the playground for recreational and educational activities, and in so doing negligently failed to exercise proper and adequate care, custody and control over them, and permitted appellant to ride on the running board knowing that it was hazardous and dangerous. By stipulation these allegations were deemed denied. The amendment added a prayer for special damages of $3823.69 bringing the demand up to $78,823.69.

The Presbytery of San Francisco is a defendant (and respondent) in this case. The San Mateo Presbyterian Church is not a party. Respondent Antisdale, the pastor of the latter organization, was joined as a defendant under allegations of his own negligence, and as the agent of The Presbytery of San Francisco under the doctrine of *respondeat superior.*

The relationship of Fong and Antisdale toward each other, toward the San Mateo Presbyterian Church and toward The Presbytery are important factors in this case and no statement of facts would be complete without a rather full summary of those relationships.

The establishing of the San Mateo Presbyterian Church and the appointment of respondent Antisdale as its pastor came about as follows: three Presbyterian laymen, a banker, a lawyer and a business man, were conducting a small Sunday school in San Mateo. Respondent Antisdale was then a student in the San Francisco Theological Seminary at San Anselmo, from which he later graduated, and these men asked him to come and help them out, which he did. While he was so assisting, the group organized themselves into a Presbyterian Church and he later became its minister. The chronology is about as follows: on July 24, 1942, at a stated meeting of The Presbytery the request of the Church Extension Board was presented for the organization of the San Mateo Presbyterian Church for which a petition containing 70 names had been presented. The church or congregation at San Mateo was organized under ecclesiastical law in August, 1942. By a writing dated March 14, 1943 addressed to Antisdale "The congregation of San Mateo Presbyterian Church" called him "to undertake the pastorial office in said congregation" at $1200 yearly, binding themselves in addition to pay in to the Board of Pensions an amount equal to 8% of his yearly salary. It was signed by 8 persons who had been appointed for the purpose by the congregation. Dr. Smith, who was at the time executive secretary of The Presbytery, was moderator of the meeting of the congregation held on March 14, 1943, for the purpose of electing a pastor, and he certified that Antisdale's election was by unanimous vote of the congregation. He acted as moderator at the meeting because there was then no local church organization and no pastor. The written "call" was signed after the election had been held. The minutes of The Presbytery show that on April 11, 1943 an adjourned meeting of The Presbytery of San Francisco convened at the San Mateo Presbyterian Church and voted to proceed with ordination and installation. Respondent Antisdale was then ordained as a Presbyterian minister and was installed as pastor of the San Mateo church. His ordination was "for life and for good behavior" according to church law; his "call" to the San Mateo pastorate was for an indefinite period. The fact that he was ordained as a minister of the gospel and installed in his first pastorate at the same ceremony seems to be only a coincidence.

A lease had been taken on premises on 25th Avenue near El Camino Real on February 15, 1942, at a yearly rental of $690, and this place was in use as a temporary church and school at the time of the accident. It was stipulated that the lease was taken in the name of The Presbytery of San Francisco (the San Mateo Church was not organized as such until August of 1942) and further that the rent was paid for the first 3 or 4 months after the date of the lease, by the War Emergency Fund of the Presbyterian Church in the United States of America, which has its office in New York, and that thereafter it was paid by the local organization, the San Mateo Presbyterian Church which occupied the leased property; further, that the San Mateo Church was subsidized by the War Emergency Fund to the amount of $50 a month "for all the realty with which this action is concerned."

From the foregoing it appears that Antisdale was "called" and employed as pastor by the congregation and installed by The Presbytery; that his salary was paid by the congregation; that the rental of the church premises was paid by the congregation, aided apparently by a subsidy from the War Emergency Fund of the national church organization.

The process by which a Presbyterian minister becomes the pastor of a particular church is illustrated by what was done in this case. He must be "called" by the congregation but he must be *installed* as pastor by the presbytery having jurisdiction, which means that before installing him it must first approve him. Its approval goes to character, fitness, education, and to the terms of his compensation, to make sure that it is proper in view of the size of the congregation and other circumstances.

So much for the process by which a pastor is employed. The next question is, How is he separated or discharged as pastor? If there is a complaint against him it must be lodged by the congregation, or by those in authority as the elders, with whatever presbytery has jurisdiction, and the charges are then heard and tried by the presbytery sitting as a court. If a member or group of a congregation has a complaint against a pastor and they cannot get the elders to take action, such individual member or such group may present it directly to the presbytery against both the pastor and the elders, and the judicial powers of the presbytery are then brought into play. The presbytery cannot and does not initiate any charges against a minister; it simply acts judicially and tries him under ecclesiastical law on such charges as are lodged by the congregation over which he presides.

A pastor's connection may, of course, terminate by his being called to another church. It was so in this case. After serving for some time in the San Mateo Church Antisdale received a call from a Los Angeles church. He had to get the permission of The Presbytery of San Francisco to accept it, and this he got. It is church law that a minister cannot change from one church to another, either within the same presbytery's jurisdiction, or outside it, without the permission of the presbytery in which he is then serving.

Doctor Edward A. Wicher, a retired Presbyterian minister, but at the time of the trial the stated clerk of The Presbytery of San Francisco testified at considerable length as to the organization and functioning of the Presbyterian Church as an ecclesiastical organization. He testified that "The Constitution of the Presbyterian Church" was the official and authoritative document. He testified that The Presbytery of San Francisco, like other presbyteries has great power and control over the ministers within its confines and such ministers are members of it, and a minister cannot transfer or be "translated" from one church to another without a "call" from the new church plus the permission of the presbytery within which he is then serving. He testified that when a "mission" becomes a "session" this control ceases. In this case, however, the accident happened while the San Mateo organization still had "mission" status.

It was stipulated that The Presbytery of San Francisco held title to the land on which the present church was built, in trust for the San Mateo Church which was incorporated under state law on March 3, 1945, and then conveyed it to the San Mateo church.

Defendant Fong was studying in Los Angeles to be a Presbyterian minister, and came to San Mateo to spend his summer vacation staying with a retired Presbyterian minister living there, named Jones. This retired minister was a close friend and the guardian of Fong, to whom he gave the use of his Ford station wagon.

The summer school was sponsored by the parents, all of whom were members of the San Mateo Presbyterian church, and it was to some extent staffed by the mothers who volunteered their services as teachers. When respondent Antisdale was taken sick Fong volunteered to assist at the summer school, and he was there on the morning of July 1 when respondent Antisdale returned to his pastoral duties. And so it happened that when the time came for the physical exercise period both Antisdale's car and Fong's borrowed station wagon were available to take the children to the recreation grounds. As they were preparing to leave, Antisdale saw the youngsters climbing on the running boards and ordered them off, but some returned thereto despite his orders.

The appeal based on the granting of The Presbytery's motion for judgment notwithstanding the verdict.

[1] It is first urged by appellant that in dealing with this motion the evidence must be viewed in the light most favorable to the verdict. That is of course true.

The Presbytery quotes the grounds on which it moved for a directed verdict and for judgment notwithstanding the verdict. They were, among others:

"1. That a charitable organization is not liable for the torts of its agent unless it has been negligent in the selection of such agent.

"2. There was no proof that either Antisdale or Fong were the agents of the Presbytery."

That Fong was not the agent of either Antisdale or The Presbytery is clearly established by the undisputed evidence in this case.

The Ford station wagon which Fong drove did not belong to The Presbytery of San Francisco or to the San Mateo Presbyterian Church, and neither organization had any direction or control over it, nor had Antisdale. It belonged to the retired minister with whom Fong was visiting, who had no connection with the Church except perhaps as a member of its congregation, who had given Fong permission to use it. Rev. Mr. Jones, the owner of the station wagon, was not joined as a defendant.

Fong was not known, as far as the record shows, by The Presbytery of San Francisco or any of its officials. He was not known, as far as the record shows, to respondent Antisdale before the morning in question when the latter returned to his pastoral duties, and there is no showing that Anstidale and Fong had any discussion or understanding that morning before the accident. Reverend Mr. Jones' generosity had supplied Fong with the station wagon, and Fong, in *his* generosity, had volunteered the station wagon and his own services. There was nothing in the nature of a "hiring" or "employing" of Fong by Antisdale and none by The Presbytery of San Francisco. Any such hiring or employing of Fong obviously would have had to be through Antisdale, or not at all. Fong was as much a volunteer prompted by charitable impulses as was the plaintiff in Edwards v. Hollywood Canteen, 27 Cal.2d 802, 167 P.2d 729. He might, in fact, have been a very officious person, but officious conduct (if any) cannot create an agency His help and assistance was as gratuitous, and as unlike "a relationship between two parties by which one has the legal right to direct the activities of the other and the latter the legal duty to submit to such direction", Stoddard v. Fiske, 35 Cal.App. 607, 609, 170 P. 663, 664, as was the case in Edwards v. Freeman, 34 Cal.2d 589, 212 P.2d 883.

A judgment for $41,500 stands against Fong in this case, and he has not appealed. But whether it be assumed that the jury found him guilty of negligence or of wilful misconduct neither his negligence nor wilful misconduct can be legally charged or attributed to The Presbytery of San Francisco, either directly or through Antisdale, for the reason that the undisputed facts show that no relationship existed of principal and agent, master and servant or employer and employee between Fong and The Presbytery or Fong and Antisdale. They show Fong to be simply a well-intentioned volunteer and a gratuitous helper, whose status was no different from that of a mother of one of the children had she driven the family automobile to help in taking the children to the recreation park.

To again quote from Stoddard v. Fiske, supra, quoted approvingly in Edwards v. Freeman, supra: "If Fiske, after undertaking his mission, had abandoned it and left his friend in the lurch, he would have been guilty of no breach of legal duty * * *." So here, if Fong, after starting for the recreation grounds, had decided to abandon the trip and had let the children off the borrowed station wagon to go on foot or to return to the church or to their homes "he would have been guilty of no breach of legal duty." Neither The Presbytery nor Antisdale could have complained or have ordered him to proceed, since neither had any right of control over him.

[2] For the reasons just given we are satisfied that the trial court properly held as a matter of law that there was no agency relation between Fong and The Presbytery either directly, or indirectly by reason of any intermediate sub-agency between Antisdale and Fong.

Antisdale, however, is charged with negligence on his own account and as an independent actor. The consideration of this phase of the case necessarily has to assume —for the purpose of the discussion—the negligence of Antisdale. And it has to assume (for the same limited purposes) that Antisdale was an agent of The Presbytery.

Assuming such negligence and agency, we are satisfied that the case is squarely within the doctrine of Humphreys v. San Francisco Area Council, Boy Scouts of America, 22 Cal.2d 436, 139 P.2d 941. In that case the court found that the driver of the truck on which the Humphreys boy was killed, was negligent. Here we are *assuming* (for limited purposes) that Antisdale was negligent. As in the Humphreys case this action is against the organization itself, based on the claimed negligence of Fong or Antisdale or both under the doctrine of *respondeat superior.*

In the first part of this discussion we have shown that Fong was not an agent or employee in any sense of those words, but merely a volunteer. In that respect the instant case is simpler than the Humphreys case where, admittedly, the truck was driven by an employee. If, under the doctrine of the Humphreys case the Boy Scout organization could not be held liable for the negligence of one of its employees, certainly this church organization can not be held liable for the tort of one who was not its employee or agent but merely a volunteer, gratuitously assisting in a good work.

With respect to Antisdale: if he was negligent (as we are assuming) the situation is no different from that in the Humphreys case where the driver's negligence was found by the court.

The difference between the Boy Scout organization and a business enterprise is pointed out at 22 Cal.2d page 443, 139 P.2d page 945, where the court says "* * * we must keep in mind that * * * the defendant council is a charitable corporation 'not conducted for any profit whatsoever' and that in none of its operations 'is it in anywise akin to a business enterprise.' This organization is engaged in the spiritual, physical and mental development of the youth of America." All of that can certainly be said with at least equal force with respect to the Presbyterian Church organization. We see no distinction whatever between the two cases.

Notwithstanding the Humphreys case was decided after the Silva and England cases, appellant contends that the case of Silva v. Providence Hospital, 14 Cal.2d 762, 97 P.2d 798, holds "that a charitable organization is liable in the same manner and to the same extent for the negligence of its employees as other persons or corporations." That, however, is an open question. The Supreme Court while definitely settling therein and in the England case [England v. Hospital of Good Samaritan], 14 Cal.2d 791, 97 P.2d 813, the rights of a paying patient in a charity hospital, has never passed upon the right of a plaintiff who is the recipient of a church's benefactions to sue his benefactor. The closest it ever came to the question is when it denied a hearing, after decision in the

District Court of Appeal of the Bardinelli case [Bardinelli v. Church of All Nations], 23 Cal.App.2d 713, 715, 73 P.2d 1264, a case on all fours with this one.

Appellant contends also that the Silva case overrules the Bardinelli case. The Silva opinion mentions it, 14 Cal.2d at page 769, 97 P.2d 798, as one of the few California cases involving charities other than hospitals, but it does not overrule it, since the only point presented for decision in the Silva case had to do with the rights of a paying patient in a "charitable" hospital, not with those of the recipient of a benefaction flowing from a charity having no business side at all.

In Edwards v. Hollywood Canteen, 27 Cal.2d 802, 812, 167 P.2d 729, 734, the court said: "Defendant is not exempt from liability on the ground that it is a charitable organization. The authorities in other jurisdictions are divided on the question of whether a *recipient* of charitable benefits may recover for negligence by the charitable organization, but by the great weight of authority, and clearly the rule in California, persons who are not recipients of the charity, such as employees and strangers, may maintain an action based on negligence. See cases collected in 3 Scott on Trusts (1939), § 402; 14 A.L.R. 576, 581, 585; O'Connor v. Boulder Colorado Sanitarium Ass'n, 105 Colo. 259, 96 P.2d 835, 133 A.L.R. 821; Silva v. Providence Hospital, 14 Cal.2d 762, 772, 773, 97 P.2d 798; Phoenix Assur. Co. v. Salvation Army, 83 Cal.App. 455, 256 P. 1106. In the Silva case it was held that a charitable organization must respond in damages to a paying patient whom it injures, the court stating that the policy of the law requiring individuals to be just before generous is applicable to charitable corporations. 14 Cal.2d at page 775, 97 P.2d 798. It is obvious that the plaintiff in this case was not a recipient of charitable benefits and, therefore, is not barred by any rule of exemption." It will be observed that the court there was careful to state just what the Silva case held and to indicate that Silva did not pass upon the rights of a recipient of charitable benefits.

[3] We are satisfied that, assuming the negligence of Antisdale (for the purpose of the discussion only), The Presbytery cannot be held liable under the doctrine of *respondeat superior,* and we believe such holding finds full support in the Humphreys and Bardinelli cases.

The Humphreys case would have no application here had there been in this record the following combination of circumstances: *If* an agency relationship had been made out between The Presbytery and Fong *and* he or The Presbytery had received compensation for appellant's ride. But neither the "if" condition nor the "and" condition is present and both would have to be. There was no agency, and there was no compensation.

The reasons why there was no agency have been already developed under the first heading.

The only possible "compensation" argument which has been or can be made on this record, is based on the envelope collection.

Antisdale was cross-examined respecting this, and testified that a collection was taken up once a week among the children "to defray the expenses incidental to the running of the school." There was no stipulated fee or tuition—"whatever they wanted to donate."

"Q. But each of the children contributed something to the upkeep of the school? * * * A. I don't know.

"Q. Anyway, you solicited contributions? A. No.

"Q. At any rate, you passed the hat around? A. No.

"Q. What mode or manner did you take, to take up this collection? A. Envelopes were given out and if they wanted to bring it in, they could.

"Q. To each of the children? A. Yes.

"Q. And the children would take the envelopes home and return with them? A. That was the idea, yes.

"The Court: I hope there was no way of identifying who made the several contributions. A. There wasn't."

Appellant testified:

"Q. Was any envelope or anything else handed to you, as a pupil of the school, for the purpose of making a payment to defray the expenses of running the school?

"Mr. Linn: That calls for the conclusion of the witness, making a payment to defray expenses.

"Mr. Healy: I will withdraw it. I think the other man said that was what it was for.

"Q. Was an envelope given to you for the purpose of making some sort of payment or contribution? A. Yes.

"Q. To the other children also? A. Yes, they are handed out to everybody.

"Q. When with relation to the day of the accident was the envelope handed to you? A. I don't remember that.

"Q. About when? A. I think it was the first day of the week.

"Q. It was some few days before the day of the accident? A. Yes.

"Q. What did you do with the envelope? A. Took them home and filled them and brought them back.

"Q. Did you get the money from your father and mother? A. Yes.

"Q. Do you recall how much money was put in the envelope? A. No.

"Q. There was some money put in it, though? A. Yes.

"Q. You took the envelope with the money back to the school? A. Yes.

"Q. And handed it to whom, do you remember? A. I think they are put in a pile all together and somebody collected them.

"Q. Some one of the teachers? A. Yes."

Neither of appellant's parents was called to testify respecting the size of their envelope donations, see § 1963, subd. 6, Code Civ.Proc., a matter exclusively within their knowledge. It is apparent from the testimony of both Antisdale and appellant that there would be no way for the church people to know the amount.

If the donations were, as Antisdale testified, "to defray the expenses incidental to the running of the school" Fong's car and Fong's services could not have been among such expenses since both were donated and gratuitous just as were the services of the mothers who taught and who brought along their own family cars to haul the children.

Moreover, no parallel can be drawn between a voluntary envelope donation made by a member of the congregation, whatever the size of the contribution (in this instance wholly undeterminable), and "compensation" such as that contemplated by § 403, Vehicle Code, or the guest cases. The case of Smith v. Fall River Joint Union High School Dist., 118 Cal.App. 673, 5 P.2d 930, is cited by appellant, but there the driver of the school bus was compensated by the school district out of money derived from taxes.

The Humphreys case, in a passage already quoted, emphasizes the *business* factor when it distinguishes a charitable organization from an ordinary business enterprise. In the Humphreys case there was a contribution to the over-all cause (so to speak) by the Humphreys boy, not of money, but of his own services as a junior scout master who also had charge of the fountain at the camp, while there was no comparable contribution here since appellant did nothing toward helping in the church's or school's ministrations to the children. He was himself a recipient and beneficiary of them.

[4] We are satisfied that in no sense can the envelope donations of appellant's parents—treating them of course as made on their son's behalf—be considered as "compensation" within the meaning of the guest law or the cases decided under it.

The appeal from the order granting respondent Antisdale's motion for a new trial.

The first count of the complaint is directed primarily against Fong, but it brings Antisdale in as one of Fong's principals. That count charges concurrent negligence to Fong and defendant Eleanor Holmes.

The second count again brings Antisdale in as one of Fong's principals, but it also alleges negligence on Antisdale's own part by failing to give way to the right, and increasing his speed, thereby causing the collision; also Fong's negligence.

The third count charges negligence to both Fong and Antisdale in the exercise of their control as teachers.

With such issues in the case as the claimed Antisdale-Fong agency relation, the position of Antisdale *wholly aside of course from the negligence charged against him,* is important and he now justifies the granting of a new trial on the basis that there was error in the instructions, which the trial judge must have recognized by granting the motion.

In the first place appellant points to the rule that under § 4½ of art. VI of the constitution a trial court in passing upon such a motion "is as firmly bound by this constitutional provision as is an appellate court", Middleton v. California Street Cable R. Co., 73 Cal.App.2d 641, 646, 67 P.2d 239, 242, citing Nance v. Fresno City Lines, 44 Cal. App.2d 868, 872, 873, 113 P.2d 244, and to the further rule that the trial court is "in a much better position to judge of the prejudicial effect of the instruction" than is an appellate court from a reading of the record. Bieser v. Davies, 119 Cal.App. 659, 663, 7 P.2d 388, 389. Respondent points also to the rule "that a stronger showing is required to justify interference with an order granting a new trial than one which has been denied." Abercrombie v. Thomsen, 59 Cal.App.2d 331, 337, 138 P.2d 701, 704. There must be "a clear and affirmative showing of a gross, manifest or unmistakable abuse of discretion." (Id.)

In discussing the appeal from the judgment we held that as a matter of law no agency relation existed between The Presbytery and Fong *or between Antisdale and Fong,* and cited Edwards v. Freeman, supra. But instead of taking the agency question away from the jury because it was a question of law the court submitted it to them, under the following instructions:

"You are instructed that if you find that at the time of the accident * * * Fong was acting on behalf of and as the agent and servant of * * * Antisdale and within the course and scope of his agency and employment, that any act or omission upon the part of * * * Fong is imputed to and in law is the act or omission of * * * Antisdale.

"Therefore, if you find that * * * Fong failed to use ordinary care and caution in the operation of the station wagon that he was driving at the time of this accident while engaged in the course and scope of his agency and employment of * * * Antisdale, such failure is in law the negligence of * * * Antisdale, and if such negligence proximately contributed to the injuries of the plaintiff * * * your verdict must be in favor of the plaintiff, provided that plaintiff * * * was exercising ordinary care for his own safety at the time of the accident.

"You are instructed that * * * Fong was at all times, under the law, required to drive the station wagon in a careful and prudent manner, having due regard for the traffic on and the surface and width of the highway, and in no event was he permitted to drive at a speed or in a manner which was likely to endanger the safety of persons or property. I instruct you that if * * * Fong failed to so drive the station wagon, he was guilty of negligence and such negligence is imputed to and in law is the negligence of * * * Antisdale, if at the time he was driving the station wagon, he was driving it on behalf of and as the agent and servant of * * * Antisdale, within the course and scope of his agency and employment."

The recent case of Edwards v. Freeman, 34 Cal.2d 589, 212 P.2d 883, 886, supra, is directly in point. There an agency relationship between a mother and son was sought to be established for the purpose of imputing to the mother the negligence of the son in driving the car in which she was riding. The mother who had to go into town asked her son, who also had to go into town, to take her along and he did so. In a collision she was injured and sued the driver of the other vehicle. The court held on appeal, "Upon the record here, where the evidence shows no more than a friendly or filial service, gratuitously rendered, it was error to submit the issue of imputed negligence to the jury and the error was clearly prejudicial because the inadequate and confusing instruction on the subject of agency at the least *permitted* the jury to find such a relation (if it be not understood as directly suggesting such a conclusion) from the mere 'instance and request' of plaintiff [citation]".

Edwards v. Freeman was reversed on an appeal from a judgment in favor of the defendant. The same question is presented to us on an appeal from an order granting a new trial, which seems to indicate that the trial judge discovered his error in submitting this agency question to the jury and sought to accomplish its rectification without an appeal. Edwards v. Freeman had not been decided by the Supreme Court when he ruled, but that case only restated the rule announced earlier in such cases as Stoddard v. Fiske, 35 Cal.App. 607, 170 P. 663, supra, which it cites.

The agency instructions which we have quoted were such as are customarily given in negligence cases. That should be borne in mind in the discussion of the next subject.

In appellant's closing brief his counsel say: "While no issue as to either the guest law nor wilful misconduct was framed by the pleadings, yet the evidence * * * was so flagrant that it did in fact amount to wilful misconduct, thereby creating a new issue at the trial which warranted the court in giving * * * instructions to the jury" on those subjects.

The fact, thus conceded, that those issues were not tendered by the plaintiff's pleading might well have led to a confusion in the instructions which the court felt duty-bound to rectify by granting the new trial. Despite the admitted absence of issues on wilful misconduct the court instructed the jury that "A basic issue to be determined by you in this case is whether plaintiff * * * was a guest of the defendant * * * Fong at the time of the accident in question."

[5] The jury was given six or seven instructions on the subject of wilful misconduct in addition to those on the subject of negligence, and the court in granting the new trial doubtless concluded that a conflict arose from this treatment of the subject. The court, moreover, in the wilful misconduct instructions failed to give § 403 of the Vehicle Code either literally or in substance and effect.

We are satisfied that there was no abuse of discretion in the granting of the new trial.

The judgment appealed from is affirmed and the order appealed from is affirmed.

NOURSE, P. J., concurs.

DOOLING, Justice.

I feel compelled to dissent from the portion of the opinion which holds that the recipient of charitable benefits cannot recover for the negligence of the charitable organization. As I read Edwards v. Hollywood Canteen, 27 Cal.2d 802, 167 P.2d 729, that question is still an open one in this state. The Supreme Court was careful to say in that case, 27 Cal.2d at page 812, 167 P.2d at page 734: "The authorities in other jurisdictions are divided on the question of whether a *recipient* of charitable benefits may recover for negligence by the charitable organization * * *." It was apparently equally careful not to state its position on this precise question. The point was not decided in Humphreys v. San Francisco Area Council, 22 Cal.2d 436, 139 P.2d 941. The only question considered in the Humphreys case was whether the evidence supported the finding that the deceased boy was a guest in the automobile and not a passenger at the time of his death. The court said in that case, 22 Cal.2d at page 443, 139 P.2d at page 945: "The charitable functions of defendant council are considered, of course, only in connection with the nature of the relationship existing between it and the scouts attending Camp Lilienthal as one of the circumstances tending to show that the privileges accorded staff members might reasonably be regarded as gratuities rather than something bought and paid for."

Because the Supreme Court has not yet come to grips with this precise question since the field was rendered fluid in this jurisdiction by its decisions in Silva v. Providence Hospital of Oakland, 14 Cal.2d

762, 97 P.2d 798, and England v. Hospital of Good Samaritan, 14 Cal.2d 791, 97 P.2d 813, I feel free to make the choice that appeals to me as most reasonable. Every criticism of the various reasons given by courts for the exemption of charitable organizations from liability for the negligence of their employees found in Silva v. Providence Hospital of Oakland, supra, commencing at page 770 and ending with the quotation from Harper on The Law of Torts at pages 775-776 of 14 Cal.2d, at pages 802, to 805 of 97 P.2d, is just as valid where a recipient of the charity is the plaintiff as where the plaintiff stands in some other relation. To quote a sentence of Professor Harper's from that opinion: "To require an injured individual to forego compensation for harm when he is otherwise entitled thereto, because the injury was committed by the servants of a charity, is to require him to make an unreasonable contribution to the charity, against his will, and a rule of law imposing such burdens can not be regarded as socially desirable nor consistent with sound policy."

The servants of Light should be more righteous than the servants of Mammon and it is a calculated and calculating charity that requires as a *quid pro quo* for its pittance of beneficence that the recipient may go maimed for life by its negligence without legal recourse. Unless the Supreme Court tells me in plain words that this is the controlling rule of law for California, I will believe otherwise.

Without unduly prolonging this dissent reference will be made to the late Justice Rutledge's scholarly and comprehensive treatment of the entire subject in President and Directors of Georgetown College v. Hughes, 76 U.S.App.D.C. 123, 130 F.2d 810. With his analysis and conclusion I am in complete agreement.

The question whether plaintiff was a guest in Fong's automobile under the meaning of the Motor Vehicle Act can have no bearing on the possible liability of the Presbytery. If he was Fong's guest that could not make him the Presbytery's guest since we have held that Fong was not the servant or agent of the Presbytery. If Antisdale's negligence, while acting as a servant of the Presbytery, was a proximate cause of plaintiff's injuries it could be no defense to the Presbytery that plaintiff was riding as Fong's guest at the time.

I concur in the affirmance of the order as to Antisdale; I dissent from the order affirming the judgment as to the Presbytery.

---

98 Cal.App.2d 278

HAWKINS v. SANGUINETTI.

Civ. 7709.

District Court of Appeal, Third District, California.

July 3, 1950.

Hearing Denied Aug. 31, 1950.

Charles W. Hawkins instituted proceedings against T. J. Sanguinetti contesting the election of Sanguinetti to the office of supervisor. The Superior Court of San Joaquin County, George F. Buck, J., entered judgment confirming Sanguinetti's election, and Hawkins appealed. The District Court of Appeal, Peek, J., held that there was not such clear and convincing evidence that the challenged votes were illegally cast for Sanguinetti as would warrant disturbing the trial court's conclusion on such questions of fact.

Affirmed.

1. Elections ⚷194(3)

If unauthorized mark appearing on ballot does not of itself warrant inference that it was designedly placed by holder for purpose of identifying his ballot, and there is no other evidence of intent in that regard, ballot may not be rejected on ground that it bears distiguishing mark. Elections Code, §§ 5714, 7054.

2. Elections ⚷295(1)

Where voter's name was written in pencil immediately to right of box-like perforation in upper left-hand corner containing ballot number and approximately on horizontal perforation above which was printed instructions to voters, act of writing name on ballot did not of itself warrant inference that it was designedly written for purposes of identifying ballot, and where there was no other evidence of such intent ballot was entitled to be counted. Elections Code, §§ 5714, 7054.

3. Elections ⚷186(4)

Where ballots clearly showed use of stamp with cross impression, but marks opposite candidate's name were blurred and imperfect, such ballots were properly counted for candidate. Elections Code, §§ 3828, 5710, 7050, 7052.

4. Elections ⚷305(6)

Whether there was sufficient portion of cross in square opposite candidate's name on ballot to count as vote for him was question primarily for trial court, and in absence of anything to contrary appearing on appeal, holding of trial court would be sustained. Elections Code, §§ 7050, 7052.

5. Elections ⚷227(2, 9)

Where it appeared that voter had voted outside of his proper precinct, and had received assistance in voting from stranger who occupied voting booth with him, vote was illegal. Elections Code, §§ 122, 5707, 5708.

6. Elections ⚷295(1)

Where vote was admittedly illegal, and voter testified that he had instructed stranger who occupied voting booth with him, in violation of Election Code, to cast vote for certain candidate, but admitted that he had poor vision and neither saw nor knew of his own knowledge where stamp was placed on ballot, and person who assisted voter was not produced as witness, contestant was not entitled to have vote deducted from opposing candidate's total, notwithstanding that there was no testimony to rebut presumption that voter's assistant carried out his instruction and cast vote for opposing candidate. Elections Code, §§ 5707, 5708, 5721–5724.

7. Witnesses ⚷254, 257

Subject to provisions of statute, it is proper to allow witness to refresh his memory by exhibiting writing to him, but only adverse party, if he should so choose, may treat such writing as evidence. Code Civ. Proc. § 2047.

8. Affidavits ⚷18

Where witnesses in election contest who testified that they had cast ballot at election although no longer residents of precinct in which votes were cast, but who could not remember for whom they voted in contest, also testified that they could not say whether their recollections had been better one month after election when affidavits signed by them were prepared, such affidavits were not admissible as records of past recollection. Code Civ. Proc. § 2047.

9. Elections ⚷293(3)

Affidavits made by illegal voters approximately one month after election were not admissible in election contest as circumstantial evidence to show for whom voters cast ballot.

10. Elections ⚷293(1)
Evidence ⚷100

Circumstantial evidence may be resorted to in election contest as well as in any other proceeding.

Blewett, Blewett & Macey, Stockton, for appellant.

Wyatt, Green & Carr, Stockton, for respondent.

PEEK, Justice.

The present controversy arises out of an election contest between appellant and respondent who were opposing candidates for the office of supervisor for the third supervisorial district of San Joaquin county in the November 1948 general election. The official canvass of the returns showed that the contestant Hawkins received a total of 7256 votes and that the contestee Sanguinetti received 7269 votes, where upon Sanguinetti was declared duly elected to said office. On January 10, 1949, Hawkins filed in the Superior Court of said county a statement of contest wherein it was alleged that (1) certain illegal ballots were cast for Sanguinetti in 17 of the district's 75 precincts; (2) that in said 17 precincts illegal ballots were counted for Sanguinetti; (3) that certain legal ballots were not counted in said 17 precincts, and (4) that such irregularities procured the election for Sanguinetti. After a hearing on the contest the trial court found the final vote to be 7264 for Sanguinetti and 7263 for Hawkins, and confirmed the election of the former as supervisor of said district.

Appellant Hawkins, in his appeal from the judgment which was accordingly entered, has attacked the same on several grounds, none of which, however, appear to warrant this court in disturbing the conclusion of the trial court.

He first argues that as the ballot labeled "Contestant's Exhibit Q" bore a distinguishing mark, it was invalid under the provisions of sections 5714 and 7054 of the Elections Code, and was improperly counted as a vote for Sanguinetti. The ballot in question had the words "Willie A. Melton" written thereon in pencil immediately to the right of the box-like perforation in the upper left-hand corner thereof which contains the ballot number, and approximately on the horizontal perforation above which is printed the instructions to voters in voting the ballot.

[1] Although section 5714 of said code provides that "A voter shall not place any mark upon his ballot by which it may be afterwards identified as the one voted by him", nevertheless no unauthorized mark appearing upon the ballot will invalidate the same "unless it appears that the mark was placed there by the voter for the purpose of identifying the ballot." (Sec. 7054.) Accordingly in the recent case of Garrison v. Rourke, 32 Cal.2d 430, 439, 196 P.2d 884, 890, wherein a like question was raised, the Supreme Court held that "Pursuant to the present law, if the mark itself does not warrant an inference that it was designedly placed by the voter for the purpose of identifying his ballot, and in the absence of other evidence of intent in that regard, the ballot may not be rejected on the ground that it bears a distinguishing mark."

Thus it is apparent that unless the name of Willie A. Melton was placed on said ballot "by the voter for the purpose of identifying his ballot", the ballot was properly counted by the trial court.

The record in regard to this particular ballot only shows that the voter's register, which was introduced in evidence, bears the name of Willie A. Melton as a voter in Mosswood Precinct, and that such a name appears on the roster of voters as one who voted at said election. The voter himself was not called as a witness and no other evidence was before the court.

[2] Upon the evidence so produced the trial court was required to draw one of two conflicting inferences—either that a voter intended to identify his ballot or that he did not so intend. In reaching his conclusion that the voter did not so intend the court observed that he believed it to be "a fair inference that the voter, Willie A. Melton, did not intend to make a distinguishing mark, that it would appear that he relied upon the perforated line and that his name would be torn off of the ballot before it was put in the box." Thus it appears that since the trial court determined the act of writing the name did not of itself warrant an inference that it was designedly written on said ballot for the purpose of identifying the same, and since there is no evidence of intent, other than that which we have previously mentioned, the trial court was justified in concluding as it did—counting the same as a vote for contestee. Garrison v. Rourke, supra, 32 Cal.2d at page 439, 196 P.2d 884.

[3] Appellant next contends that certain ballots labeled "Contestant's Exhibits L, S, Y-1 and A-2" are illegal in that the mark opposite the name of Sanguinetti is not a visible cross but consists of some form of a circle, blotch or other individual mark, and therefore under the provisions of sections 3828, 5710, 7050 and 7052 of the Elections Code said ballots were improperly counted for Sanguinetti.

Exhibit L shows that a stamp was used throughout the ballot although it appears to have been applied with a twisting motion in the square following contestee's name.

Exhibit S also shows that a stamp was used by the voter but that it blurred when used in voting for contestee.

Exhibit Y-1 also discloses an imperfect cross following contestee's name but that a stamp was used throughout.

Exhibit A-2 in all respects appears to be quite similar to Exhibit Y-1.

We find nothing in the code sections relied upon by contestant to indicate that the trial court was in error in concluding that the challenged votes were legally cast for respondent. Nor do we find anything to the contrary in the cases cited and relied upon by appellant—Morrison v. White, 10 Cal.App.2d 266, 52 P.2d 263, 266, and Lester v. Fairbairn, 32 Cal.App.2d 411, 89 P.2d 1091, 1092. In the first case the registered ballots bore "a distinct and individual mark, not stamped, but drawn". In the second case the crosses on the ballot were likewise "distinct and individual" and clearly appeared to have been "drawn".

Again referring to the Garrison case, supra, it appears that a like question was raised therein and the court in affirming the action of the trial court stated that the particular ballot there in question, like the exhibits last mentioned "clearly shows the use of a stamp with a cross impression", and since there was no "evidence to show either on or dehors the face of Ballot 46 that it was not the stamp provided for the purpose" the conclusion of the trial court was proper.

Appellant next contends that "Contestant's Exhibit P" was improperly counted for contestee for the same reasons that appear in his argument concerning his last contention. In this regard the contestant states that it is because of the inconsistency in the court's ruling in rejecting certain other ballots, Contestant's Exhibits O-1, G-2 and L-1 and Contestant's Exhibits 11-13-20 and 31, that he makes this contention. The ballots so rejected are not before us. The only information we have in regard thereto is the comment appearing in respondent's brief that on each ballot the cross was drawn and not stamped. Each of the crosses made on the ballot here in question—Contestant's Exhibit P—were imperfect. However, that is not to say that the mark was not made with the stamp provided for that purpose or that it was impossible to determine the voter's choice. Elections Code, section 7052. Hence, for the reasons hereinbefore mentioned in relation to contestant's previous contention, this ballot likewise was properly counted for the contestee.

[4] It is next contended by contestant that his Exhibit C-1 was illegally marked in that the voter's choice could not be determined therefrom. On this particular ballot it appears that none of the crosses were perfectly centered in the space provided for that purpose, and as to the office in question the trial court found that more than two-thirds of the cross appears in the square following the contestee's name and the remaining portion appears above the line running between said square and the square following contestant's name. "Whether there was a sufficient portion of the cross in the square opposite defendant's name to count as a vote for him was a question primarily for the trial court." Garrison v. Rourke, supra, 32 Cal.2d at page 439, 196 P.2d at page 890. The rule as enunciated by the court in the Garrison case, supra, is in accordance with section 7050 of the Elections Code, that a cross partly within and partly without a square does not invalidate it, and subsection c of section 7052 of the same code, that the vote shall be counted unless for some reason it is impossible to determine the voter's choice. Since the court determined that the major portion of the cross was in the square following the contestee's name the voter intended to so vote, and in the absence of anything to the contrary, we conclude that the holding of the trial court in this regard was proper.

[5] A further contention is made by appellant that the ballot cast by one John Hyde was illegal and should have been deducted from Sanguinetti's total. Both parties are in accord as to the illegality of Hyde's vote. His testimony, when called as a witness for contestant, shows without contradiction that he was voting outside of his proper precinct (section 122, Elections Code), that he received assistance in voting from a stranger who occupied the voting booth with him in violation of section 5707-5708 of said code, and that

admittedly he did not comply with the provisions of section 5721-5724 of the same code relative to the method of receiving assistance in voting.

[6] Contestant, in support of his contention that the court erred in not deducting Hyde's vote from the contestee's total, refers to Hyde's statement that after requesting assistance from a postman in the adjoining booth, he instructed his assistant to cast a vote for Sanguinetti. Appellant then argues that since no evidence was presented by contestee to rebut such testimony it must be presumed that said assistant carried out Hyde's instructions and cast a vote for Sanguinetti, and therefore not alone should the ballot have been declared illegal but also the trial court should have deducted a vote from the contestee. We are not so convinced of the conclusiveness of such testimony as contestant appears to be. It should be noted that upon direct examination the witness also testified that he had poor vision, that he did not have his glasses at the time and that the light was not too good in the voting booth, while on cross-examination he testified that he neither saw, nor did he know of his own knowledge, where the stamp was placed on the ballot nor did he read any of the names appearing on the ballot. Additionally it should be noted that the person who assisted Hyde was not produced as a witness. Under such circumstances it cannot be said that the evidence was so clear and convincing as to warrant this court in disturbing the conclusion reached by the trial court on such a question of fact.

Appellant's final contention relates to the testimony of four witnesses called by him, and in particular to the refusal of the trial court to admit into evidence affidavits signed by said witnesses approximately one month after the election.

The record shows that each of the witnesses testified that he or she cast a ballot at said election although no longer a resident of the precinct in which the vote was cast and therefore were illegal voters in said precinct. Three of the witnesses could not remember for whom they voted in the supervisorial contest and the fourth testified that he did not cast a vote for that office.

Preliminary to appellant's motion to introduce the affidavit of the first witness into evidence she was asked, "did you have a better recollection for whom you voted for that office on December 9th than you now have?" To which the witness replied, "No, I don't." The second witness made a similar reply to a like question by contestant's counsel. The third witness testified that he could not say whether his recollection was better at the time the affidavit was signed or at the time of trial. Also when asked if the affidavit refreshed his memory as to whether or not he cast a vote for supervisor he replied, "I just can't recall whether I did or not." The fourth witness, when asked, "Did you vote for a candidate for the office of supervisor?" replied, "I did not."

At the conclusion of the testimony of each witness and after he had been given an opportunity to examine the affidavit signed by him, counsel attempted to introduce the same into evidence upon two grounds: (1) that they were a form of past recollection record and as such were admissible as affirmative evidence, and (2) that they were a form of circumstantial evidence admissible to show for whom each voter had cast his ballot.

[7, 8] Subject to the provisions of section 2047 of the Code of Civil Procedure it is proper to allow a witness to refresh his memory by exhibiting to him any writing coming within the provisions of said section. However, in no sense were the adaffivits here in question testimony, such as, appellant contends, would warrant their introduction into evidence. Estate of Packer, 164 Cal. 525, 530, 129 P. 778. It should further be noted, as is also provided in said section, that it is only the adverse party, if he should so choose, who may treat the writing as evidence. The reason for the rule is succinctly stated in the Packer case, supra, 164 Cal. at page 530, 129 P. at page 780, where the court observed that "to permit this to be done by the party producing the witness would open the door to the admission of

hearsay and manufactured evidence without limit."

[9, 10] We find nothing in the cases of other jurisdictions relied upon by appellant in support of the second portion of his final contention. While it is true that circumstantial evidence may be resorted to in an election contest as well as in any other proceeding the case of Robinson v. McAbee, 64 Cal.App. 709, 222 P. 871, is not, as appellant contends, authority for the use of writings in a manner such as is proposed by appellant herein.

In Lauer v. Estes, 120 Cal. 652, 53 P. 262, 263, the trial court, over objection, allowed the introduction into evidence of a declaration of a witness [an illegal voter] as to how he had cast his vote. In reversing the judgment the Supreme Court held that a declaration of a disqualified voter, as to how he voted, made sometime after the election, in the form of an affidavit before a notary public, "is clearly incompetent, and hearsay of the most dangerous kind", and "in no sense part of the res gestae,—even if such a declaration might be admitted at all as part of the res gestae."

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

98 Cal.App.2d 375

DAUT v. DAUT.

Civ. 7788.
Sac. 6075.

District Court of Appeal, Third District,
California.
July 10, 1950.

George Daut brought action against Mildred Laverne Daut for divorce. An order setting aside interlocutory and final decrees entered in plaintiff's favor upon defendant's motion was entered by the Superior Court, Mendocino County, Lilburn Gibson, J., and the plaintiff appealed. The District Court of Appeal, Adams, P. J., held that where husband appeared by attorney in divorce action brought by wife in Maryland and knew of decree entered therein before bringing divorce action in California but concealed such facts from court, husband was guilty of extrinsic fraud justifying decrees in husband's divorce action to be set aside.

Affirmed.

1. Divorce 🔑327

Where husband appeared by attorney in wife's Maryland divorce action and filed an answer to complaint therein in which answer he admitted wife's residence in Maryland for sufficient time to authorize that action, and Maryland court granted wife a divorce, Maryland divorce decree became final and was entitled to full faith and credit in California and was beyond attack in husband's subsequent divorce action in California.

2. Divorce 🔑331
Husband and wife 🔑272(1)

When wife secured divorce in Maryland in action in which husband appeared by attorney, the property of the parties which had been community property became common property of the two and California court had no power to award the property to husband in husband's subsequent divorce action.

3. Divorce 🔑165(3)

Where husband appeared by attorney in divorce action brought by wife in Maryland and knew of decree in wife's favor entered therein before bringing divorce action in California but concealed such facts from court, husband was guilty of "extrinsic fraud" justifying decrees in husband's divorce action to be set aside.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Extrinsic Fraud".

4. Judgment 🔑386(7)

Where extrinsic fraud is practiced upon a court there is no statutory limitation upon time within which application for relief may be made.

◆

Mannon & Brazier, Ukiah, for appellant.
Preston & Falk, Ukiah, for respondent.

ADAMS, Presiding Justice.

The parties to this action were formerly husband and wife living in Ukiah, Mendocino County, California. On April 11, 1947 George Daut filed in that county an action for divorce. In an affidavit for service of summons by publication he alleged that defendant, Mildred Laverne Daut, was going under and using the name of Mrs. W. E. Schenck, and that she resided at Larch Road, Briarcliff Manor, in the state of New York. An order was made for publication of summons, and it was further ordered that a copy of the summons, together with a copy of the complaint, be deposited in the United States Post Office at Ukiah, "directed to the said defendant Mildred Laverne Daut at her place of residence, to-wit: Larch Road, Briarcliff Manor, New York." Publication of summons was duly made, and on September 8, 1947, an affidavit by the secretary of plaintiff's attorneys was filed in which it was averred that on April 11, 1947, she had mailed copies of the summons and complaint in an envelope addressed to "Mildred Laverne Daut, Larch Road, Briarcliff Manor, New York." Request for default of defendant was filed September 8, 1947, and default entered. The matter was referred to a court commissioner for the taking of testimony, and on September 15, 1947, the commissioner having filed his report, an interlocutory decree of divorce was entered adjudging that the plaintiff was entitled to a divorce upon the ground of extreme cruelty, and awarding to him all of the community property of the parties. On September 24, 1948, a final decree was filed, dissolving the marriage and reaffirming the award of the community property to plaintiff.

On July 26, 1949, defendant, describing herself as "Mildred Schenck, formerly Mildred Daut," filed a notice of motion to vacate and set aside the default taken against her, and the interlocutory and final decrees, asserting that same had been taken and entered by reason of fraud and mistake, also asserting that the court had no jurisdiction in the matter and that said judgments were void. She also filed a proposed answer to the divorce complaint, and an affidavit in which she averred that neither summons nor complaint had been served upon her personally, and that her first knowledge of the entry of judgment against her was received December 8, 1948. She stated that on April 1, 1947 her address was and ever since had been "Mrs. W. E. Schenck, Larch Road, Briarcliff Manor, New York." By reference the proposed answer was made a part of her affidavit. The proposed answer set up as a separate defense that on May 15, 1946 she had filed a suit for divorce from plaintiff in Maryland, that plaintiff had been summoned as defendant therein, that he had filed an answer in said court and was represented by counsel, and had in said answer admitted that she as plaintiff in said action had been a resident of Maryland for more than one year; that said action had been tried on June 18, 1946, and a decree then rendered severing the bonds of matrimony between the spouses.

The trial court heard the motion on August 12, 1949, at which time counsel for movant moved that the two decrees be set aside on the ground that they had been secured by reason of fraud, mistake, and without due process of law, and that the court was without jurisdiction to enter such decrees. He offered, and there was received in evidence, without objection, the affidavit filed by Mildred in support of the motion, and a transcript of the proceedings in the Maryland divorce action showing the parties were divorced nearly a year prior to the filing of the California action. He likewise introduced the entire file in the California divorce action. George Daut was called under section 2055 of the Code of Civil Procedure, and identified certain letters which he admitted he wrote to Mildred. In the first, written August 27, 1947, he discussed property settlement with her, and said that his attorney had urged him to go into court but he had refused; and he added: "as far as I am concerned things can go as they are for a while, until we both reconsider." On November 12, 1948, he again wrote her saying that regarding any kind of a settlement he would like to hear further on any suggestions she had. The former letter was written after he had secured the interlocutory decree, and the latter one after the entry of his final decree. On December 2, 1948 he wrote

Mildred that he had secured a final decree, enclosed a copy of same, and said: "It looks like this makes us even. We both have a separate divorce."

On August 12, 1949, after the hearing upon the motion, the trial court granted same, setting aside the decrees and default, and giving the defendant ten days after notice to answer the complaint. It was stated in the order that defendant was not given "due process of law"; that the court never acquired jurisdiction to adjudicate the case, and that both decrees were void.

This appeal is taken from the aforesaid order.

[1, 2] The evidence produced at the hearing on defendant's motion shows without contradiction that appellant appeared by attorney in the Maryland action and that he filed an answer to the complaint therein in which answer he admitted the wife's residence in Maryland for a sufficient time to authorize that action; that the Maryland court held that plaintiff had shown grounds for divorce, and that it made and entered its decree dissolving the bonds of matrimony thertofore existing between the parties. That decree became final. It thereupon became entitled to full faith and credit in this state, and was and is beyond attack in the present action. Heuer v. Heuer, 33 Cal.2d 268, 201 P.2d 385; Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429, 1 A.L.R.2d 1355; Coe v. Coe, 334 U.S. 378, 68 S.Ct. 1094, 92 L.Ed. 1451, 1 A.L.R. 2d 1376; In re Estate of Schomaker, 93 Cal.App.2d 616, 209 P.2d 669; Knox v. Knox, 88 Cal.App.2d 666, 199 P.2d 766. The former spouses ceased to be husband and wife and became single persons. The California court therefore acquired no jurisdiction to entertain the present action. From and after the Maryland decree the property of the parties which had been community property became the common property of the two and the trial court had no power to award same to plaintiff. In re Estate of Brix, 181 Cal. 667, 186 P. 135; Tarien v. Katz, 216 Cal. 554, 15 P.2d 493, 85 A.L.R. 334; Calhoun v. Calhoun, 81 Cal. App.2d 297, 183 P.2d 922; Fieger v. Fieger, 28 Cal.App.2d 736, 83 P.2d 526; Lorraine v. Lorraine, 8 Cal.App.2d 687, 48 P.2d 48; 5 Cal.Jur., sec. 32, p. 360; 3 Cal.Jur.Supp., sec. 153, p. 673. The evidence also shows that in prosecuting his action in this state and in securing the decrees in his favor, plaintiff committed such fraud upon the trial court as justified the setting aside of such decrees.

[3] That appellant knew of the Maryland decree is evidenced by his letter to respondent in which he stated that now both had divorce decrees. He did not inform the court of the prior dissolution of the marriage. Furthermore, after his filing of his action in this state in which he prayed that the community property be awarded him, and while he was securing from the trial court a decree awarding the community property to him, he was carrying on a correspondence with respondent regarding a settlement of their property rights which was well calculated to mislead her as to his intentions and to forestall the entry into her mind of his prosecution of a divorce action in California. He concealed all of this from the court. Had plaintiff revealed the facts to that court, it would, doubtless, have arrived at a different conclusion. Compare Harada v. Fitzpatrick, 33 Cal.App.2d 453, 91 P.2d 941; Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P. 184; Landon v. Landon, 74 Cal.App.2d 954, 169 P.2d 980.

Such fraud is extrinsic and justifies a court in setting aside prior decrees in a divorce action. See Tomb v. Tomb, 120 Cal. App. 438, 7 P.2d 1104, and cases therein cited. Also see Rivieccio v. Bothan, 27 Cal.2d 621, 165 P.2d 677.

[4] And where extrinsic fraud is practiced upon a court there is no statutory limitation upon the time within which application for relief may be made. Tomb v. Tomb, supra; McGuinness v. Superior Court, 196 Cal. 222, 230, 237 P. 42, 40 A.L.R. 1110; In re Estate of Estrem, 16 Cal.2d 563, 571, 107 P.2d 36; Rivieccio v. Bothan, supra, 27 Cal.2d at page 625, 165 P.2d 677; Rhea v. Millsap, 68 Cal.App.2d 449, 453, 156 P.2d 941; Deyl v. Deyl, 88 Cal.App.2d 536, 539, 199 P.2d 424.

In what we take to be in the nature of an opinion the court stated in its order that the affidavit of mailing executed by plaintiff averred that copies of summons and complaint were addressed to "Mildred Laverne Daut, Larch Road, Briarcliff Manor, New York," while the person to be served was, according to plaintiff's affidavit, then going under the name of Mrs. W. E. Schenck, and therefore the papers should have been directed to her under that name; that it was not reasonably probable that a letter addressed to Mrs. Mildred Laverne Daut would be delivered to Mrs. W. E. Schenck; that she did not receive such a letter and that she was never personally served with summons. Then followed the order of the court setting aside the decrees of divorce. But since the opinion of the court was not an essential part of the order, and since the court held that it had never acquired jurisdiction to adjudicate the case, we cannot assume that its conclusion was based solely upon what it appears to have thought was insufficient service upon defendant. Since its order setting aside the decrees finds ample evidentiary support in the record, and the foregoing authorities support such conclusions in point of law, it is unnecessary to determine whether or not its reasoning regarding the sufficiency of substituted service is sound.

The order appealed from is affirmed and the action is sent back for such further proceedings as may be proper in view of the opinion herein expressed.

VAN DYKE and PEEK, JJ., concur.

ROSICRUCIAN FELLOWSHIP v. ROSICRUCIAN FELLOWSHIP NON-SECTARIAN CHURCH et al.

Civ. 3663.

District Court of Appeal, Fourth District, California.

July 6, 1950.

As Modified July 13, 1950.

Rehearing Denied Aug. 1, 1950.

Hearing Granted Aug. 31, 1950.*

The Rosicrucian Fellowship, a corporation, sued the Rosicrucian Fellowship Non-Sectarian Church, a corporation, and others, to enjoin defendants from transacting business under the name of such church, soliciting Rosicrucian Fellowship students, probationers or disciples for financial or other support, using plaintiff's copyrighted literature in disseminating the teachings of the Rosicrucian philosophy and interfering in plaintiff's business and operation. Defendants filed a cross-complaint against plaintiff and Z. Glen Meyncke and others, as individuals and officers, trustees and directors of plaintiff corporation for declaratory relief and determination of defendants' rights in real and personal property held in trust by such corporation. From a judgment of the Superior Court of San Diego County, Robert B. Burch, J., for defendants and cross-complainants, plaintiff and cross-defendants appealed. The District Court of Appeal, Mussell, J., held that plaintiff corporation had exclusive control and management of the unorganized Rosicrucian Fellowship Church's physical properties and was authorized under a contract to use the name "Rosicrucian Fellowship" and entitled to injunction against violations of its right to use such name.

Judgment reversed.

1. Religious societies ⇨24

Any use of religious corporation's property not in violation of corporation's duties as trustee for members of unorganized church is not subject of control by courts.

2. Religious societies ⇨11

A corporation organized to establish college for teaching of a religious philosophy and establishment and maintenance of non-sectarian church, with members of corporation and their nominees as trustees for benefit of members of unorganized church, and corporation subsequently organized by number of members of such church for purpose of disseminating and perpetuating teaching of such philosophy, did not represent nor have right to control unorganized church in exercise of its ecclesiastical and esoteric functions and dissemination of its teachings.

3. Religious societies ⇨14

The civil courts have no ecclesiastical jurisdiction and will interfere in controversy in religious organization only when property or civil rights are involved.

---

* Subsequent opinion 245 P.2d 481.

4. Religious societies 🔑14

So much of a judgment as determined whether parties to action or any of them had right to exercise or control any ecclesiastical or esoteric functions of unorganized church was improper as beyond court's power and unnecessary to determination of parties' property rights.

5. Religious societies 🔑29

A contract between woman organizing corporation disseminating certain religious teachings and older corporation similarly engaged for dissolution of new corporation, delivery of its religious books to old corporation on payment of inventory value thereof, granting to old corporation of exclusive right to print and distribute books, pamphlets, etc., covered by copyrights owned by such woman, and her election as trustee of corporation, chairman of its executive committee and manager of its activities, was not breached and terminated by her removal from such offices by failure to re-elect her for another year.

6. Religious societies 🔑18, 25

A corporation, holding real and personal property in trust for use and benefit of all members of unorganized church association, had exclusive right of control and management of such property and duty to use it to serve interests of such beneficiaries, who could enforce corporation's liability for breach of such duty in proper action.

7. Religious societies 🔑18, 24

Groups of members of unorganized church, which had no spiritual head or system of church government regularly set up by its membership, had no right to exercise exclusive control and management of church's affairs or property, and members having adopted no rules and regulations governing exercise of right to disseminate church's teachings, courts cannot set up system of church government or determine who may or may not disseminate such teachings.

8. Religious societies 🔑11, 18

A corporation, of which only a few members of unincorporated church are members, had no right to govern other members of such church, and another corporation, holding real and personal property in trust for use and benefit of all members of church, has exclusive control and management of its physical properties, while control of its ecclesiastical functions is vested in entire membership until church organization is established.

9. Religious societies 🔑11

Under provision of contract between corporation, organized to disseminate certain religious teachings, and widow of originator thereof that she should write, prepare or supervise preparation of students' and probationers' letters to be signed "Rosicrucian Fellowship," corporation was authorized to use such name and entitled to injunction against violations of such right by another corporation organized by probationers and disciples of such fellowship.

◆

Rollin L. McNitt, Los Angeles, Homer C. Compton, and Edythe Jacobs, Los Angeles, of counsel, for appellants.

Stewart, Shaw & Murphey, Los Angeles, Luce, Forward, Kunzel & Scripps and Fred Kunzel, San Diego, of counsel, for respondents.

MUSSELL, Justice.

Action for injunction. Cross-complaint for declaratory relief.

In this action, filed September 26, 1944, plaintiff corporation seeks an injunction against the defendants The Rosicrucian Fellowship Non-Sectarian Church, a corporation, five individuals named as directors and incorporators thereof and the Rosicrucian Probationers Association, restraining them from transacting business under the name "The Rosicrucian Fellowship Non-Sectarian Church"; from soliciting any of the students, probationers or disciples of "The Rosicrucian Fellowship" for free-will offerings or financial or other support; from using any of the copyrighted books or other literature used by plaintiff in disseminating the principles or teachings of the Rosicrucian Philosophy; from interfering in the business and operation of plaintiff; and from interfering with the conduct of meetings, services or lectures given by plaintiff or under its direction or sponsorship. Plaintiff also asks that the defendants be required to deliver up to The Rosicrucian Fellowship all of the financial contributions and free-will offerings received by them to date from the students, probationers and disciples, and all copies of mailing lists containing the names and addresses of such students, probationers and disciples of The Rosicrucian Fellowship.

The defendants, who allege that they represent all of the probationers and disciples of the Rosicrucian Philosophy residing in the United States and a majority of all probationers and disciples in the world, ask in their cross-complaint for declaratory relief; that the court fix and determine their rights in the real and personal property held in trust by the plaintiff; that cross-complainants and all other students, probationers and disciples, as members of the church institution and the members of defendants' corporation, be declared to be the beneficiaries of said trust property and entitled to the use and enjoyment thereof without interference or molestation by the plaintiff, its officers or trustees; that cross-complainants be declared to be entitled to the possession, use and enjoyment of the plates and stencils containing the names of the students, probationers or disciples, and the machinery and other personal property for the transposition of the same; that it be adjudged that the copyright upon the emblem and insignia of the Fellowship is owned by Mrs. Max Heindel and that the Fellowship, defendant corporation, and all other students, probationers and disciples are entitled to the use of said insignia and emblem without molestation or interference by cross-defendants; that Mrs. Heindel be declared to be the owner of all copyrights, books, pamphlets and letters described in a contract dated November, 1935, between Mrs. Heindel and plaintiff (attached to the Cross-Complaint as Exhibit "E"); that the said contract be declared to be null and void; that it be adjudged that the sole right of plaintiff corporation in and to said books, pamphlets, letters and copyrights thereof are as set forth in a contract between The Rosicrucian Fellowship, its trustees, and Mrs. Max Heindel, dated October 23, 1931 (attached to the Cross-Complaint as Exhibit "D"); that it be determined that the defendant corporation, cross-complainant, is entitled to print, publish, sell and use each and all of said books, pamphlets and letters under license from Mrs. Heindel; that cross-defendants be required to render an accounting and that they be required to pay any sums found due thereon.

The trial court decreed that plaintiff take nothing by its complaint; that plaintiff corporation owns and holds certain real property in the city of Oceanside, together with the improvements, fixtures and all personal property thereon as trustee, in trust for the use, benefit and enjoyment of the cross-complainants as members of the unincorporated church association organized in 1908 and 1909, and as members of The Rosicrucian Fellowship Non-Sectarian Church, as beneficiaries; that cross-complainants, as such beneficiaries, are entitled to the use and enjoyment of said real property, improvements, fixtures and all other personal property in and upon said real property in the conduct of ecclesiastical and esoteric functions of the Rosicrucian Philosophy without molestation or interference from the cross-defendants.

The trial court then designated and determined the ecclesiastical and esoteric functions of The Rosicrucian Fellowship and decreed that the use and enjoyment of the said real and personal property by cross-complainants, as such beneficiaries, is and shall be the dominant use and enjoyment thereof; that the cross-defendants have not acquired and do not have any right to exercise or control any of the said ecclesiastical or esoteric functions or to use any of the said real or personal property for any of said functions; that the probationers and disciples of the Rosicrucian Philosophy have not waived their right to organize themselves into a permanent organization with a complete system of church government, or to assert or exercise full and complete control of all said ecclesiastical or esoteric functions of the

Rosicrucian Philosophy; that the plaintiff corporation, The Rosicrucian Fellowship, acting by and through its trustees, has and shall hereafter have the right and is entitled to the use and enjoyment of said real and personal property in the conduct of certain designated temporal functions, all for the account and benefit of the members of the said unincorporated church association and defendant corporation beneficiaries thereof; that the said use of said real property, improvements, fixtures and personal property for said temporal or secular purposes shall be servient to the rights of said probationers and disciples to the use and enjoyment thereof in the conduct of the said ecclesiastical and esoteric functions and purposes, as members of said church; that the probationers and disciples of the unorganized church association, prior to July 6, 1944, and as members of The Rosicrucian Fellowship Non-Sectarian Church, from continuous usage at all times from November, 1909, are entitled to use and enjoy the name "The Rosicrucian Fellowship" and the said insignia and emblem without molestation or interference from cross-defendants, or any of them; that the probationers and disciples of the Rosicrucian Philosophy, as members of the said unorganized church association, and as members of The Rosicrucian Fellowship Non-Sectarian Church, as beneficial owners, are entitled to the use and enjoyment of the names and addresses of all students, probationers and disciples, and multigraph plates and machinery necessary for the transposition thereof, free from interference or molestation by cross-defendants, or any of them.

The court found Mrs. Heindel to be the owner of all copyrights upon books, pamphlets and letters written by Mr. and Mrs. Max Heindel and other probationers and disciples and the insignia and emblem thereon, subject to the nonexclusive right of the plaintiff corporation to print, publish and sell the same under an agreement between Mrs. Heindel and plaintiff corporation dated October 23, 1931.

The court determined that the contract of October 9, 1934, (Exhibit "E" to the Cross-Complaint) had been breached and was terminated and is null and void. The cross-defendants were enjoined from claiming or asserting ownership of the said real and personal property, except as trustees for the use, benefit and enjoyment of the probationers and disciples of the Rosicrucian Philosophy as beneficiaries; from interfering with said probationers and disciples in the use and enjoyment of the trust property in the conduct and study of the established ecclesiastical or esoteric functions; from claiming or asserting the exclusive right to the use of the name "The Rosicrucian Fellowship" or the said insignia or emblem; from preventing or interfering in any way with the use by said probationers and disciples of the names and addresses of such students, probationers and disciples and the stencils, multigraph plates and machinery necessary for the transposition thereof; from writing or mailing certain letters to students and probationers concerning the activities of cross-complainants, and from doing any act to prevent or deter such probationers or disciples from becoming members of defendant corporation.

Facts

In the fall of 1907 one Max Heindel studied Mystic Christianity known as the "Rosicrucian Philosophy" in the Black Forest of Germany, under the Ancient Order of Rosicrucian Brothers, organized in the sixteenth century by Christian Rosenkruez. In 1908, in New York, Heindel wrote "The Cosmo-Conception of Mystic Christianity", based upon his studies in Europe. From 1908 to November, 1910, he lectured and taught the Rosicrucian Philosophy in numerous cities of the United States to induce the public to study and accept that teaching or interpretation of the Christian faith. He organized and established groups, called "centers", in Ohio and Washington and designated as "students" those who became interested in said teaching and until they had completed a sufficient study or a course of lessons written and prescribed by him. When the "students" had completed said studies, attained sufficient learning of said Christian teaching and had executed a written pledge to live in accord with said teaching, they were designated as "probationers". "Probationers", after additional study, devotion and faithful demonstration of religious life and the execution of a further pledge in accord with said teachings, were designated as "disciples". As a part of said religious faith, each and every probationer and disciple was taught individual religious self-reliance and self-discipline and obligated himself alone and in conjunction with all other probationers and disciples, to preach the gospel and heal the sick, and, by sacrifice, to mutually assist each and all other probationers and disciples and to serve humanity in the relief of human suffering.

Max Heindel married Augusta Foss (Heindel) in 1910 and Mrs. Heindel assisted in the writing of lectures and monthly esoteric letters and lessons to students, probationers and disciples of the Rosicrucian Philosophy.

Between 1910 and 1913 "centers" were established in Los Angeles; San Francisco; Sacramento; Yakima, Washington; and Portland, Oregon. The probationers and disciples constituted an unincorporated church association and were known as and used the name "The Rosicrucian Fellowship".

In 1911 Max Heindel purchased real property, known as "Mt. Ecclesia", near the city of Oceanside. This property was improved with funds contributed by Mrs. Heindel, from funds received from students, probationers and disciples, from receipts from the sale of books, pamphlets and other writings of Mr. and Mrs. Max Heindel, and the operation of lodging facilities and cafeteria on the said real property. By letters signed, addressed and mailed to students, probationers and disciples, Max Heindel declared that he held "Mt. Ecclesia", together with all buildings and personal property thereon and thereat, in trust, for the use, benefit and enjoyment of students, probationers and disciples of the Rosicrucian Fellowship.

In 1913 the Heindels and three other persons, who were nonbelievers in the said teachings, caused the plaintiff corporation to be formed for the purpose of establishing a college or seminary for the study of the principles of the teachings known as "Rosicrucian Philosophy". The articles of incorporation were amended in 1925 to include in the corporate purposes the establishment of a non-sectarian church for advocating and disseminating the principles and teachings of the Rosicrucian Philosophy and universal brotherhood and to establish a sanitarium.

In 1935 the name of the corporation was changed to "The Rosicrucian College". By further amendment in 1940, the name of the corporation was changed to "The Rosicrucian Fellowship" and its purposes were stated in part to be "to establish and maintain a non-sectarian church or religious organization, * * * with power to appoint, ordain and consecrate its ministers, * * * to advocate, teach and disseminate the principles and teachings of the Christian religion as interpreted by the Rosicrucian Philosophy. * * *" and to print, publish, sell and/or otherwise distribute and dispose of the books, writings, magazines and other literary productions of the Heindels pertaining to the principles and teachings of the Rosicrucian Philosophy.

Plaintiff corporation was organized without the approval or consent of the students or members of the unincorporated church association. The by-laws and all amendments thereto provided, among other things, that the trustees of the plaintiff corporation be elected from members of the corporation; and that the only members of the said corporation were the trustees, or such persons as the trustees might designate. The by-laws were adopted and amended without the knowledge, approval or consent of the students, probationers or disciples as members of the unincorporated church association known as "Rosicrucian Fellowship".

From 1913 until January 6, 1919, the date of his death, Max Heindel retained title to Mt. Ecclesia. During this period the Heindels, with the assistance of other probationers and disciples, as members of the unincorporated church association, conducted all ecclesiastical and esoteric functions of the Rosicrucian Philosophy for the unincorporated church association.

All books, pamphlets and letters on the Rosicrucian Philosophy written by the Heindels until January 6, 1919, were copyrighted and registered in the name of the owner, Max Heindel. After January 6, 1919, Mrs. Max Heindel continued to print and publish additional books, pamphlets and letters, which she copyrighted in her name.

The estate of Max Heindel was distributed to Mrs. Heindel and she has at all times since been the owner of all copyrights upon all of said books, pamphlets and letters and all plates and mattrices for the publication thereof, subject to the rights of the plaintiff corporation under a license agreement executed by Mrs. Heindel on October 23, 1931, and on October 9, 1934.

In 1920 Mrs. Heindel executed a grant deed to the plaintiff corporation, as grantee and trustee, of the real property at Mt. Ecclesia and all improvements, fixtures and personal property thereon and thereat, in trust, for the use, benefit and enjoyment of the probationers and disciples of the Rosicrucian Philosophy, as members of the unincorporated church association known as "The Rosicrucian Fellowship". Thereafter, the plaintiff corporation acquired real property adjacent to Mt. Ecclesia and improved the same from funds in part received from probationers and disciples.

From 1913 to April 24, 1945, plaintiff corporation conducted certain temporal and secular functions and printed, published and sold books, pamphlets and letters written by the Heindels and had, and now has, possession and use of the mailing lists of the students, probationers and disciples and addressograph plates and machinery for the transposition thereof.

From time to time after January 10, 1913, the plaintiff corporation approved and recommended rules and regulations for the removal of names of students, probationers and disciples from the mailing list for delinquency in mailing monthly report cards or blanks for a period of ninety days and for immoral conduct. They authorized classes for the training of probationers as lecturers; the issuance of charters to "centers", the compilation of various statements made in the said copyrighted books, pamphlets and letters into correspondence courses, and the establishment of esoteric and healing departments at Mt. Ecclesia. All of these acts were done without the consent or approval of the unorganized church members or the defendant corporation.

In 1931 a controversy arose between Mrs. Heindel and the plaintiff corporation. Mrs. Heindel moved to Oceanside and undertook the establishment of a separate plan or organization for the purpose of disseminating the teachings of the Rosicrucian Philosophy and formed a corporation sole known as the "Max Heindel Rose Cross Fellowship". In that year she and plaintiff corporation executed an agreement, dated October 23, 1931, granting a nonexclusive license to the plaintiff corporation for certain purposes, which agreement will be hereinafter discussed.

On October 9, 1934, a new contract was executed between Mrs. Heindel and plaintiff corporation modifying the 1931 agreement and granting plaintiff an exclusive license for certain purposes, which agreement will also be hereinafter discussed.

In 1943 a number of the members of the unincorporated church formed an association known as the "The Rosicrucian Probationers Association". This association was for the purpose of organizing a permanent church institution and to establish an ecclesiastical government therefor. There were approximately 400 probationers and disciples in the United States who were members, and the association continued to operate and exist until July 6, 1944. On that date the association was incorporated under the name of "The Rosicrucian Fellowship Non-Sectarian Church". This corporation was organized for the purpose, among other things, of carrying on, disseminating and perpetuating the teachings of the principles of the Rosicrucian Philosophy. By-laws, rules and regulations were adopted providing for a complete system of representative church government to carry on the ecclesiastical and esoteric functions of the original unorganized church association.

Both plaintiff and defendant corporations attempted to exercise the control over the ecclesiastical and esoteric functions of the unorganized church. The plaintiff corporation amended its by-laws to provide for the suspension or removal of students, probationers or disciples under conditions imposed by them and mailed out letters to members of the unorganized church in an attempt to prevent the members of the unorganized church from organizing a permanent church organization and from becoming members thereof.

It was alleged by cross-complainants that plaintiffs, after 1943, have taken possession of all forms of confidential discipleship instructions and have refused to deliver possession thereof to the defendant corporation. These activities on the part of both corporations led to the filing of the present action. Both parties claim that they are entitled to the use and enjoyment of all names and addresses of all students, probationers and disciples and plates, stencils and the machinery for transposition thereof.

Issues

The issues, as stated by appellant are: (1) Did the trial court have jurisdiction to render the judgment? (2) Is the judgment within the issues raised by the pleadings? (3) Did the trial court commit reversible error in its rulings in admission and exclusion of evidence?

As stated by respondents, the primary issues are: (1) The determination of the rights of the parties to use, possess and enjoy the real and personal properties at "Mt. Ecclesia" in the conduct of the ecclesiastical functions of the Rosicrucian Philosophy, a religious belief. (2) The property rights of the parties (a) To use the name "The Rosicrucian Fellowship"; (b) To print, publish, sell and use copyrighted books and documents under written license agreements from Mrs. Heindel, owner of said copyrights; (c) To use the emblem or insignia upon said copyrighted documents; (d) The ownership of copyrighted documents and literature; and (e) The use and possession of the mailing lists of members (probationers) and the students of the Rosicrucian Philosophy, together with plates and machinery for the transposition thereof.

A determination of the controversy before us involves first, a consideration of the judgment in Weaver, et al. v. Meynke, No. 107939, in the Superior Court of San Diego County. That action was by members of the Rosicrucian Fellowship Church against the Rosicrucian Fellowship, a corporation, and its trustees. The judgment therein (referred to as the "Haines Judgment") has become final and is binding upon the parties hereto. There is no contention here that it is not res adjudicata as to the issues there raised. The said judgment provides in part:

"The persons who constitute the believers in and the followers of the Rosicrucian Philosophy constitute a church known as the Rosicrucian Fellowship, as distinguished from the Rosicrucian Fellowship, a corporation, without any ecclesiastical organization or system of government; that said church, as such, owns no real or personal property; that all of the real and personal property conveyed or transferred to or controlled by said corporation is owned by said corporation; and that said corporation holds all of said real and personal property as trustee for the members of said church for the purposes allowed by the articles of incorporation, as amended, and the by-laws of said corporation, and the laws of the State of California."

The trial court in the instant action found, on substantial evidence, that Mrs. Heindel was the owner of all copyrights upon books, pamphlets and letters written by Mr. and Mrs. Heindel and other probationers and disciples and the insignia and emblem thereon, subject to the provisions of the 1931 license contract.

[1, 2] Plaintiff corporation owns the real property here involved and certain personal property, all of which must be used by plaintiff corporation as trustee for the members of the unorganized church. Any use of such property not in violation of the duties of plaintiff corporation, as trustee, is, therefore, not the subject of control by the courts. Plaintiff corporation was organized by the Heindels and three other persons to establish a college or seminary for the study and teachings of the principles of the Rosicrucian Phil-

osophy and, by amendment, its purposes included the establishment and maintenance of a non-sectarian church or religious organization. The members of the corporation were and are its trustees and their nominees. The students, probationers and disciples of the unorganized church are not members of the corporation and have no voting power in the election of its officers. Since the students, probationers and disciples of the Rosicrucian Fellowship have never been organized and since no system of church government has been adopted by them, it follows that neither of the corporations here involved represent or have the right to control the unorganized church in the exercise of its ecclesiastical and esoteric functions and the dissemination of its teachings.

[3] A religious organization possesses a dual nature and status, Wheelock v. First Presbyterian Church, 119 Cal. 477, 486, 51 P. 841, and the plaintiff corporation is the trustee for all of the members of the unincorporated church holding title to the property, with power to manage and control the same for the unincorporated church. This unincorporated church has no polity as such. Its membership is widely scattered throughout the world and the establishment of a church organization among its members presents a problem of considerable magnitude. However, we are not here concerned with the establishment of a church organization. By reason of the division of state and church under our system of political and religious freedom it has been very generally recognized that the civil courts have no ecclesiastical jurisdiction and will only interfere in a controversy in a religious organization when property or civil rights are involved. Watson v. Jones, 13 Wall. 679, 80 U.S. 679, 20 L.Ed. 66; Dyer v. Superior Court, 94 Cal.App. 260, 269, 271 P. 113; Church of Christ of Long Beach v. Harper, 83 Cal.App. 41, 46, 256 P. 476. The rule announced in these cases is that the only basis for the court's interference in an ecclesiastical controversy is that some property or civil right is involved. In the instant case, no ecclesiastical rule, custom or regulation has been regularly adopted by the unorganized church herein involved.

[4] Insofar as the judgment herein provided that the parties or any of them had or did not have the right to exercise or control any of the ecclesiastical or esoteric functions of the unorganized church, such determination was beyond the power of the court and unnecessary to a determination of the property rights of the parties. The use of the real and personal property of plaintiff corporation is only limited by the trust, the by-laws and the laws of this state. The use and possession of the personal property owned by Mrs. Heindel is, within the issues framed by the pleadings, limited by the license contracts of 1931 and 1934.

[5] By the terms of the 1931 contract, Mrs. Heindel granted an irrevocable, non-exclusive license and permit to plaintiff to publish, sell and distribute at its pleasure the books and pamphlets covered by all copyrights. It was agreed by the parties that Mrs. Heindel should have the undisputed ownership of the copyrights and all rights secured thereby until her death, subject, however, to the right of the Fellowship to print, publish, sell and distribute such books; that the Fellowship would provide Mrs. Heindel for the duration of her lifetime an annuity of $125.00 per month. It was not contended at the trial that this contract was not in force as between the parties, but there was a controversy concerning the contract of October 9, 1934, executed by the same parties. This latter contract recited that Mrs. Heindel had organized a corporation sole, known as the Max Heindel Rose Cross Philosophies, which corporation was a successful, going concern engaged in disseminating the Rosicrucian teachings and had a large following of students, probationers and disciples; that the corporation had on hand monies, numerous books, pamphlets and other material used in teaching the Rosicrucian Philosophy and in addition thereto, had a right to a legacy of $10,000; that the two groups had agreed to a union and a consolidation of activities with the purpose of teaching the Rosicrucian Phil-

osophy in a more effective manner. The agreement then provided, in consideration of $1.00 and other good and valuable considerations, that the Rose Cross Philosophies Corporation be abandoned and dissolved; that the books of the Rose Cross Philosophies owned and on hand be invoiced, at printer's cost, and delivered to and become the property of the Rosicrucian Fellowship; that the Fellowship pay to the Rose Cross Corporation the amount of the inventories and appraisal, estimated to be between $2,500 and $3,500.

It was agreed that the 1931 contract should remain in force, except as modified therein; that the plaintiff corporation be granted the exclusive right to print and distribute the copyrighted books, pamphlets and documents covered by all copyrights, and that at the death of Mrs. Heindel they should become the exclusive property of plaintiff corporation. The amount of the annuity provided in the 1931 contract was fixed at the sum of $125.00 monthly. Mrs. Heindel was granted living quarters in the Rose Cross Lodge at the headquarters of plaintiff corporation for life and in addition, was allowed her sustenance at the cafeteria for the same period. It was agreed that Mrs. Heindel should be elected a trustee of the corporation and chairman of the executive or governing committee and that she was to become manager in charge of the Fellowship's activities. Mrs. Heindel was to write, prepare and supervise the preparation of the students and probationers' lessons and letters. It was further provided that a part of the consideration of the contract should be the assurance to Mrs. Heindel that if at any time she ceased to be active in connection with the work and retired from authority, that she should then become president emeritus of the organization for life; that her annuities, living quarters and her sustenance should continue during her lifetime and that she should co-operate with the Fellowship to the end that the teachings of the Rosicrucian Fellowship might be given to the world to the best possible advantage.

After the execution of this agreement, the Max Heindel Rose Cross Philosophies Corporation was dissolved; its assets were taken over by plaintiff corporation at their inventory value and Mrs. Heindel received $3,200 from plaintiff corporation therefor. She returned to headquarters at Mt. Ecclesia about January 1, 1935 and resumed writing the probationers' letters and students' monthly lessons. She was elected trustee of plaintiff corporation, chairman of the executive or governing committee and president of the corporation and was appointed editor of the magazine published by the corporation.

The minutes of plaintiff corporation recite certain activities on the part of Mrs. Heindel occurring early in 1942 as reasons for her removal as president of appellant corporation, which removal was effected on February 20, 1943, when the officers of plaintiff corporation were elected for the ensuing year and Mrs. Heindel was not reelected as chairman of the executive committee, or as trustee.

The trial court found in this connection that the sole consideration for the contract of 1934 was "the agreements and covenants" therein contained to be kept and performed by the cross-defendant and its trustees, as follows: That Mrs. Heindel would be elected and maintained at all times thereafter as trustee, chairman of the executive or governing committee and manager in charge of said corporation's activities; that said corporation would cause vacancies to be created in its board of trustees for the said purpose; that Mrs. Heindel at no time offered to return any part of the consideration paid to her under the contract; that the provisions of said contract were and are severable. The court adjudged that the contract had been breached, terminated and was null and void. We conclude that the conclusion reached by the court in this respect was erroneous.

The agreement provides for the election of Mrs. Heindel as trustee but does not provide that she should be maintained at all times thereafter as such trustee. As a part of the consideration of the contract, Mrs. Heindel agreed to cooperate with the Fellowship to the end that the teachings of the Rosicrucian Philosophy might be disseminated to the best possible advantage. To hold that she was entitled to be retained and re-elected as such trustee under any and all circumstances would place an unwarranted construction on the terms of the contract. In addition to that found by the trial court to be the "sole consideration", the contract provides that Mrs. Heindel was to receive lodging and sustenance for the rest of her life. She received $3,200 for the inventory of assets of the Max Heindel Rose Cross Philosophies; she moved into the Rose Cross Lodge and thereafter was permitted to build a cottage, where she resided until the trial of this action. The cooperation of Mrs. Heindel with the plaintiff corporation was also one of the material considerations set forth in the agreement.

The reasons given in the resolution of plaintiff corporation for the removal of Mrs. Heindel as president are: That she attempted on January 29, 1942, to terminate the tenure of office of the secretary, the treasurer and bookkeeper and that she withdrew moneys from the bank belonging to plaintiff corporation and removed and withheld assets of the corporation. If true, these reasons constituted good cause for her removal and also demonstrate her lack of cooperation in carrying out the purposes of the 1934 contract.

Mrs. Heindel retained benefits which she received under the contract and has made no offer of restoration of such benefits. Moreover, it was decreed in the "Haines Judgment": "That the removal of Mrs. Max Heindel as president of said corporation in February, 1942, by the trustees of said corporation was legal."

We find no substantial evidence in the record to support the trial court's finding with respect to the "sole considerations of the contract" of 1934 and its resulting decree that said contract had been breached, terminated and was null and void. We conclude that the 1934 contract was still in effect at the time of the trial of the action. It follows that plaintiff corporation has the exclusive license to use the personal property of Mrs. Heindel in accordance with the terms of the contract.

[6] Plaintiff corporation holds the real property conveyed to it, and all personal property conveyed by the 1934 agreement, in trust, for the use and benefit of all the members of the unorganized church association, including those members of said association who are also members of defendant corporation. As such trustee, plaintiff corporation has the exclusive right of control and management of the property held by it and the duty to use its property to serve the interests of the beneficiaries. A breach of duty in this respect may be enforced by the beneficiaries in a proper action.

[7] In the instant case it was stipulated that there is no attempt to remove the trustees for malfeasance or failure to carry out the purposes of plaintiff corporation. Since there is no "spiritual head" of the unorganized church, as described in the Haines Judgment, and since no system of church government has been regularly set up by the membership of the unorganized church, groups of members, such as defendant corporation who represent only a part of the church, have no right to exercise exclusive control and management of the church affairs or property. Defendant corporation itself is not a member of such church and has no right of control of the actions of plaintiff corporation, except as it represents part of the beneficiaries. The persons who constitute the believers in and the followers of the Rosicrucian Philosophy constitute a church, without any ecclesiastical organization or system of government. No rules and regulations having been adopted governing the exercise of the right to disseminate the teachings of the Rosicrucian Philosophy, the courts cannot set up a system of church government or determine who may or may not disseminate the doctrines of this philosophy.

[8] Defendant corporation was organized July 6, 1944. This incorporation was not an organization of the entire membership of the original unincorporated church, and the corporation thus formed, does not have the right to govern members of the original unorganized church who are not members of the Rosicrucian Fellowship Non-Sectarian Church.

Since we have concluded that the 1934 contract was not breached by plaintiff, it follows that the plaintiff corporation has the exclusive control and management of the physical properties of the unorganized church and the control of the ecclesiastical functions thereof is vested in the entire membership of the church until such time as a church organization is established providing otherwise.

[9] The trial court concluded and declared in its judgment "that the probationers and disciples of the unorganized church association, prior to July, 1944, and as members of the Rosicrucian Fellowship Non-Sectarian Church, from continuous usage at all times from November, 1909, are entitled to use and enjoy the name "The Rosicrucian Fellowship" and the said insignia and emblem without molestation or interference from cross-defendants, or any of them". Cross-defendants were permanently enjoined "from claiming or asserting the exclusive right to the use and enjoyment of the name "The Rosicrucian Fellowship" or the said insignia or emblem, or from interfering in any way with the use thereof by the cross-complainants".

Under the provisions of the 1934 contract, Mrs. Heindel was to write, prepare or supervise the preparation of the students' lessons and letters, and the probationers' letters, which are to be signed "Rosicrucian Fellowship, by Mrs. Heindel". This provision clearly indicates that plaintiff corporation is authorized under the contract to use the name "Rosicrucian Fellowship" and the provision of the judgment limiting plaintiffs' use thereof was erroneous. Plaintiff corporation has been carrying on the business of a religious corporation for many years, using the name "Rosicrucian Fellowship, a corporation". Defendant corporation acquired no exclusive right to the use of said name. Flagrant violation of the rights of plaintiffs to use the name "Rosicrucian Fellowship" in the conduct of their corporate business entitles plaintiffs to injunctive relief. Law v. Crist, 41 Cal. App.2d 862, 865, 107 P.2d 953.

Since we have determined that the judgment herein must be reversed for the errors noted, it is not necessary to decide other questions raised on this appeal.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

35 Cal.2d 586

SOUTHERN CALIFORNIA FREIGHT LINES v. PUBLIC UTILITIES COMMISSION et al.

L. A. 21217.

Supreme Court of California, in Bank.

June 30, 1950.

Writ of review proceeding by the Southern California Freight Lines, against the Public Utilities Commission of the State of California and others to set aside portions of an order of the Public Utilities Commission relating to highway common carriers' certificates sought by petitioner and by 13 other applicants before the Commission and for other relief. The Supreme Court, Schauer, J., held that the Commission's order should be set aside insofar as it purported to impose restrictions against the consolidation by petitioner of operating rights held by it and in all other respects should be affirmed.

Order of Commission annulled insofar as it prohibited consolidation of operating rights granted therein to petitioner with petitioner's existing rights, and in all other respects affirmed.

1. Automobiles ⚷104

Under statute prohibiting consolidation of certificates of public convenience and necessity issued to any one highway common motor carrier with another such certificate or operative right issued to or possessed by another highway common carrier so as to permit through service but providing that any one highway common carrier may establish through routes and joint rates under all certificates possessed by such carrier, one highway common carrier is not prohibited from consolidating services and routes authorized in its several certificates. Gen. Laws, Act 5129a; Act 6386, §§ 2¾, 50¾(c).

2. Automobiles ⚷104

Where highway common motor carrier was granted additional certificates of public convenience and necessity to operate between certain points by the Public Utilities Commission, carrier was authorized to consolidate its certificates for purposes of offering through service, and order of Commission insofar as it prohibited consolidation was void. Gen. Laws, Act 5129a; Act 6386, §§ 2¾, 50¾(c).

3. Administrative law and procedure ⚷484
Carriers ⚷10
Constitutional law ⚷297

Where Public Utilities Commission denies applications of carriers for certificates of public convenience and necessity, Commission is not required to make specific negative findings that public convenience and necessity does not require proposed service, and failure to make such findings is not arbitrary or discriminatory nor does it deny petitioning carrier due process of law. Const. art. 1, § 13; U.S.C.A. Const. Amend. 14.

4. Automobiles ⚷84

Where Public Utilities Commission granted certificate of public convenience and necessity to motor carrier to operate between certain points over protest of opposing carrier who was serving such points, and decision of Commission expressly declared that there was evidence of a public need for additional service and that public convenience and necessity required establishment and operation of proposed service, no constitutional rights of opposing carrier were infringed and findings and conclusions of Commission would not be set aside by Supreme Court. Gen. Laws, Act 6386, § 67; Const. art. 1, § 13; U.S.C.A. Const. Amend. 14.

5. Automobiles ⚷84

In review proceeding to set aside portions of order of Public Utilities Commission relating to highway common carrier certificates sought by applicants, evidence sustained commission's determination that there was a need for service covered by certificate granted to applicant to operate between certain cities. Code Civ. Proc. § 1074.

◆

H. J. Bischoff and W. A. Steiger, Los Angeles, for petitioner.

Everett C. McKeage, Roderick B. Cassidy, Boris H. Lakusta, Hal F. Wiggins, J. Thomason Phelps and Harold J. McCarthy, all of San Francisco, for respondents.

SCHAUER, Justice.

In this review proceeding petitioner seeks to have set aside portions of an order of the Public Utilities Commission relating to highway common carrier certificates sought by petitioner and by thirteen other applicants before the commission, and also asks this court to order the commission "to make findings on the issues of public convenience and necessity on" petitioner's application for a certificate between certain points in Southern California. Upon consideration of the entire record and the applicable law we conclude that the commission's order should be set aside insofar as it purports to impose restrictions against the consolidation by petitioner of operating rights held by it, and in other respects should be affirmed. Unless otherwise stated, all sections cited herein will be those of the Public Utilities Act, Stats. 1915, p. 115, as amended, Deering's Act 6386.

Highway common carriers (see § 2¾) must obtain certificates of public convenience and necessity from the commission (§ 50¾(c)). The broad authority of the commission to regulate such carriers is summarized in California Motor Transport Co. v. Railroad Commission, 1947, 30 Cal. 2d 184, 187-188, 180 P.2d 912, and need not be repeated here. Petitioner is a highway common carrier and other certificates of public convenience and necessity held by it engages in the business of transporting general commodities by motor vehicle between numerous points in the counties of Los Angeles, Orange, San Bernardino, Riverside, Imperial, and San Diego. All of the other applicants for certificates are also "for hire" truck carriers and operate either as certificated highway common carriers under the Public Utilities Act, or as "permitted carriers"[1] under the provisions of the Highway Carriers' Act, Stats. 1935, p. 878, as amended, Deering's Act 5129a. Certain of the applicants, including petitioner, operate between some points as permitted carriers and between other points as highway common carriers.

In 1941 four of the subject applications for certificates were filed with the commission and hearings commenced. The hearings were discontinued in 1942, because of war conditions, and not resumed until 1946. Petitioner by its application, filed on January 29, 1946, and later amended, sought to extend its highway common carrier authority to the San Francisco Bay area, the Sacramento area, all points and places between Los Angeles and Santa Barbara, and all points and places between Los Angeles and Pomona and Ontario. Meanwhile, applications of other motor carriers were filed, seeking certificates to operate as highway common carriers generally between the San Francisco Bay area and the Los Angeles area. All applications were consolidated, and virtually a new proceeding began upon resumption of hearings in 1946. At one time there were 22 applicants for certificates, of which 14 remained at the time of the decision here under review.

In February of 1946 the commission instituted an investigation to assist in determining the need for additional highway common carrier service in the areas involved. This proceeding was also consolidated with the certificate applications. Evidence was taken during 112 days of hearing; over 350 exhibits were received and the transcript of oral testimony exceeds 10,000 pages.

As appears from the decision of the commission, during the period 1930-1948 no new highway common carrier rights had been granted between the San Francisco and Los Angeles areas, despite "the continuous and heavy growth of the State generally, and particularly of the metropolitan areas, both in industry and in population." The commission further found that the greater volume of traffic in general commodities between those metropolitan areas was being handled by permitted carriers, the larger of which were the applicants before the commission. Eight of the applicants, including petitioner, were granted certificates authorizing operations between "Los Angeles Territory" and "San Francisco Territory."[2]

---

[1] The term "permitted carriers," as here used, includes "highway contract carriers" and "radial highway common carriers." Such carriers are subject to the more limited regulatory provisions of the Highway Carriers' Act. (Stats.1935, p. 878, as amended, Deering's Act 5129a). They need only obtain permits (from the Public Utilities Commission) before commencing operations. The same carrier may not operate "both as a common carrier and as a highway contract carrier of the same commodities between the same points." (Highway Carriers' Act, sec. 4.)

Petitioner's certificate was issued subject to a prohibition against the "consolidation of the operating rights granted herein with existing rights" without further commission order. Petitioner's contentions appear to be: (1) that the prohibition against consolidation and against the establishment of "through routes and joint rates" is contrary to the express provision of the 1941 amendment to section 50¾ (c); it urges, further, that the commission erred in authorizing the applicant Pacific Freight Lines to extend its operating rights in southern California to northern California without a restriction against consolidation while denying that right to petitioner "whose showing was more substantial"; (2) that the commission erred in not making specific findings on the issues of public convenience and necessity in connection with petitioner's application for authority to extend its service from points it now serves in the six southern counties of the state to the San Francisco territory, to the Santa Barbara area and to the Pomona area; (3) that the commission erred in authorizing another applicant, Sterling Transit Company, to operate between San Francisco Bay area and San Diego area, and between Los Angeles territory and San Diego area.

This court is asked to order the commission (1) to remove the restriction against consolidation by petitioner of the services and routes authorized in its several certificates; (2) to make findings on the issues of public convenience and necessity on petitioner's application referred to in contention (2) hereinabove; (3) to cancel that portion of the certificate of public convenience and necessity which authorized Sterling Transit Company "to operate as a common carrier between San Diego on the one hand and Los Angeles and San Francisco on the other hand"; (4) for such other relief as may be "meet in the premises."

1. *The Prohibition Against Consolidation.*

As amended in 1941,[3] subsection (c) of section 50¾ provides, so far as here material, that upon application the commission "shall have power, with or without hearing, to issue said certificate [of public convenience and necessity] as prayed for, or to refuse to issue the same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity require. Without the express approval of the commission, no certificate of public convenience and necessity issued to ~~any~~ *one* highway common carrier under the provisions of this section, or heretofore issued by the commission *to one highway common carrier* for the transportation of property by auto truck or self-propelled vehicle, nor any operative right of *one highway common carrier* founded upon operations actually conducted in good faith on July 26, 1917, shall be combined, united or consolidated with another such certificate or operative right *issued to or possessed by another highway common carrier* so as to permit through service between any point or points served, *by one highway common carrier,* ~~under any such separate certificate or operative right~~, on the one hand, and any point or points served, *by another highway common carrier,* ~~under another such certificate or operative right~~, on the other hand; nor, without the express approval of the commission, shall any through route or joint, through, combination, or proportional rate be established by ~~any~~ *one* highway common carrier between any point or points which it serves ~~under such certificate or op-~~

---

[2] As specifically defined by appendices to the commission's decision.

[3] The section has since been further amended in respects immaterial here.

~~erative right~~ *on the one hand* and any point or points served ~~which it serves under any other such certificate or operative right~~ by another highway common carrier, on the other hand. *Any one highway common carrier may establish through routes and joint rates, charges, and classifications between any and all points served by such highway common carrier under any and all certificates or operative rights issued to or possessed by such highway common carrier."* The portions of the above quoted section which are italicized were added, and those indicated as stricken out were deleted, by the 1941 amendment.

[1] The conclusion seems inescapable that by the 1941 changes in subsection (c) the Legislature intended to remove the prohibition against the consolidation, without commission approval, by a highway common carrier of certificates and operative rights which it, itself, holds, but to maintain such prohibition insofar as concerns the consolidation of certificates held by different carriers.

The commission relies upon the fact that the provision giving to it the power to "attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity require," remains in section 50¾, and argues that "whereas prior to the 1941 amendment consolidation was not allowed without express" commission approval, subsequent to such amendment consolidation was allowed provided the commission did not forbid it.

[2] We are persuaded, however, that the pertinent portion of the 1941 amendment was intended to accomplish the result here urged by petitioner. Of course, in considering applications for the issuance and transfer of certificates the commission doubtless may take into consideration the fact that new rights may be consolidated with those already existing, and the effect upon the general highway transportation system of such possible consolidation. Nevertheless, as petitioner contends, it appears that under the facts shown here the amendment as a matter of law authorizes such consolidation. When the facts bringing the law into operation are shown to exist the commission exceeds its jurisdiction when it makes an order contrary to that law; and the order, insofar as it is inconsistent with law, is void.

The commission also urges that the case of California Motor Transport Co. v. Railroad Commission, 1947, supra, 30 Cal.2d 184, 180 P.2d 912, supports its claim that it did not exceed its authority in imposing the prohibition against consolidation. In that case a carrier sought, under certificates held by it from point A to point B, and from point B to point C, to give through service between points A and C by a route other than through point B, and this court held that the 1941 amendment did not permit such through service without commission authority.[4]
Inasmuch as we remarked, page 189 of 30 Cal.2d, 180 P.2d at page 915, that "It might be argued that * * * a carrier could not combine his rights under the 1941 amendment without the consent of the commission, but it is not necessary to go that far in this case," it is apparent that the cited decision did not settle against petitioner here the matter now at issue.

2. *The Failure to Make Specific Findings.*

[3] Petitioner argues that because section 50¾ provides that highway common carriers must first obtain from the commission a certificate "declaring" that public convenience and necessity require the particular operation involved, and because the commission has recognized such requirement by stating, in Re Pacific Gas and Electric Co., 1941, 43 C.R.C. 753, 757, that "The Commission makes its findings of public convenience and necessity because this is the requisite finding imposed by statute in all such cases," it necessarily follows that a specific finding "that public convenience and necessity does not require the proposed service would be a requisite to the denial

---

[4] Also involved in that case was the effect of commission orders permitting transfer of certain certificates carrying restrictions against service to intermediate points, which orders did not expressly reimpose such restrictions.

of an application." As hereinabove stated, petitioner's application was granted in certain respects. As to applications not granted, the commission's decision and order (encompassing, in all, some 31 pages) stated that in "all other respects, the applications of these carriers will be denied." There is no requirement in section 50¾ that specific negative findings be made as to applications which are denied, petitioner cites no persuasive authority in support of its position, and no compelling reason now appears why such detailed findings should be required in this proceeding by this court. Contrary to petitioner's general allegation, we are convinced that the failure to make such findings appears in this record to have no element of arbitrariness or discrimination or to deny petitioner due process of law.

3. *The Certificates Granted to Sterling Transit Company.*

[4] Petitioner alleges generally that the orders of the commission of which it complains "deprive petitioner of rights without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States and Article 1, Section 13, of the Constitution" of this state. In particular, it is urged that the granting of a certificate to Sterling to operate "between San Diego and Los Angeles over the protest of petitioner who was serving said points, without a finding of fact as to the inadequacy of existing service or the need of additional service, and without evidence upon which to base such finding or any finding of public convenience and necessity," infringes constitutional rights of petitioner. The decision of the commission expressly declares that "With respect to the application of Sterling to transport between San Francisco area and San Diego area, and also between Los Angeles territory and San Diego area * * * There * * * was evidence of a public need for additional service," and further states "That public convenience and necessity require the establishment and operation of the service proposed * * *." Evidence introduced by Sterling supports the findings of the commission in this respect. Some ten shippers of merchandise testified, in substance, that they were currently using the services of Sterling as a contract carrier between Los Angeles and San Diego areas and between San Francisco and Los Angeles area, that the service rendered by Sterling was more dependable and satisfactory than they had been able to secure from other carriers, that they would utilize Sterling if it became a certificated carrier between those areas, and that it would be a business advantage to them to have Sterling certificated in that they would have "assurance we would continue to get the same type of service we have had in the past from Sterling * * * [and] they can handle c.o.d.'s as well as freight collect * * * if they were certificated." Under such circumstances no constitutional right of petitioner has been infringed, and the findings and conclusions of the commission will not be set aside by this court. (See section 67 of the Public Utilities Act[5]; Code Civ. Proc. § 1074[6]; American Toll Bridge Co. v. Railroad Commission of

---

5. "* * * The findings and conclusions of the commission on questions of fact shall be final * * *; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination * * *. The provisions of the Code of Civil Procedure of this State relating to writs of review shall, so far as applicable and not in conflict with the provisions of this act, apply to proceedings instituted in the Supreme Court under the provisions of this section * *.

"*Constitutional questions.* In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the said constitutional question shall not be final."

6. Section 1074 of the Code of Civil Procedure provides as follows: "The review upon this writ [of review] cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer."

California, 1938, 12 Cal.2d 184, 190-193, 83 P.2d 1; see Ashbury Truck Co. v. Railroad Commission, D.C., 1931, 52 F.2d 263, 267, affirmed, 287 U.S. 570, 53 S.Ct. 94, 77 L.Ed. 501; San Diego & Cornado Ferry Co. v. Railroad Commission, 1930, 210 Cal. 504, 508-513, 292 P. 640; Southern California Edison Co. v. Railroad Commission, 1936, 6 Cal.2d 737, 748-749, 755, 59 P.2d 808.

[5] The evidence summarized above disposes also of petitioner's contention that the certificate granted Sterling to operate between San Diego and San Francisco is "not supported by any evidence whatsoever," inasmuch as evidence adduced by Sterling pointed to the need of its services between Los Angeles and San Francisco, and, as urged by petitioner, consolidation of routes, since authorized by statute, may not be prohibited by the commission.

The order of the commission is annulled insofar as it prohibits the consolidation of the operating rights granted therein to petitioner with petitioner's existing rights, and in all other respects is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

WEST KEY NUMBER SYSTEM

SANGUINETTI v. MOORE DRY DOCK CO.

Civ. 14209.

District Court of Appeal, First District, Division 2, California.

July 6, 1950.

Hearing Granted Aug. 31, 1950.*

Action under the Jones Act, 46 U.S.C.A. § 688, by Louis L. Sanguinetti against Moore Dry Dock Company, also known as Moore Drydock Company, a corporation, for injuries sustained while in defendant's employ. The Superior Court in and for the City and County of San Francisco, Lile T. Jacks, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Goodell, J., held that plaintiff as operator in charge of tug boat when injured was a seaman having command of tug and not a harbor worker and hence was entitled to sue under Jones Act.

Judgment affirmed.

1. Workmen's compensation 🔑260, 2089

Operator in charge of tug who was actively engaged in navigating it when injured, though two-fifths of his working time was spent as a rigger in shipyard, was a "master" or "seaman" having command of tug at time of injury and not a "harbor worker" and as such he was excluded from coverage of Longshoremen's Compensation Act and therefore entitled to sue under Jones Act. Jones Act, 46 U.S.C.A. § 688; Longshoremen's and Harbor Workers' Compensation Act, §§ 1 et seq., 2, 3, 5, 33 U.S.C.A. §§ 901 et seq., 902, 903, 905.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Master" and "Seaman".

2. Appeal and error 🔑1041(3)

Where evidence in action under Jones Act showed beyond dispute that plaintiff was master of tug and therefore a seaman when injured, denial of motion to amend answers so as to conform to plaintiff's evidence by changing to a denial defendant's admission that plaintiff was employed as a seaman by defendant and was at all times acting as such was not error, particularly in view of other admissions in answer not sought to be converted into denials. Jones Act, 46 U.S.C.A. § 688.

3. Trial 🔑79, 105(2)
Witnesses 🔑270(2)

Overruling objection to cross-examination of witness for defendant as to his employment as an investigator by named insurance company was not error, particularly where preceding and succeeding questions, answered without objection, identified witness definitely with named company.

4. Trial 🔑105(2)

In action under Jones Act for injuries sustained by plaintiff while in defendant's employ, repetitious cross-examination of claim adjuster as to whether he represented defendant's insurance carrier or plaintiff when trying to obtain a release from plaintiff was not error, in absence of objection on ground of repetition or assignment of misconduct, where defense counsel had stipulated that witness was working for insurance carrier. Jones Act, 46 U.S.C.A. § 688.

---

* Subsequent opinion 228 P.2d 557.

5. Appeal and error 🔑206(2)

Error could not be predicated on cross-examination of defense witnesses as overemphasizing defendant's insurance coverage or as constituting misconduct, where no objection was made to cross-examination on such ground and no assignment of misconduct or irregularity or request for an instruction to disregard it was made during course of such cross-examination.

6. Appeal and error 🔑206(2)

Objection that question asked defense witness on cross-examination gave jury false impression as to extent of defendant's insurance coverage should have been made at time question was asked and not for the first time on appeal.

7. Pleading 🔑250

Motion to amend complaint, made at conclusion of plaintiff's case in chief, so as to increase the amount of damages demanded was addressed to the sound discretion of trial court.

8. Pleading 🔑250

Amendment of complaint so as to increase the amount of damages demanded did not change the cause of action itself.

9. Pleading 🔑238(1)

That new matter may have been known to applicant at time of filing his original pleading is not sufficient ground for denying the right to amend.

10. Pleading 🔑250

In action under Jones Act for injuries sustained by plaintiff while in defendant's employ, permitting plaintiff to amend complaint at conclusion of his case in chief so as to demand $75,000 damages instead of $50,000 was not abuse of discretion, though defendant carried liability insurance up to $50,000 only. Jones Act, 46 U.S.C.A. § 688.

11. Damages 🔑210(2)

Informing jury of the amount sued for through the medium of an instruction limiting recovery to such amount is not error.

12. Pleading 🔑238(1)

The practice of moving in the presence of jury for leave to amend complaint so as to increase the amount sued for should not be encouraged.

13. Appeal and error 🔑1041(2)

Moving in presence of jury at conclusion of plaintiff's case in chief for leave to amend complaint so as to increase the amount sued for was not prejudicial misconduct.

14. Trial 🔑143

Any discrepancies in plaintiff's own account of cause of his injury are just as much jury questions as are conflicts and contradictions between two witnesses or two groups of witnesses.

15. Seamen 🔑29(5.16)

Whether any negligence of defendant owner of tug boat was the proximate cause of injury to operator of tug whose leg was crushed when he fell between barge and tug while attempting to board tug after leaping from moving tug onto barge when clutch of tug stuck and whether operator acted reasonably in leaving moving tug pilotless were questions for jury. Jones Act, 46 U.S.C.A. § 688.

16. Appeal and error 🔑930(1, 4)

Award of $75,000 to operator of tug boat whose leg was crushed when he fell between tug and barge was not so excessive as to show that jury erroneously failed to apply rule of comparative negligence or was improperly influenced by allowance of motion made in its presence to amend complaint so as to increase amount sued for from $50,000 to $75,000 or by alleged overemphasis of insurance coverage. Jones Act, 46 U.S.C.A. § 688.

◆

Williamson & Wallace, San Francisco, Brobeck, Phleger & Harrison, San Francisco, for appellant.

Hoberg & Finger, San Francisco, Henry G. Sanford, San Francisco, for respondent.

GOODELL, Justice.

In this action, brought under the Jones Act, 46 U.S.C.A. § 688, respondent recovered a $75,000 verdict. A new trial was denied.

Respondent was employed by appellant as the operator of the "Moore No. 2", a tugboat 45'10" in length, and of 12'9" beam. She was used to tow small craft, to place barges alongside hulls under repair at appellant's shipyards in the Oakland Estuary, and to go wherever needed around San Francisco bay. Respondent worked in the yard as a rigger when not running the tug; while employed as a rigger a whistle would be blown if he was needed on the tug and he would drop his rigging work and take to the water. The record shows that his 40-hour week was split approximately 24 hours as tug captain and 16 as rigger. He was paid $1.80 an hour as captain and $1.54 as rigger. He took his orders from the rigging department. At times a deck-hand assisted on the tug, but at other times respondent handled her alone, all according to the task.

On May 2, 1947, respondent was ordered to go across to the San Francisco waterfront and pick up appellant's 66 foot derrick-barge. He took the tug across the bay, picked up the barge which was loaded with scrap steel, towed her back to appellant's shipyards on the estuary, tied her to a dock where the steel was unloaded, and was engaged in berthing her at her regular mooring when the accident happened. The deck-hand had made the barge fast and respondent was maneuvering the tug so as to shove the barge sideways against the dock. Respondent's account is: "I headed for the barge and when I got fairly close I tried to get the tug out of gear but it [the clutch] stuck again and while I throttled down as low as possible I still hit the side of the barge while in gear." (According to his statement he had had trouble with the clutch sticking for some time and had reported its condition, but nothing had been done about it.) He then jumped from the tug onto the barge and made the line fast from the bow of the tug to the barge. In getting back onto the tug he fell feet first between tug and barge, grabbing hold of the barge before hitting the water, but the tug swung in toward the barge and respondent's left leg was pinned between the two vessels and very badly crushed.

Appellant presents eight points on this appeal, namely, (a) that the court had no jurisdiction of the subject-matter of the action; (b) that it abused its discretion in denying defendant's motion to amend its answer; (c) that it erred in denying a nonsuit; (d) that there was prejudicial misconduct of counsel in unduly emphasizing insurance coverage; (e) that there was an abuse of discretion in granting leave to amend the complaint to increase the prayer from $50,000 to $75,000 in view of the lateness of the application and of appellant's insurance coverage; (f) that there was prejudicial misconduct in moving to amend the complaint in the presence of the jury; (g) that the evidence was insufficient to support the jury's finding that appellant's negligence (if any) was the proximate cause of the accident, and (h) that the damages are so excessive as to indicate that the jury failed to apply the rule of comparative negligence.

(a) *The jurisdictional question:* Appellant contends that the court had no jurisdiction of the subject-matter of this action because respondent's status was that of a harbor worker and as such he was within the coverage of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, ch. 509, 33 U.S.C.A. § 901, § 905 of which declares the remedies of the act to be exclusive.

Section 902 of the act provides that "(3) The term 'employee' does not include a master or member of a crew of any vessel * * *" and § 903 provides that "* * * No compensation shall be payable in respect of the disability or death of (1) A master or member of a crew of any vessel * * *." Respondent claims that since he was master of the tug, §§ 902-903 excluded him from the coverage of the act, wherefore the Jones Act was open to him and the court had jurisdiction.

Appellant relies mainly on Moore Dry Dock Co. v. Pillsbury, 9 Cir., 1938, 100 F.2d 245, and stresses the coincidence that the tug now in question was the tug therein involved, and that that case determined that the *persons* employed on her were not seamen but harbor workers.

The Pillsbury case settled the status of nobody but Howland, a deckhand, who when drowned was engaged in *repairing* the tug boat while she was tied up at appellant's shipyard dock. The question was whether he was a member of her crew or a harbor worker. No such question is now presented since respondent was admittedly the master of the "Moore No. 2" and actively engaged when injured in *navigating* her. See Norton v. Warner Company, 321 U.S. 565, 64 S.Ct. 747, 751, 88 L.Ed. 931 for a discussion of the difference in status between persons "loading, unloading, refitting, and repairing ships" and those *aiding in their navigation.* See, also, Smrekar v. Bay & River Nav. Co., 69 Cal.App.2d 654, 160 P.2d 85.

[1] Appellant's counsel in his opening statement admitted that respondent "was the operator in charge of the tug, and he was in law what would be called a 'master' * * *." This means that he was *a seaman having command.*

In Warner v. Goltra, 1934, 293 U.S. 155, 159, 55 S.Ct. 46, 48, 79 L.Ed. 254, 257-258, Goltra was the master of a tug-boat operating on the Ohio River. At the time he met his death a pilot was at the wheel because Goltra held no license for those waters. Goltra's dependents sued under the Jones Act and a general demurrer to their complaint was sustained on the ground that a "master" was not a "seaman" within the meaning of that act. The judgment for defendant owner was affirmed. On certiorari the state court's decision was reversed, the Supreme Court of the United States holding that masters are "seamen having command."

There are three, but only three, factual differences between that case and this. First, Goltra held no license, while respondent held one. Second, Goltra at the time was not operating his tug while respondent when injured was actively in control of his. But these two differences only make the instant case the stronger of the two. Third, respondent worked part time as a rigger. The record shows that he spent approximately three-fifths of his time running the tug and two-fifths as a rigger. This circumstance does not change his status since he was on active duty as master when injured, Long Island R. Co. v. Lowe, 2 Cir., 145 F.2d 516, 518, and exposed to the hazards of a seaman, not a rigger. Had he been injured ashore while working as a rigger a different problem would be presented.

The Goltra case is cited in South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 259, 60 S.Ct. 544, 547, 84 L.Ed. 732, 737, and in the Norton case, supra, each of which involved the question whether the employee was the "member of a crew", and both of which distinguish the Pillsbury case. In doing so the Bassett case speaks of persons whose services on a vessel are "of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation."

There is no essential difference between this and the Goltra case, and upon its authority we must hold that in denying appellant's motion to dismiss for lack of jurisdiction the court ruled correctly.

(b) *The motion to amend the answer:* The complaint alleged in paragraph I "That this action arises under Section 33 of the Merchant Marine Act of 1920, 46 U.S.C.A. 688 * * *." and in paragraph IV: "That at all times herein mentioned, plaintiff was employed as a seaman by defendant, and was at all times herein mentioned acting in the course of his said employment." The answer expressly "Admits the allegations of Paragraph I * * * and IV of plaintiff's complaint."

[2] After a week of trial appellant orally moved to amend the answer by changing to a denial its admission that plaintiff was a seaman and at all times acting as such, on the ground that it would

be "in conformance with the testimony introduced by the plaintiff."

The judge remarked: "* * * I am ruling that you cannot amend your answer *under this set of facts that have gone in so far* * * *." (Emphasis added.) This indicated that his action was not based on any technical or procedural ground, but solely on the testimony, which showed beyond dispute that respondent was the tug's master and therefore a seaman, Goltra case, supra, *just as pleaded and admitted.*

Moreover, the ruling could not have been erroneous since the answer contains other admissions not sought to be converted into denials. In paragraph III it alleges "that plaintiff as Master of said tugboat" had certain duties to perform. In paragraph IV "defendant admits that * * * plaintiff was employed by defendant as operator and Master of said tugboat." In paragraph V defendant affirmatively alleges "That, while plaintiff was Master of said tugboat * * * said tugboat was engaged in mooring a barge * * * and plaintiff was in charge of said operations; * * *."

There was no error in denying the motion.

(c) *The motion for nonsuit* was based on the ground that respondent was not a seaman. For the reasons first discussed, and on the same authority, it was properly denied.

(d) *The insurance question:* It is claimed that "Plaintiff's counsel was guilty of deliberate and gross misconduct in unnecessarily emphasizing, in the presence of the jury, that defendant's potential liability was covered by indemnity insurance."

Early in the case there was testimony as to the visits of insurance adjusters to appellant's shipyard to examine the clutch, which testimony was partly in response to questions by respondent's counsel under § 2055, and partly to questions by appellant's own counsel. We do not understand appellant to attack this testimony as it came out rather incidentally and to some extent because of appellant's own questions. The real attack is centered on the cross-examination of the witnesses Goodenough and Rose.

The former was called by appellant to prove certain statements made by respondent in the hospital a few days after the accident with respect to the details thereof. The first question of appellant's counsel brought out that he was a claims adjuster then with the Hartford but formerly with Pacific Employers Insurance Company. Appellant's counsel then stipulated that when the witness interviewed respondent he was working for Pacific.

Respondent's counsel on cross-examination brought out, without objection, that Pacific was appellant's insurance carrier. Then ensued a series of questions designed to show that at that interview the witness represented Pacific, not respondent. It culminated in the answer "At all times that I worked in the Moore Dry Dock I attempted to handle the claims on an overall basis; that is, if the man had something coming I was there primarily to see that he got it; I wasn't there to beat him out of it. * * * I explained to Mr. Sanguinetti that there was a voluntary compensation endorsement on the policy that provided for compensation benefits, and it was up to him to make an election, whether he wanted to accept the compensation benefits * * * or whether he wanted to pursue his rights under the Jones Act. I explained to him what his rights under the Jones Act were."

It is now urged that "plaintiff's counsel unnecessarily mentioned, reiterated and worried the fact of defendant's insurance coverage * * *." It is true that respondent's counsel mentioned Pacific by name eight times during Goodenough's testimony, but appellant's counsel himself mentioned it by name three times. If it is now claimed that the questions were repetitious the answer is that appellant did not even invoke the old, familiar objection "already asked and answered." Such objections as appellant did make were not on the ground that respondent had improperly injected "insurance" into the case or unduly emphasized it. They were on entirely different grounds. There was no assignment of misconduct, or even a suggestion of it.

It must be remembered, also, that the examination embraced workmens' compensation as well as liability insurance, and it appears that Pacific was appellant's carrier on both, although the transcript does not show its limit of liability. Appellant's brief volunteers that such limit was $50,000.

The witness Rose for the defense testified that he was an investigator employed by Brown Brothers and in May, 1947, made an investigation of respondent's injury. On cross-examination he was asked as to Brown Brothers' functions and answered "We do investigational work for insurance companies and for attorneys on occasion." He testified that he was put on this case by Goodenough and that he "asked me to report to the Pacific Employers Insurance Company." "Q. In other words, you were then an investigator employed through Brown Brothers by the Pacific Employers Insurance Company, were you?" Appellant's objection "as assuming something * * * contrary to the evidence" was overruled, the court remarking "he would have a right to show the real concern." "Q. Were you working on behalf of the Pacific Employers Insurance Company in the last analysis? [no objection] A. I suppose so. I reported to them." He testified that he had worked on other cases for Pacific—he assumed not more than 10 or 12 a year.

[3] The ruling could not have been erroneous since in addition to the court's reason that respondent was entitled "to show the real concern" the preceding and succeeding questions and answers both identified him definitely with Pacific.

"Insurance" was not injected into this case by respondent and we do not understand appellant to so contend. The subject found its way in through the testimony of the early witnesses who were appellant's employees, who testified that the insurance adjusters came to the shipyard to check on the clutch. Its entry was in a manner which was incidental and not designed to smuggle contraband into the case, see Duffey v. General Petroleum Corp., 93 Cal.App.2d 757, 209 P.2d 986. In Goodenough's testimony Pacific was first named in answer to the first question asked by *appellant's own counsel,* followed by a stipulation proffered by him. After that respondent clearly had the right on cross-examination to find out just who Pacific was, and he did so by a question to which there was no objection.

[4] The inquiries (admittedly repetitious) whether Goodenough represented the insurance carrier or the respondent when he talked to the latter and tried to get a release from him, could not have begotten error since appellant's counsel had stipulated that he was then working for Pacific. There was no objection to their repetition and no assignment of misconduct.

[5] The failure to object to the questions put to Goodenough and Rose leaves appellant without any solid ground on which to urge error on appeal, 24 Cal.Jur. "Trial" § 59, p. 777; 10 Cal.Jur. 10 yr. supp. p. 654; Duffey v. General Petroleum Corp., supra—which also involved "insurance".

This applies as well to appellant's contentions respecting misconduct. There was no assignment of misconduct or irregularity either coupled, or not, with a request for an instruction to disregard it, during the entire course of the Goodenough-Rose examination, hence error cannot be urged on appeal, Cope v. Davison, 30 Cal.2d 193, 202–203, 180 P.2d 873, 171 A.L.R. 667; Murphy v. Zwieg, 100 Cal.App. 266, 269, 279 P. 1062, and its citations,—another "insurance" case.

Appellant complains especially of the question "And if any loss occurred there due to unseaworthiness of the vessel, or due to the negligence of a fellow employee, the one who would pay the loss would be the Pacific Employers Company?" which was answered "that would be correct." There was no objection.

[6] It is argued that appellant's coverage was $50,000 and no more, but that the prayer had been already amended to demand $75,000 which gave the jury the impression that appellant was covered up to $75,000. The answer to this is that the

time to have objected to this question was *when it was asked.* 24 Cal.Jur. p. 777, supra.

The authorities which we have cited under "The insurance question" were all cited by respondent. Appellant in its closing brief makes no attempt to answer them.

The court gave the following instruction at the end of the case: "In the examination of prospective jurors * * * questions were asked by counsel to learn whether any juror had had an interest in a casualty insurance company. This was done for the sole purpose of discovering if any of you had a biased view point. *You are reminded that no insurance company is a party to this action, and whether either party is insured has no bearing whatsoever on any issue that you must decide. Therefore, the oath that you took as jurors requires that you refrain from any inference, speculation, or discussion about insurance.*" (Emphasis added.)

We find no error whatever under this head.

(e) *The amendment of the complaint:* At the conclusion of plaintiff's case in chief counsel moved to amend the prayer so as to demand $75,000 instead of $50,000. Abuse of discretion is claimed because of the delay in moving, and "in view of the circumstances respecting defendant's insurance coverage."

[7, 8] Such a motion, of course, is addressed to the sound discretion of the court. 21 Cal.Jur. p. 181. The cases have used some strong language with respect to amendments. As early as Stringer v. Davis, 30 Cal. 318, 321, the Supreme Court expressed itself in no uncertain terms on the subject of liberality in granting amendments. In Guidery v. Green, 95 Cal. 630, 633, 30 P. 786, 787, the court said: "It can very rarely happen that a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case * * *." The same language is repeated in Crosby v. Clark, 132 Cal. 1, 8, 63 P. 1022, and in Carter v. Lothian, 133 Cal. 451, 452, 65 P. 962. In the latter case it is said: "This court has frequently reversed for refusing to allow amendments to pleadings, but not for granting amendments." In Rabe v. Western Union Tel. Co., 198 Cal. 290, 299, 300, 244 P. 1077, 1080, it was said: "Especially should liberality be exercised in favor of allowing the amendment where * * * the amendment would not state a new or different cause of action from that attempted to be stated in the original complaint." It is clear, of course, that an amendment to increase the demand does not touch the cause of action itself. Babcock v. Jewell, 110 Cal.App. 323, 294 P. 30.

In Fetterley v. Gibson, 210 Cal. 282, 283, 291 P. 411, 412, the court went as far as to say: "The allowance or refusal of amendments is a matter so largely within the sound discretion of the trial court that its exercise will not be disturbed in the absence of a showing of *gross* abuse." (Emphasis added.)

[9] As to the delay: Appellant points out that the amendment was contemplated before the trial opened and should have been requested then instead of waiting until plaintiff's case was in. "The fact that the new matter may have been known to the applicant at the time of *filing his original pleading* is not sufficient ground for denying the right to amend." Kroplin v. Huston, 79 Cal.App.2d 332, 340, 179 P.2d 575, 580, and its citations, including 21 Cal. Jur. p. 191, § 133. (Emphasis added.) Besides, there was no *new matter.*

As to insurance coverage: Appellant's brief tells us that it carried liability insurance up to $50,000, although this is not shown in the transcript and would hardly have been admissible as a piece of evidence. From appellant's argument on insurance-emphasis it is manifest that appellant would have stoutly objected to its admission had that been attempted. When the motion to amend was under discussion in chambers the judge was informed by appellant's counsel that it was not covered beyond $50,000, and that fact was urged as a reason for denying the motion, since the increased demand for 50% more than the coverage would put an entirely new face on the situation. The insurance carrier of course was not a party (and the jury were thereafter so instructed); appellant was the only party defendant before the court from first to last and a motion such as this, if otherwise allowable, could not have been denied on any such ground or consideration. No authority is cited to sustain appellant's argument and we doubt if any can be found.

[10] There was no abuse of discretion in granting leave to amend.

(f) *The claimed misconduct in moving to amend in the jury's presence:* The record shows:

"Mr. Hoberg: * * * Plaintiff will rest but asks leave to amend the complaint to increase the amount in the prayer from $50,000 to $75,000 incurred and to be incurred on the evidence that has been submitted here before the court and jury.

"Mr. Ray: I desire to argue that matter in chambers and reserve the right at this time to move for a mistrial upon the grounds of plaintiff's misconduct in connection with the motion.

"The Court: Well, I will hear that matter out of the presence of the jury."

In chambers counsel argued, as they do now, that the effect of granting the motion would be to convey to the jurors the impression that the judge thought the plaintiff should recover and "that the verdict should be in excess of $50,000 and not in excess of $75,000", and that such impression could not be effaced or neutralized since the damage had been done when the motion was made. Further, that the manner in which the motion was made showed it was deliberate and purposeful and no mere thoughtless slip.

[11] It has to be admitted, however, that even assuming the motion had been made *out* of the jurors' presence, and granted, they would still have learned from the instructions that plaintiff's demand was $75,000 rather than $50,000. Appellant concedes that the "tactic" of letting the jury know the amount sued for through the medium of an instruction "is sanctioned by usage in California." But, more than that, it is sanctioned by direct *authority.* In Lahti v. McMenamin, 204 Cal. 415, 421, 268 P. 644, 646, the court found it "difficult to understand how a jury * * * can be properly instructed" without such an instruction. That case recognizes a division of opinion in the United States, but says that the weight of authority countenances such an instruction. Other California cases are cited in McNulty v. Southern Pacific Co., 96 Cal.App.2d 841, 216 P.2d 534.

Buswell v. San Francisco, 89 Cal.App.2d 123, 133, 200 P.2d 115, 121, is cited by appellant because it appears therein that the prayer was originally for $20,000, and "At the end of the trial and in the absence of the jury, plaintiffs moved to amend" to $30,000. It is argued that the court was careful to point out that *it was in the absence of the jury,* consequently that that was relevant and important, otherwise "the court would hardly have taken pains to note" it. By necessary implication, it is argued, the case is strong authority that it is prejudicial error to grant such a motion when made *in* the jury's presence. Obviously the question was not, and could not have been, before the court. The real question therein arose because after the motion was granted no written amendment was filed. The statement by the court that the motion was made *out* of the jury's presence was of no significance but simply rounded out the court's narrative of the facts. It could not by implication or otherwise have laid down any rule of law on a point which was not presented. The opinion, 89 Cal.App.2d on page 133, 200 P.2d 115, shows the two points which *were* presented.

Misconduct was first brought up when defendant's counsel requested an adjournment to chambers. It was next considered by the judge when the motion was made for a mistrial. His denial thereof impliedly held that he did not consider it had been made in bad faith or was prejudicial. On appellant's motion for new trial the opportunity to pass on this question was again presented, and the judge again ruled favorably to respondent.

Respondent in his brief pointed out that appellant had cited no California authority holding it to be misconduct to make such a motion in the presence of the jury, or any case from any other jurisdiction so holding. Presumably in response to that comment appellant in its closing brief cites four New York cases.

In Sohman v. Metropolitan Street Ry. Co., 56 Misc. 342, 106 N.Y.S. 1033, the motion to increase the prayer was made *out* of the jury's presence. The granting of it was held to have been within the court's discretion. The case decides nothing touching the instant problem.

The decision in Kenney v. South Shore etc. Co., 126 App.Div. 236, 110 N.Y.S. 503, 504, seems to have turned on the delay in making the application to amend and the absence of any showing. The court said: "The record before us does not disclose any ground whatever upon which plaintiff based this application; nor is there anywhere, either in the recital of the application itself or in the statement of the court on granting the motion, a suggestion of a reason why such an amendment was asked for at that time, nor why it was then granted." There is a strong indication in the opinion of a rule that such applications must be made at Special Term, and that the failure to make it there was unexplained. We, of course, have no such rule. There was a dissenting opinion. It is true, as appellant's brief shows, that the court commented on the motion having been made in the presence of the jury, and the possible implications and inferences which they might have drawn from the court permitting the increase (as heretofore discussed) but it does not follow that the reversal was based on the ground that the motion was made in the jury's presence.

Sandresky v. Erie R. Co., 91 Misc. 67, 153 N.Y.S. 612, holds (syllabus): "In an action for personal injuries to a physician, and damage to his automobile * * * where plaintiff had fully recovered, and had had his car repaired before the complaint was filed, it was error to permit him at the trial, without any affidavit therefor, to amend his complaint so as to increase the amount of damages claimed." It is true the opinion concludes as follows: "We think the present case is within the rule, and that it was error to permit the plaintiff to amend the complaint in the presence of the jury, and that because of this error the judgment should be reversed, with costs, unless the plaintiff is willing to stipulate that the damages shall be reduced to come within the cause of action originally pleaded. If such stipulation is made, then the judgment, as so modified, should be affirmed, without costs." But there is no discussion of the presence-of-the-jury point beyond that statement, and it would seem from the whole opinion that the case did not turn on that point since the headnote gives no hint of it.

In Pfeil v. Klein, 247 App.Div. 510, 286 N.Y.S. 721, 722, the fact that a bill of particulars had been furnished adding up to no more than the $3,000 originally sued for seems to have had considerable influence on the decision. The court said:

"The effect of the granting of the motion to conform the pleadings to the proof was to conform the pleading to whatever verdict the jury might find, and this, occurring, as it did, in the presence of the jury, carried the implication that the court thought that the proof warranted a verdict larger than $3,000. This caused prejudice to defendants, which requires a reversal."

It would appear from the New York cases that their practice is to require an affidavit showing the reasons for the amendment, and that such affidavit should be made by the applicant himself. See Fitzgerald Bros. Const. Co. v. State, 188 Misc. 940, 69 N.Y.S.2d 672.

Sawyer v. Munson S. S. Line, D.C.N.Y., 7 F.Supp. 193, simply holds (syllabus) "Motion to amend personal injury complaint by increasing amount of damages alleged should be made in advance of trial, not at trial." And the language of the opinion shows that it was upon that ground that the motion to amend was denied, not because it was made in the presence of the jury (which appears). In the opinion the court cites the Kenney case, supra. That, of course, is not necessarily the law in California. The ruling was, of course, by *a trial court* and in the exercise of a trial court's discretion. It was affirmed, 2 Cir., 73 F.2d 1012–1013.

Vaughan v. Magee, 3 Cir., 218 F. 630, 631, cited by appellant, simply turns on the point of letting the jury know the amount sued for. The court followed what it termed the "stern and unyielding" rule which had "long obtained" in Pennsylvania. That, of course, is not the California rule, Lahti v. McMenamin, supra; Buswell v. San Francisco, supra; McNulty v. Southern Pacific Co., supra.

In our opinion this claimed misconduct is the most serious question on the appeal. The trial judge himself remarked in chambers "It [amendment] is done everyday here, but I don't know whether in raising the amount—whether that is a matter that should have gone in outside of the presence of the jury."

[12] Such practice is not to be encouraged, and nothing we have said is to be taken as approving it. The only question which we have to decide is whether the motion *as it was made in this instance,* with no more and no less said before the jury than this record shows, amounted to misconduct. The New York cases which appellant quotes, and which we quote, show the real danger—the danger of the possible transference of what might be interpreted by the jury as the judge's views as to what the verdict should be.

[13] That the making and granting of the motion lets the jury know the amount demanded is not *per se* a good legal objection since the jury normally gets that figure anyway from the instructions, Lahti v. McMenamin, supra. The only question is whether the manner in which the oral motion was made gave the jury any fixed suggestion or impression of the judge's appraisement of the case. He was in a better position than we to decide that, and as said before, his rulings indicated that he did not consider it prejudicial misconduct. We repeat, the practice is not to be encouraged either as proper or safe.

[14] (g) *The contention that the evidence was insufficient to support the jury's finding that appellant's negligence (if any) was the proximate cause of the accident.* The burden of appellant's attack hereunder is "that there are startling conflicts in plaintiff's own account" of the cause of his injury. Such discrepancies, if any, are just as much jury questions as are conflicts and contradictions between two witnesses or two groups of witnesses. In People v. Holman, 72 Cal.App.2d 75 at pages 88-91, 164 P.2d 297, we had occasion to discuss the question of self-contradictory testimony, and to cite a number of cases on the subject.

[15] The lengthy summary of these claimed discrepancies invites *this court* to pass upon the question of proximate cause —a jury question. For example counsel say "Leaving a moving tug pilotless in close quarters could only be justified as reasonable conduct if it were the sole expedient by which to avert a threatened disaster. Plaintiff clearly did not behave *as a reasonable* man in creating such a risk to persons and property." (Emphasis added.) An appellate court obviously can do nothing with such questions.

(h) *The contention that the damages are so excessive as to indicate that the jury failed to apply the rule of comparative negligence.*

The $75,000 verdict is not attacked as excessive because it is disproportionate to the plaintiff's injuries or because it shows passion or prejudice. The plaintiff was not cross-examined with respect to his injuries nor was his medical witness cross-examined, nor did defendant put on any medical evidence of its own.

The jury was out for only 35 minutes and it is argued that this shows that proper attention was not given to comparing the claimed negligence of respondent with that alleged against appellant and reducing the amount of the recovery accordingly, as well as to giving proper consideration to the question of proximate cause. It is argued, also, that the claimed error of the court in allowing plaintiff's amendment and counsel's misconduct in moving for it, improperly influenced this high verdict.

[16] None of these arguments is sufficient, and all of them in combination are insufficient, to warrant a court on appeal in saying that the jury failed to follow the court's instructions—none of which is attacked herein.

One of appellant's subsidiary points is that the conduct of respondent's counsel in moving *in the jury's presence* to amend the prayer upward, coupled with their emphasis of insurance coverage, *interacted* with prejudicial *cumulative* effect. In other words, it is urged, the two *in combination* were prejudicial. Each of appellant's attacks has been discussed under points (d) and (f) separately, and we have found no error or misconduct in *either* instance. It follows that with no error or misconduct in *either*, there cannot be error in *both* on any theory of interaction, cumulation, or combination.

Another subsidiary point arises out of the Baskin case. At the first argument of this case Baskin v. Industrial Accident Commission, 89 Cal.App.2d 632, 201 P.2d 549, was mentioned. Since then this court has decided the same case the second time, Baskin v. Industrial Accident Commission, 97 Cal.App.2d 257, 217 P.2d 733. We are satisfied that the Goltra case, discussed herein under the first heading, definitely settles the status of this respondent as a "seaman having command", and not as a harbor worker, hence the Baskin case has no bearing on the present problem.

We find no error at all in the record.

The judgment is affirmed.

NOURSE, P. J., DOOLING, J., concur.

---

98 Cal.App.2d 370

EAMOE v. BIG BEAR LAND & WATER CO.

Civ. 17418.

District Court of Appeal, Second District,
Division 1, California.

July 10, 1950.

Action by Leon Eamoe against the Big Bear Land & Water Company for damages arising out of a fraudulent and negligent representation in the sale of land. The Superior Court of Los Angeles County, Raymond McIntosh, J., entered judgment of nonsuit after jury trial, and plaintiff appealed. The District Court of Appeal, White, P. J., held that where vendor's agent, acting within scope of ostensible authority, showed purchaser two lots, told him that those were the lots he was buying, gave purchaser a receipt purporting to describe correctly the lots which he had shown them, and negligently permitted mistaken legal description to be carried into formal contract, when purchaser learned of mistake by agent, and elected not to rescind but to affirm contract for purchase of lots he had not intended to buy, purchaser was not precluded from suing vendor for damages caused by misrepresentations of agent.

Judgment reversed and cause remanded for a new trial.

1. Principal and agent 🔑158

A principal may protect himself from liability for damages arising from unauthorized fraudulent representations of his agent, by means of an exculpatory provision in an installment purchase contract, but such a provision does not preclude a defrauded purchaser from rescinding and recovering from innocent seller consideration paid, and seller cannot relieve himself of consequences of his own breach of duty.

2. Principal and agent 🔑156

Where agent who negotiated sale of realty was himself a victim of mistaken belief that legal description of land he exhibited to purchaser was as set forth in contract of purchase, the rule that a principal may by contract relieve himself of liability in deceit for prior or subsequent frauds of an agent was not applicable.

3. Principal and agent 🔑156, 159(1)

Where agent, acting within scope of ostensible authority, showed purchaser two lots, told him those were the lots he was buying, gave him a receipt purporting to describe correctly the lots, and negligently permitted mistaken description to be carried into formal contract, when purchaser learned of mistake made by agent and elected not to rescind but to affirm contract for purchase of lots he had not intended to buy, purchaser was not precluded from suing principal for damages he suffered, notwithstanding an exculpatory provision in installment purchase contract in favor of principal.

4. Principal and agent ⚷150(2)

When an agent on behalf of his principal performs an unauthorized act, if principal has put agent in a position to mislead innocent parties, principal is responsible to latter.

5. Appeal and error ⚷927(3)

Where an appeal was taken from a judgment following a nonsuit, the District Court of Appeal considered evidence in light most favorable to losing party in trial court.

◆

Clifton A. Hix, San Pedro, for appellant.

Charles A. Bank, Beverly Hills, for respondent.

WHITE, Presiding Justice.

This is an appeal from a judgment of nonsuit in a jury trial. It was alleged in the complaint "for fraud and negligent representations" that defendants Edgar Blackshaw and Vic Lichtig, as agents for defendant Big Bear Land and Water Company, showed to plaintiff a parcel of land and stated that it was described as Lots 2 and 3 of Block 164; that plaintiff, relying upon such representation, signed an agreement to purchase said parcel; that plaintiff was informed he could immediately commence the erection of a house on the parcel, and plaintiff did so; that after plaintiff had expended $2,000 for labor and materials, he learned for the first time, on or about July 18, 1946, that the land he had selected and built upon was not lots 2 and 3 of Block 164, but lots 2 and 3 of Block 159, and that the land he had built upon was not owned by defendant land and water company. About August 1, 1946, the owners of the lots in block 159 demanded that plaintiff remove his structure from their premises and he did so. It was further alleged that "plaintiff has elected to retain Lots 2 and 3 of Block 164 of Tract No. 2312, as described in his contract of purchase from the defendants although said land are lots which this plaintiff did not select and had never seen until after July 18, 1946." Damages of $5,000 were claimed "because of the misrepresentation of defendants as aforesaid."

Defendant Edgar Blackshaw, one of the agents of the corporate defendant, died shortly before the trial, and as to defendant Vic Lichtig, the evidence failing to show that he participated in the transaction so far as the showing to plaintiff of the wrong property was concerned, the action was, during the trial, dismissed as to each of the foregoing defendants, leaving Big Bear Land and Water Company as the sole defendant.

It appears that defendant Blackshaw, a sales agent, on April 6, 1946, showed plaintiff two lots (lots 2 and 3 of Tract 159). These lots were located between Teal and Shore Drive and faced Barker Boulevard. Plaintiff made a deposit and received a receipt in which the property was described as Lots 2 and 3 of Block 164, and the receipt further showed the location of the property as facing Barker Boulevard between Teal and Shore Drive.

At the same time plaintiff signed a contract of sale in blank, which defendant land and water company was to fill in and mail to plaintiff. Plaintiff asked permission of the agents to proceed with building upon the lots he had selected and was told he could do so. The formal contract was executed by defendant land and water company and mailed to plaintiff. It described lots 2 and 3 of tract 164, but contained no description of their location with reference to streets.

Plaintiff was told by the sales agents that he could proceed with building if he desired. On July 6, 1946, he commenced building a house on lot 3 of block 159 (one of the two lots he thought he had purchased). On July 18, 1946, he first learned that the lots described in the receipt and the formal contract were located in another block. On August 1, 1946, in compliance with the demand of the owners, he had the house removed from the lot, and thereafter it was reassembled on lot 3 of Block 164. On September 30, 1946, a new contract was entered into for the purchase by plaintiff of lot 2 of block 164, and on November 4, 1946, plaintiff received a grant deed to lot

3 of block 164. Thereafter plaintiff sold lot 3, with the house thereon, for $2,000.

The sole question for decision is whether plaintiff is precluded from recovering against the principal, Big Bear Land & Water Company, by reason of the provision contained in the installment purchase contract reading as follows:

"This contract contains the entire agreement of the parties, it being understood that the authority of Seller's Agents is limited and confined to securing purchasers for its property upon the terms and conditions set out in this agreement, and not otherwise; that sales representatives have no power or authority to make any change, alteration, modification, stipulation, inducement, promise or any representation whatsoever other than those herein stated; that said sales representatives are acting as special agents, and all representations not herein set forth are by Buyer deemed waived.

"It is a specific and special consideration moving to Seller for its acceptance of this contract, that Buyer waives reliance upon any representation, inducement, promise or understanding either at variance with the express provisions herein contained, or not herein specifically mentioned and described; and that but for such waiver Seller would not accept or execute this agreement."

[1] It has been settled in this state since the decision in Speck v. Wylie, 1 Cal. 2d 625, 36 P.2d 618, 95 A.L.R. 760, that a principal may protect himself from liability for damages arising from unauthorized fraudulent representations of his agent, by means of a provision such as that above quoted. Such a provision, however, does not preclude a defrauded purchaser from rescinding and recovering the consideration paid from the innocent seller. Rest., Agency, secs. 259, 260; Herzog v. Capital Co., 27 Cal.2d 349, 353, 164 P.2d 8, and authorities there cited. A seller cannot, however, by such a provision, relieve himself of the consequences of his own breach of duty. Herzog v. Capital Co., supra; Rothstein v. Janss Investment Corp., 45 Cal.App.2d 64, 113 P.2d 465.

[2] We are not here confronted with a case where a purchase of property was induced by material representations fraudulently made by the agent of the seller who was in charge of the negotiations. There is no showing here other than that the agent who negotiated the sale was himself a victim of the mistaken belief that the legal description of the lots he exhibited to plaintiff was as set forth in the contract of purchase. While it is the law, as is stated in Speck v. Wylie, supra, 1 Cal.2d at page 627, 36 P.2d at page 619, that "A principal may, by contract with another, relieve himself of liability in deceit for prior or subsequent frauds of an agent to such other", and that the person damaged under such circumstances is restricted to rescission and securing a return of the consideration paid, we are impressed that the foregoing limitation is not applicable to a situation such as the one now confronting us. As so cogently stated by Mr. Justice Shenk in his concurring opinion in the case of Speck v. Wylie, supra, 1 Cal.2d at page 628, 36 P.2d at page 619, "The rule proceeds upon the theory that an innocent principal so contracting may not be permitted to enrich himself by reason of his agent's *fraud*, * * *." (Emphasis added.) And as we read the rule, it is intended to protect an innocent principal, and the public generally, from misrepresentations, careless or deliberate, on the part of an agent with respect to the quality, size, condition, nature, and other attributes of the specific property to be sold. Here the representations were not made regarding the subject matter of the contract, such as its value, its mineral content, its condition, its prospects for enhancement in value, the repurchase thereof, etc.

[3] The argument that respondent, Big Bear Land and Water Company, was an innocent principal in the present case, that when appellant learned of the mistake made by respondent's agent, appellant elected not to rescind but to affirm a contract for the purchase of lots he had not intended to buy, and under the rule announced in Speck v. Wylie, supra, he has no cause of action against the respondent, ignores a

fact present in the instant case which distinguishes it from the ordinary case of fraudulent representations of an agent unauthorized by the principal with respect to the *subject-matter* of a sale. The selling agents in the case now before us were acting within the scope of their ostensible authority when they showed appellant the lots, told him those were the lots he was buying, gave him a receipt purporting to describe correctly the lots which they had shown him, and negligently permitted their mistake to be carried into the formal contract. The recognized and legitimate purpose of the exculpatory provision is to protect an innocent principal against liability for statements of an agent beyond the scope of his actual authority by notifying the purchaser of the limits of the agent's authority. Manifestly, despite the provision, the purchaser was justified in believing that the agent had authority to show and sell property of the principal, knew which property belonged to the principal, and was authorized to issue a receipt containing a correct description of the property displayed. Furthermore, it may reasonably be assumed that the principal here relied on the agent to describe the property correctly, since it executed and sent to plaintiff a contract containing the same description as that given by the agent.

[4] Where the true owner of property holds out another as having full power of disposition over the property, and innocent third parties are thus led into dealing with such agent, they will be protected. The rights of third parties in such cases are derived from the act of the principal in permitting the agent to hold himself out as having full power to contract with reference to the property. The rights of third parties under such circumstances do not depend upon the actual authority of the party with whom they directly deal, but are derived from the act of the real principal in holding out such agent as being vested with authority to dispose of the property, and which act precludes the principal from disputing, as against innocent third parties, the existence of the authority which, through negligence or mistaken confidence, he has allowed to be vested in the agent with whom they are dealing. Hollywood Holding & Development Corp. v. Oswald, 119 Cal.App. 21, 25, 5 P.2d 963. To epitomize, it may be said that when an agent on behalf of his principal performs an unauthorized act, if the principal has put the agent in a position to mislead innocent parties, he is responsible to the latter.

In such cases as that here involved, it is true the agent has been negligent in the performance of his duties, and some innocent person must be the loser. Should it not be the one who gave the agent the power which he misused, intentionally or unintentionally?

[5] It should be remembered that throughout this opinion we have followed the rule applicable to cases wherein the appeal is taken from a judgment following a nonsuit, which rule requires that the evidence shall be taken by the appellate tribunal in the light most favorable to the losing party in the court below. We are therefore expressing no opinion as to the weight of the evidence or its truth or falsity.

No other points raised demand our consideration.

The judgment is reversed and the cause remanded for a new trial.

DORAN and DRAPEAU, JJ., concur.

98 Cal.App.2d 364

DEPARTMENT OF SOCIAL WELFARE OF CALIFORNIA v. MACHADO.

Civ. 14304.

District Court of Appeal, First District,
Division 2, California.
July 10, 1950.

Action by Department of Social Welfare of the State of California against Elmer L. Machado, as administrator of the estate of Edwin D. Coram, deceased, to recover an amount paid to decedent as an old age pension. The Superior Court, County of Monterey, H. G. Jorgensen, J., rendered a judgment for the plaintiff, and the defendant appealed. The District Court of Appeal, Dooling, J., held that the evidence supported a finding that decedent had fraudulently misrepresented that he was entitled to the pension.

Judgment affirmed.

1. Paupers ⚿40

In action by Department of Social Welfare against estate to recover amount paid to decedent as old age pension, whether money found on decedent's person represented previous bank deposits or whether decedent saved that money from old age pension was a question for the trial court. Welfare and Institutions Code, §§ 2163, 2223.5.

2. Appeal and error ⚿996

Trial court may draw inferences from evidence, and where two inferences from facts are equally reasonable, inference drawn cannot be disturbed on appeal.

3. Fraud ⚿58(1)

Fraud may be inferred from circumstantial evidence.

4. Appeal and error ⚿996

On appeal, finding of fraud is supported if there is any substantial evidence from which inference of bad faith may reasonably be drawn.

5. Paupers ⚿40

In action by Department of Social Welfare against estate to recover amount paid to decedent as old age pension, evidence supported finding that decedent had fraudulently represented that he was entitled to pension by misrepresenting assets. Welfare and Institutions Code, §§ 2163, 2223.5.

6. Trial ⚿404(5)

Where trial court filed memorandum order for judgment, and later filed findings of fact to the contrary, findings prevailed over memorandum.

7. Trial ⚿403

Until findings are signed and filed, no judicial action has been taken, and judge is free to reconsider his evaluation of evidence.

John A. Murphy, Salinas, for appellant.

Fred N. Howser, Attorney General, William J. Power, Deputy Attorney General, for respondent.

DOOLING, Justice.

Respondent, Department of Social Welfare, recovered judgment against the estate of Edwin C. Coram, deceased, for $2641. This amount had been paid to Coram between July 1, 1942 and April 30, 1947 as an old age pension.

Coram died at the age of 81 years in October, 1947. He had lived alone for many years at Moss Landing and in April, 1947, he was found unconscious on the highway and taken to the Monterey County Hospital. There $944 was found sewed into his clothes. He was declared incompetent and a guardian of his person and estate appointed on June 14, 1947.

The trial court found that he had fraudulently represented that he was entitled to the old age pension by misrepresenting his assets and ordered judgment accordingly. Under Welfare and Institutions Code, § 2223.5 "a person who has received aid in good faith, honestly believing himself to be entitled thereto, but who is found to have possessed property in excess of the amount allowed under the provisions of this chapter, shall be considered to have been ineligible for aid only during the period for which the excess property, if it had been applied to his support at the rate of the aid granted him, would have supported him. In such case the recipient shall repay only the aid he received during such period of ineligibility."

Since $600 was the limit of property which an aged person might own and be entitled to the old age pension, Welfare and Institutions Code, § 2163, appellant claims that the limit of the judgment should be the difference between $600 and $944, or $344. Board of Social Welfare v. County of Los Angeles, 27 Cal.2d 90, 162 P.2d 635. This depends upon appellant's claim that there is no evidence that decedent did not act in good faith in receiving his pension.

[1, 2] There is evidence that decedent did not work and had no known source of income except his old age relief from a time before 1942; that in 1921 he had a bank deposit of about $5000 in a San Francisco bank from which he made withdrawals of about $150 to $200 every month until it was exhausted in January 1940; and that he had deposited $375 in a Watsonville bank in 1940 from which he made various withdrawals until it was closed out in February 1942. It was a reasonable inference from these facts that the source of the $944 found sewed in his clothes was these bank deposits. Appellant suggests that the proper inference is that decedent saved this amount from his old age pension. It is for the trial court to draw the inference and even where two inferences from the facts are equally reasonable, the inference drawn by the court cannot be disturbed on appeal. Mah See v. North American Accident Ins. Co., of Chicago, Ill., 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123; Hamilton v. Pacific Electric Ry. Co., 12 Cal.2d 598, 603, 86 P.2d 829; Webster v. Board of Dental Examiners, 17 Cal.2d 534, 539–540, 110 P.2d 992.

[3-5] It does not follow, as appellant contends, that because decedent was incompetent from the time of his collapse in April, 1947, he was incompetent before, and neighbors testified that, while growing increasingly feeble, blind and deaf, he was cabable of understanding up to that date. Fraud may be inferred from circumstantial evidence, McNulty v. Copp, 91 Cal.App.2d 484, 490, 205 P.2d 438, and the evidence supports the inference that decedent, knowing that he had cash in excess of $600, represented that he did not possess that amount. The clear and convincing evidence rule is for the guidance of the trial court, and on appeal a finding of fraud is supported if there is any substantial evidence from which the inference of bad faith may reasonably be drawn. Viner v. Untrecht, 26 Cal.2d 261, 267, 158 P.2d 3; Stromerson v. Averill, 22 Cal.2d 808, 815, 141 P.2d 732.

[6, 7] The trial court filed a memorandum order for judgment which recited: "The court finds that the defendant sustained the burden of proof that the decedent, Edwin D. Coram, received aid in good faith honestly believing he was entitled thereto * * *." The findings of fact later signed were to the contrary. The findings must prevail over the memorandum. Until the findings are signed and filed no judicial action has been taken, and the judge is free to reconsider his evaluation of the evidence. For this reason the formal findings cannot be impeached by the memorandum previously filed. Strudthoff v. Yates, 28 Cal.2d 602, 615–616, 170 P.2d 873.

In September, 1947, an amount in excess of $14,000 was received by decedent from the estate of a deceased brother. This was several months after the last payment of old age relief to decedent and under Welfare and Institutions Code, § 2163.1 the receipt of this money has no bearing on the case, although it does operate to make the judgment collectible in full.

Judgment affirmed.

NOURSE, P. J., GOODELL, J., concur.

---

98 Cal.App.2d 380

In re MORRISON'S ESTATE.

Civ. 3990.

District Court of Appeal, Fourth District, California.

July 10, 1950.

Rehearing Denied Aug. 1, 1950.

Hearing Denied Sept. 7, 1950.

Proceeding in the matter of the estate of Wilton M. Morrison, also known as W. M. Morrison, deceased. The Security Trust & Savings Bank of San Diego, a corporation, executor, filed a petition for probate of will and codicil. The Superior Court of San Diego County, Robert B. Burch, J., rendered an order denying admission to probate of the codicil, and Ruth Rogers and others, legatees, appealed. The District Court of Appeal, Mussell, J., held that doctrine of integration rather than doctrine of incorporation by reference was applicable, and that certain sheets of writing which had been executed by the deceased shortly before his death constituted a codicil to his will.

Reversed.

1. Wills ⚷97

In the law of wills, "integration", as distinguished from incorporation by referance, occurs when there is no reference to a distinctly extraneous document, but it is clear that two or more separate writings are intended by the testator to be his will.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Integration".

2. Wills ⚷97, 99

Where testator the day before his death wrote on a sheet of paper that he intended it to be his will and that it was intended to "help these people," and witnesses signed that sheet of paper, and testator took that sheet and a second sheet and folded them and put them in an envelope which he sealed and gave to a friend to take to bank, and after testator's death the second sheet was found to contain in testator's handwriting a list of names of persons to which testator desired to have bequest and devise made, and second sheet was not signed, rule of "integration" was applicable rather than principle of incorporation by reference, and the two sheets were a codicil to will.

◆

H. G. Sloane, San Diego, for appellants.

Renwick Thompson, San Diego, for respondent.

MUSSELL, Justice.

Appellants Ruth Rogers, Marjorie W. Phipps, Gladys Morrison, Lloyd Hanck and Mrs. J. Breckenridge are legatees and devisees named in a codicil to the will of Wilton M. Morrison and appeal from the order of the trial court denying its admission to probate.

From the settled statement, in lieu of a reporter's transcript and clerk's transcript, it appears that Wilton M. Morrison died in the city of San Diego on April 10, 1949. The Security Trust and Savings Bank of that city duly filed a petition for probate of will and codicil and deposited with the county clerk a formal typewritten and witnessed will bearing date December 6, 1948; also three documents in the handwriting of the decedent. The petition of the bank asked that the formal will be admitted to probate and that an adjudication be made by the court whether the three documents in the handwriting of the decedent constituted a valid holographic codicil to the last will and testament of the decedent. The trial court, after hearing, admitted the formal will to probate and found and decreed that the said three documents did not constitute a valid holographic codicil to the last will and testament of the decedent and said writings were denied admission to probate. The sole question presented is whether the three documents constitute a valid codicil to the formal will of decedent.

It further appears from the settled statement that the decedent, for several months prior to his death on April 10, 1949, was suffering from cancer. On April 9, 1949, he was aware of his condition and in the afternoon of that day requested his friend and companion, Lloyd Hanck, to communicate with his lawyer, who had prepared the will of December 6, 1948. The attorney could not be reached. Between 2:00 and 3:00 o'clock in the afternoon of April 9th decedent had friends visit him at his apartment, listened to a broadcast of a baseball game and discussed the game with his friend, Lloyd Hanck. At about 3:00 o'clock Mr. Morrison complained, stating that he was not feeling well, and in the evening of that day, in the presence of his wife, Hazel Morrison, and Lloyd Hanck, decedent requested his wife to get him a pencil and a pad of paper. She handed these to him and he started writing on the top sheet, using a cushion in his lap for support. He requested Lloyd Hanck to move his seat as he wanted him to act as a witness. Decedent completed the writing in the course of twenty to thirty minutes, during which he paused frequently. He produced either from his pocket or from the writing pad a second sheet of paper. When the decedent finished writing, he affixed his signature to the top sheet and Mrs. Morrison and Mr. Hanck signed it as witnesses. While decedent was writing on the top sheet, Mr. Hanck observed that he "consulted with" some other paper while he was writing on the top sheet on the tablet and that the other sheet was underneath it; that decedent "had something under the top piece of paper on the tablet but it was not apparent whether he was writing on it or studying it". The decedent held two pieces of paper when he folded them and put them in an envelope, sealed it and gave it to Mr. Hanck. He then said to Mr. Hanck: "Take it down to the bank and give it to Mr. Sutherland the first thing Monday morning. I might not be here. I might be dead". He said "It was something for Hanck and the nurse and he hoped he would get it".

Subsequent to decedent's death on April 10, 1949, there was delivered to the bank a sealed envelope upon which there was written in the handwriting of decedent:

"April 9 1949
Security Trust & Sav Bank
From W. M. Morrison".

It is conceded that the envelope and the writing thereon is not a part of the codicil. The envelope, when opened, contained two unnumbered sheets of paper, each in the handwriting of the decedent. The larger sheet of paper, dated, written and signed in the handwriting of decedent, and also bearing the signatures of Hazel M. Morrison and Lloyd A. Hanck, is as follows:

"To Whom It May Concern In San Diego April the 9th 1949

"I mean for all of this to be in my 'Will' that is now in keeping at the Security Trust and Savings Bank. Well realizing that this is written under poor conditions it is only to help these people

"Wilton M. Morrison
Signed
"Witness Witness
Hazel M. Morrison Lloyd A. Hanck"

The second sheet contained the names of appellants and others with certain monetary sums set opposite their respective names. This document is also in the handwriting of the decedent and reads as follows:

"Mrs. Merchant	2000.00
Ed & Ova	500.00
Sister	500.00
Sister	500.00
Ruth	1000.00
Marj	———
Gladys	5000.00
Lloyd Hanck	1000.00
Nurse Mrs. Ellis	300.00
Mrs. J. Breckenridge	500.00
Mr. & Mrs. Green	1000.00
Farm all to 3 Sis	———
All personal to Judy	———"

Mr. Sutherland was and is president of the Security Trust and Savings Bank of San Diego, executor named in the will of December 6, 1948, which was in the possession of Mr. Morrison's attorney. Decedent died Sunday morning, April 10, 1949, and the envelope, still sealed, was delivered to decedent's attorney.

Mrs. Morrison testified that the first time she saw the second sheet containing the list of names was when it was shown to her at the bank after her husband had passed away. She stated that in the evening of April 9, 1949, she did not see any piece of paper with any writing of the decedent upon it prior to the death of her husband except the one which she signed as a witness; that she did see the decedent put the paper which he had signed in an envelope; that he also took a folded paper out of his pocket and put it in the envelope at the same time.

Appellants contend that the principle of integration applies to the questioned documents and that the decision of the trial court is contrary to the law as stated in Re Estate of Dumas, 34 Cal.2d 406, 210 P.2d 697. We conclude that appellants' contention is correct.

[1] As was said in Re Estate of Wunderle, 30 Cal.2d 274, 281, 181 P.2d 874, 878: "In the law of wills, integration, as distinguished from incorporation by reference, occurs when there is no reference to a distinctly extraneous document, but it is clear that two or more separate writings are intended by the testator to be his will. In re Estate of Francis, 191 Cal. 600, 601, 217 P. 746; In re Estate of Clisby, 145 Cal. 407, 409, 78 P. 964, 104 Am.St.Rep. 58; In re Estate of Taylor, 126 Cal. 97, 100, 58 P. 454; In re Estate of Bauer, 51 Cal.App.2d 636, 638, 124 P.2d 630; In re Estate of Swendsen, 43 Cal.App.2d 551, 555, 111 P.2d 408; see, Atkinson on Wills, Secs. 139, 143; 16 Cal. L.Rev. 154, 155. Thus several writings, connected by sequence of thought (In re Estate of Swendsen, supra; In re Estate of Johnston, 64 Cal.App. 197, 221 P. 382), folded together (In re Estate of Merryfield, 167 Cal. 729, 141 P. 259), or physically forming one document (In re Estate of Clisby, supra; see, In re Estate of Skerrett, 67 Cal. 585, 8 P. 181), have been admitted to probate as constituting an holographic will."

This rule is quoted in Re Estate of Dumas, supra, 34 Cal.2d at page 406, 210 P.2d 697. In the Dumas case, the instruments admitted to probate consisted of three papers, all in the handwriting of the testatrix. The first page was written on January 20, 1935, in a "greenish-blue" colored ink. It was dated at the top and headed "The Last Will and Testament of Nellie Dumas." Following customary recitals of soundness of mind, etc., it read "The following bequests are to be given my friends herein named." The executors were named and the document stated "In testimony I set my name this 20th day of January, 1935" and was signed Nellie Dumas and her address. A blank space of several inches followed thereafter. The second and third pages were written nine years after the first page and were in black ink. Minute spots of greenish-blue ink appeared on the reverse side of the third page. The second page was completely filled with bequests of mentioned property to various named persons and there was an interlineation on one item that was made by the testatrix some time after the second and third sheets were written. The second page was neither dated nor signed and the third concluded with the bequests, covering about three-fourths of the paper, at which place it was "Signed Nellie Dumas" and her address. No date appeared thereon. All papers remained in the possession of the testatrix at all times until April 3, 1947. On that date the decedent placed the envelope containing the papers in a white envelope, sealed the latter and handed it to a roomer in her home, with instructions to deliver it in decedent's safety deposit box, where it remained until after her death. The three sheets in the envelope were not mechanically fastened together but were folded in a unit in order.

The contestants urged that the first page was a complete will in itself and that the second and third sheets were, in effect, codicils or new wills, but ineffective as such because the second sheet was neither dated nor signed and the third was not dated, both requirements of an holographic will.

The court held that the rule of integration was applicable rather than the principle of incorporation by reference and the order of the trial court admitting the papers to probate as the holographic will of the decedent was affirmed.

In the instant case, it is quite clear that the two writings were intended by the testator to be his will. The testator stated in the first sheet of the codicil that he meant "all of this" to be in his will. These words are meaningless unless considered in connection with the second sheet containing the names of the intended beneficiaries. The statement that the document was written under poor conditions and "only to help these people" is likewise meaningless without reference to the names of the people he wished to help, which are set forth on the second sheet. It is quite evident that the second sheet was in its present form and was in the testator's hands when the accompanying sheet was signed and witnessed. It is also quite evident that both documents were complete in their present form and were in decedent's custody at the time the signatures were affixed and that no change was made in them thereafter. Both the subscribing witnesses saw the decedent put both pieces of paper in the envelope, seal and deliver it for transmittal to the bank.

While the witnesses did not see decedent write on the second sheet, that circumstance may well have been occasioned by decedent's desire that the exact amounts thereon stated be kept from his wife and his friend. Decedent did state, however, that there was something for Hanck and the nurse, which statement can only be explained by the fact that Hanck and the nurse were both named in the second sheet.

[2] Both sheets of paper are admittedly in the handwriting of decedent. They were written with a pencil. The appearance of the writing on the second sheet indicates that it was written "under poor conditions" as was the witnessed writing. This and other circumstances indicate that both writings were completed at or about the same time. The two writings are connected by sequence of thought and plainly indicate that they were both intended by the testator to constitute a codicil to his will.

The respondent's contention that the decision in this matter involves the principle of incorporation by reference and not integration is without merit.

Order reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

George A. BERTRAM, plaintiff and respondent, v. Saverio ORLANDO and Enis Orlando, defendants and appellants.

Civ. 14341.

District Court of Appeal, First District, Division 2, California.
July 25, 1950.

Appeal from Superior Court, Marin County; J. O. Moncur, Judge.

Fahey, Bocci & Gallen, Daly City, for appellants.

L. L. James, Carl E. Day, San Francisco, for respondent.

PER CURIAM.

The submission of the above entitled cause is hereby set aside and the parties are requested to brief the following question:

Can a landowner acquire an easement by prescription to have his buildings encroach upon the surface of the adjoining land?

See on the one hand: Jones on Easements, sec. 161, p. 139; Thompson on Real Property, sec. 417, pp. 682–683; Washburn, Easements and Servitudes, 4th Ed., ch. 1, sec. 4, p. 147 and cases cited; and on the other: Tiffany on Real Property, 3d Ed., sec. 775, p. 238 and cases cited; John Hancock Mut. Life Ins. Co. v. Patterson, 103 Ind. 582, 2 N.E. 188, 53 Am.Rep. 550; Krueger v. Beecham, 116 Ind.App. 89, 61 N.E.2d 65, 70; Sprenzel v. Windmueller, 286 Ill. 411, 121 N.E. 805; Slachter v. Olderman, 116 Conn. 156, 164 A. 202; Carrigg v. Mechanics' Savings Bank, 136 Iowa 261, 111 N.W. 329. Cf. the following California cases: Chapman v. Sky L'Onda, etc., Water Co., 69 Cal.App.2d 667, 159 P.2d 988; Knight v. Cohen, 7 Cal.App. 43, 93 P. 396; Collins v. Gray, 3 Cal.App. 723, 86 P. 983; Emerson v. Bergin, 76 Cal. 197, 18 P. 264; Bernstein v. Dodik, 129 Cal.App. 454, 18 P.2d 983; Belestra v. Button, 54 Cal.App.2d 192, 128 P.2d 816; Pacific Gas & Electric Co. v. Crockett L. & C. Co., 70 Cal.App. 283, 233 P. 370; Ward v. City of Monrovia, 16 Cal.2d 815, 108 P.2d 425; Hannah v. Pogue, 23 Cal.2d 849, 147 P.2d

572; Shonafelt v. Busath, 66 Cal.App.2d 5, 151 P.2d 873.

The parties to file typewritten briefs. Appellants allowed 20 days; respondent 20 days to reply; and appellants 10 days to file closing brief.

98 Cal.App.2d 406

VOGT v. LAZAR.

Civ. 17310.

District Court of Appeal, Second District, Division 3, California.

July 12, 1950.

Rehearing Denied Aug. 2, 1950.

Francis J. Vogt, also known as Buddy Vogt, brought action against Nathan R. Lazar, also known as Nat R. Lazar, to recover treble amount of alleged usurious interest. The Superior Court of Los Angeles County, Arnold Praeger, J., rendered a judgment for the defendant, and the plaintiff appealed. The District Court of Appeal, Wood, J., held that recovery on fourth amended complaint was not barred by one-year limitations, and that fourth amended complaint sufficiently alleged that principal of loans had been repaid by plaintiff.

Judgment reversed.

1. Limitation of actions 🔑127(3)

Where fourth amended complaint in suit to recover treble the amount of alleged usurious interest did not allege a cause of action foreign to the cause of action alleged in the original complaint, nor did it allege a new and different cause of action, and original complaint was filed within year provided by statute of limitations, recovery on fourth amended complaint was not barred by one-year statute of limitations, though fourth amended complaint was not filed until more than one year after alleged payment of usurious interest. Gen. Laws, Act 3757, § 3; Const. art. 20, § 22.

2. Usury 🔑142(3)

Where fourth amended complaint in suit to recover treble amount of alleged usurious interest alleged that each loan made by defendant to the plaintiff was secured by accounts receivable, that plaintiff was required and did pay to the defendant the amount of each account, which was not paid by debtor of plaintiff before expiration of 60 days from date of assignment, sufficiently alleged that principal had been repaid. Gen.Laws, Act 3757, § 3; Const. art. 20, § 22.

Max Sisenwein, Henry Galen, Los Angeles, for appellant.

Gendel & Raskoff, Los Angeles, for respondent.

WOOD, Justice.

Plaintiff appeals from a judgment of dismissal entered upon an order sustaining a demurrer to his fourth amended complaint without leave to amend.

There were fourteen alleged causes of action in said complaint. Defendant demurred generally and specially. One of the grounds of demurrer was that the alleged causes of action were barred by the "one-year period of limitation" of the usury law. The demurrer upon that ground was based upon the theory that the fourth amended complaint, which was filed about two years after the original complaint was filed, stated a different cause of action from the alleged cause of action in the original complaint.

It was alleged in the first cause of action of the fourth amended complaint that at all times mentioned therein plaintiff was doing business under the fictitious firm name of Brooke-Branton, and defendant was doing business under the fictitious firm of California Factors; on August 23, 1945, plaintiff entered into a written instrument with the defendant, a copy of which is attached to the original complaint and by reference is incorporated in the fourth amended complaint; on April 5, 1946, plaintiff entered into a written instrument with defendant, a copy of which is attached to the amended complaint and by reference incorporated in the fourth amended complaint; by the terms of said instruments plaintiff purportedly agreed to sell and defendant purportedly agreed to purchase accounts receivable; said instruments constituted a scheme on the part of defendant to evade the usury law; defendant prepared said instruments; at all times "during the existence of said instruments," and during the continuance of the "relationship" the plaintiff and defendant agreed that defendant would be entitled to a minimum rate of interest of 3 per cent for a period of 60 days; at all times during the existence of the relationship between the parties and in connection with every transaction thereafter set forth in the complaint the defendant charged and collected a minimum rate of interest of 3 per cent for 60 days on all moneys "loaned"; each loan made by defendant to plaintiff was secured by accounts receivable; plaintiff "was required and did pay" to the defendant the amount of each account which was not paid by the debtor of plaintiff before the expiration of 60 days from the date of assignment; defendant, as a part of said arrangement, loaned to plaintiff 79 per cent of the face amount of each invoice after deducting the trade discount and 3 per cent of the amount loaned, which represented interest; the terms and conditions for lending moneys to plaintiff by the defendant were in the same manner and upon the same basis on and after April 5, 1946, as they were during the period "commencing August 23, 1945, to April 5, 1946"; at the time the instrument of April 5, 1946, was signed the plaintiff and defendant agreed that the method of operation for lending money to the plaintiff was to continue and be the same as it was theretofore; the instruments "heretofore referred to" were signed by plaintiff at the direction of defendant for the purpose of making it appear that the transfers of accounts receivable constituted an agreement of purchase and sale, whereas in fact the understanding was that the accounts receivable were assigned as security and not by way of outright sale; plaintiff was required to sign said instruments "as prepared by the defendant"; and one year had not elapsed at the time of filing this action since the payment of all or any of the usurious interest paid to the defendant. It was alleged further, in paragraphs XII and XIII, that during May, 1946, defendant loaned to plaintiff $47,017.09; plaintiff agreed with defendant that said loan would be repaid within 60 days; as a condition of making said loan the defendant charged plaintiff and accepted from plaintiff interest in the sum of $2,188.41; said interest charge was at a rate of interest in excess of 10 per cent per annum and was in excess of that allowed by the laws of this state; by reason of these premises defendant became indebted to the plaintiff for treble the amount of money so paid as interest.

The allegations of said first cause of action, except said paragraphs XII and XIII, were re-alleged in the next following ten causes of action (to and including the eleventh cause of action). The additional allegations in each of said ten causes of action were the same as the allegations in said paragraphs XII and XIII of the first cause of action, except that the allegations regarding a loan in May, 1946, were omitted, and in each of said ten causes of action it was alleged that in a particular other month (beginning with June, 1946, and continuing to and including March, 1947—ten months) a certain amount of money was loaned by defendant to plaintiff and a certain amount was charged and accepted by defendant as interest on said loan. The amount charged and accepted as interest, as alleged in each of said ten causes of action, was at a rate of interest in excess of 10 per cent per annum.

The twelfth, thirteenth, and fourteenth causes of action also included the allegations of the first cause of action, except paragraphs XII and XIII.

In the twelfth cause of action it was alleged further that in December, 1946, the defendant imposed an additional charge purportedly for postage in the sum of $3,079.57; said sum was paid to defendant; in fact defendant did not expend said sum for postage; said charge constituted additional interest for loans theretofore made.

In the thirteenth cause of action it was alleged further that in March, 1947, the defendant imposed an additional charge purportedly for postage in the sum of $478.12; said sum was paid to defendant; in fact defendant did not expend said sum for postage; said charge constituted additional interest for loans theretofore made.

In the fourteenth cause of action it was alleged further that during the period commencing May 1, 1946, and ending March 30, 1947, plaintiff assigned to defendant a total of $132,837.87 of accounts receivable; defendant retained as a reserve a sum equivalent to 21 per cent of said accounts receivable which amounted to $27,789.93; defendant has retained said sum for its own use and benefit, and defendant holds said money for the benefit of plaintiff; although due demand has been made on defendant for said sum no part thereof has been paid.

Plaintiff prayed for judgment for the sum of $20,033.60 (the total amount thereinbefore alleged to have been paid as interest), and that said sum be trebled and plaintiff recover from defendant the sum of $60,100.80 as treble damages; and that plaintiff have judgment for $27,789.93 upon the fourteenth cause of action.

The California Constitution limits the rate of interest upon "any loan or forbearance of money" to a rate not exceeding 10 per cent per annum. Art. XX, sec. 22. A person who has paid a greater sum as interest than is allowed to be received by law may recover in an action at law treble the amount so paid providing such action shall be brought within one year after such payment. Stats.1919, p. lxxxiii, Deering's Gen. Laws, 1937, Act 3757, sec. 3; Milana v. Credit Discount Co., 27 Cal.2d 335, 339, 163 P.2d 869, 65 A.L.R. 621. The original complaint was filed April 23, 1947. The fourth amended complaint was filed March 23, 1949.

Defendant (respondent) asserts that the fourth amended complaint relates to a new cause of action entirely foreign to the cause of action attempted to be pleaded in the original complaint. His argument is to the effect that since the fourth amended complaint sets forth a wholly new cause of action, the date of filing that complaint (and not the date of filing the original complaint) is the date to be considered in determining whether the action was commenced within the year provided by the statute of limitations. A question to be determined is whether the fourth amended complaint states a new cause of action.

It was alleged in the original complaint that on August 23, 1945, plaintiff entered into a written agreement with defendant, a copy of which was attached thereto and made a part thereof; by the terms of said agreement plaintiff purported to have sold and defendant purported to have purchased accounts receivable for the consideration therein recited, payable at the time and in the manner therein set forth; pursuant to the provisions of said agreement and in accordance therewith the plaintiff on August 23, 1945, and on many dates thereafter to and including April 1, 1947, sold or discounted many accounts receivable to the defendant; notwithstanding the terms and conditions as recited in said agreement, the purported sales by plaintiff to defendant of the invoice accounts referred to in said agreement were not in truth or in fact sales but were loans which were made by defendant to plaintiff upon the condition that plaintiff pay a greater sum than that allowed to be received under the laws applicable to the payment of interest, to wit: a sum greater than 10 per cent per annum. It was alleged further, upon information and belief, that within one year "immediately preceding the filing of this action, plaintiff has paid and the said defendant has received a sum of approximately $25,000.00 as interest," the exact amount being unknown to plaintiff at the time the complaint was filed, and that plaintiff asked leave of the court to amend and insert the true amount when ascertained at the trial; said sum of $25,000 was paid by plaintiff pursuant to the terms and conditions of said agreement and was received by defendant as interest for the loan of said money; said sum was in excess of the rate of interest permitted by the laws of California and the defendant became indebted to plaintiff in the sum of $75,000, which is treble the amount of money paid to defendant as interest. Also in the original complaint there was a purported cause of action for declaratory relief, and a purported cause of action for an accounting.

Defendant (respondent) argues further that plaintiff in his fourth amended complaint relied upon an agreement different from the one relied upon in the original complaint. He asserts that in the original complaint a written agreement dated August 23, 1945, is incorporated therein and that $25,000 was paid by plaintiff to defendant as interest pursuant to said agreement; and that the fourth amended complaint incorporates said written agreement, and also incorporates a written agreement dated April 5, 1946, and contains allegations to the effect that neither agreement was intended by the parties to apply to their transactions but in fact the parties "agreed to a different arrangement."

[1] It appears that, irrespective of the dates when the agreements were made, the allegations of the original complaint and the fourth amended complaint regarding interest were based upon the payment of interest during the year immediately preceding the filing of the original complaint (filed April 23, 1947). It was alleged in the original complaint that the approximate sum of $25,000 had been paid as interest "within one year immediately preceding the filing of this action." It was alleged in the fourth amended complaint that certain sums of money (totaling about $20,000) were paid as interest on loans made during each month from and including May, 1946, to and including March, 1947 (all of which months were within the year preceding the filing of the original complaint). In each of said complaints recovery is sought upon the same general set of facts. The fourth amended complaint did not allege a cause of action "foreign" to the cause of action alleged in the original complaint; nor did it allege a new and different cause of action. In the case of Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358, wherein it was held that the trial court improperly sustained a general demurrer to plaintiff's fifth amended complaint without leave to amend, the court stated, 20 Cal.2d at page 717, 128 P.2d at page 524, 141 A.L.R. 1358: "The ground of general demurrer principally urged by the defendants is that the cause of action is barred by the statute of limitations. This contention is based on the theory that the fifth amended complaint charging fraud states a new and different cause of action from that for negligence stated in the original complaint. Unless the amended complaint sets forth an entirely different cause of action from the original, however, the amended complaint, for the purposes of the statute of limitations, must be deemed filed as of the date of the original complaint. * * * The modern rule, where amendment is sought after the statute of limitations has run, is that the amended complaint will be deemed filed as of the date of the original complaint so long as recovery is sought in each complaint upon the same general set of facts." The causes of action alleged in the fourth amended complaint were not barred by the statute of limitations.

[2] Defendant contends that no cause of action for usury was stated in the fourth amended complaint, in that, it was not alleged that the principal had been repaid. That contention is not sustainable. It was alleged in paragraph VIII of the first cause of action as follows: "Each loan made by the defendant to the plaintiff was secured by accounts receivable. Plaintiff was required and did pay to the defendants the amount of each account, which was not paid by the debtor of the plaintiff before the expiration of sixty (60) days from the date of assignment." That paragraph was incorporated by reference in each of the other thirteen causes of action of the fourth amended complaint.

The contention that the fourth amended complaint does not state facts sufficient to constitute a cause of action is not sustainable.

Defendant also contends that plaintiff did not have legal capacity to sue, in that, plaintiff alleged he was doing business under a fictitious name and he did not allege compliance with sections 2466 and 2468 of the Civil Code. It may be stated generally that those sections require, as a condition to maintaining an action upon a transaction had under a fictitious name, the filing and publishing of a certificate of doing business under the fictitious name. It does not appear, however, that the pleading could not have been amended to include allegations showing compliance with said sections.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

98 Cal.App.2d 403

OPPENHEIMER v. CLIFTON'S BROOKDALE, Inc.

Civ. No. 17689.

District Court of Appeal, Second District, Division 2, California.

July 12, 1950.

Rehearing Denied July 21, 1950.

Action by John G. Oppenheimer against Clifton's Brookdale, Inc., for declaratory judgment that defendant was without legal right to continue alleged bribery of police officers. The Superior Court, Los Angeles County, Arnold Praeger, J., sustained defendant's demurrer without leave to amend, and the plaintiff appealed. The District Court of Appeal, McComb, J., held that complaint did not state a cause of action.

Judgment affirmed.

1. Bribery ⚷1(1)

Bribery or attempted bribery or any attempt corruptly to influence official action of police officers constitutes the criminal offense of bribery. Pen.Code, §§ 67½, 684.

2. Declaratory Judgment ⚷84, 300

Complaint in private individual's action for declaratory judgment alleging bribery of police officers by defendant did not state a cause of action and individual did not have capacity to maintain action, since alleged offense was public offense and could be prosecuted only in the name of the people. Pen.Code, §§ 67½, 684.

John G. Oppenheimer in propria persona.

Harry A. Keithly, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment predicated upon the sustaining of a demurrer to plaintiff's complaint without leave to amend in an action for declaratory relief, plaintiff appeals.

Facts: The substance of plaintiff's complaint is that "(a) Said defendants * * * have bribed the Los Angeles City Police Force with meals at half the regular price charged to other Citizens, which practice of buying Justice from Police Officers, beclouds sound judgment of such officers, so that in a controversy at Clifton's Brookdale, Inc., between plaintiff and an employee of said defendants, * * * bribed officers instantly took sides with the defendants, and conferred favors upon them * * * by setting themselves up as Judge and Jury and administering physical punishment without provocation against plaintiff. Such practices of bribery * * * has an adverse, if not demoralizing effect on the high standards * * * Members of a Police Force should possess * * * Action of defendants makes officers of the Law stooges of a corporation * * * and plaintiff therefore prays the Court to declare defendants' hidden, but nonaltruistic motives of seeking favors and attempting to, and succeeding in, buying Justice, to be against Public Policy * * * Police also congregate and loiter at defendants' business establishments, and forsake their duties and responsibilities, by parking Police Department motor vehicles for hours on end in the streets and alleys adjacent to defendants' Cafeteria.

"(b) Defendants operate a Private Food Service Training School, unlicensed in or by the State of California, the instructors of which are not duly accredited or licensed as teachers, to practice teaching in the State of California. A tuition of three hundred dollars ($300.00) for a 13-week course is charged by said defendants * * * Plaintiff holds that this practice by defendants is toying with the fates of people seeking employment * * *."

Defendant filed a general and special demurrer to the complaint which was sustained without leave to amend.

Question: Did the complaint state a cause of action?

This question must be answered in the negative. Section 67½ of the Penal Code reads as follows: "Every person who gives or offers as a bribe to any ministerial officer, employee, or appointee of the State of California, county or city therein or political subdivision thereof, anything the theft of which would be petty theft is guilty of a misdemeanor; if the theft of the thing so given or offered would be grand theft the offense is a felony."

[1,2] Bribery or attempted bribery or any attempt corruptly to influence official action of police officers constitutes the criminal offense of bribery. People v. Frazer, 80 Cal.App. 464, 469, 252 P. 633. Hence the offense attempted to be alleged by plaintiff was a public offense and not a private offense and as such could only be prosecuted in the name of the people of the state of California. Penal Code, sec. 684*; Matter of Application of Clark, 24 Cal.App. 389, 395, 141 P. 831; In re Nicholls, 74 Cal.App. 504, 506, 241 P. 399.

Therefore since the present action was not instituted in the name of the people of the state of California but by a private citizen the complaint on its face showed that plaintiff did not have the capacity to maintain the action, and that he could not state a cause of action against defendants. Consequently the trial court properly sustained the demurrer to the complaint.

Affirmed.

MOORE, P. J., concurs.

WILSON, Justice.

I concur in the judgment and in the conclusion that the complaint does not state a cause of action. I do not find anything in the complaint from which it can be inferred that plaintiff is attempting to usurp the functions of the law enforcement officers or to act in the name or on behalf of the people of the state of California in the prosecution of a criminal offense. Plaintiff's sole purpose, as indicated by the allegations in his pleading, is to obtain (1) a declaratory judgment that defendant is without legal right to continue the performance of the acts alleged in the complaint to have been committed, and (2) an injunctive order requiring defendant to cease and desist from the continuance of such practices.

98 Cal.App.2d 426

LANSBURGH v. MARKET ST. RY. CO.

Civ. 14420.

District Court of Appeal, First District,
Division 2, California.

July 13, 1950.

Hearing Denied Sept. 7, 1950.

Action by Timothy S. Sheehan against Market Street Railway Company to recover earnest money paid under agreement to purchase realty, wherein S. Laz Lansburgh, as assignee of original plaintiff, was substituted for him as plaintiff. The Superior Court in and for the City and County of San Francisco, Sylvain J. Lazarus, J., entered judgment for defendant and the substituted plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that proposed extension of a street involving probable condemnation of part of the realty sold did not render vendor's title defective as a matter of law and did not entitle purchaser to rescind agreement.

Judgment affirmed.

1. Vendor and purchaser 🔑112(1)

Pendency of condemnation proceedings at time fixed for performance, though commenced after the making of agreement to sell realty, is considered an encumbrance upon title which entitles purchaser to rescind, since he is not required to accept the award instead of the realty for which he contracted.

---

* Section 684 of the Penal Code reads: "*Parties to a criminal action.* A criminal action is prosecuted in the name of the people of the state of California, as a party, against the person charged with the offense."

2. Vendor and purchaser 🔑130(2)

A "marketable title" to realty must be free not only of actual defects but also of reasonable doubt and probable litigation.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Marketable Title".

3. Vendor and purchaser 🔑129(1)

The condition of title at the time fixed for performance of agreement to sell realty determines the rights of the parties to agreement.

4. Vendor and purchaser 🔑130(2, 8)

Reasonable doubt or probable litigation sufficient to make a title not marketable refers to dubious defects, encumbrances, outstanding claims or color of title in others, which if upheld would prove the title defective at the time of performance of agreement to sell.

5. Vendor and purchaser 🔑130(2, 8)

The inchoate right of eminent domain which city and county have in realty within their boundaries is not an encumbrance or defect of title which will prevent owner from conveying marketable title thereto.

6. Eminent domain 🔑63

The filing of a map showing proposed street extension project involving condemnation of private property has no restricting legal effect and does not impede free use of such property by owner or subject him to risk of losing cost of building subsequently erected thereon.

7. Eminent domain 🔑180

The issuance of summons is the first step with regard to condemnation proceedings which affects the legal relation of owner to property taken or constitutes an encumbrance thereon. Code Civ.Proc. §§ 1243, 1249.

8. Eminent domain 🔑124, 179
Lis pendens 🔑15

The issuance of summons marks the commencement of condemnation proceeding and requires the filing of a lis pendens and at the date of such issuance the right to compensation and damages accrues and the value of property taken and the damages are measured as of such date. Code Civ. Proc. §§ 1243, 1249.

9. Vendor and purchaser 🔑31, 36(1), 107, 109

The probability, as shown by preliminary plans or rumors, that part of realty may be taken in condemnation proceeding may have such an influence on the value of realty and its fitness for some intended use as to justify rescission by purchaser on theory of frustration, material failure of consideration, mistake or fraud.

10. Vendor and purchaser 🔑112(1), 129(1), 334(5)

Proposed extension of a street involving probable condemnation of part of realty which plaintiff had agreed to purchase did not render vendor's title at closing date prior to institution of any condemnation proceeding defective as a matter of law and did not entitle purchaser to rescind agreement and recover earnest money deposited thereunder.

11. Vendor and purchaser 🔑123, 341(3)

In action by purchaser to rescind agreement to purchase realty and recover earnest money deposited thereunder on ground that vendor could not perform agreement to convey good title insured as such by named title company, findings that named title company did not refuse to insure good title and that clause relating to proposed street extension project was inserted in its title report to purchaser at purchaser's request and did not constitute a valid objection to title were supported by substantial evidence.

12. Vendor and purchaser 🔑114

Where attempted rescission by purchaser of agreement to purchase realty was based solely on unremoved objections to title and it was stipulated that only unremoved objection with respect to proposed street extension was the basis of action by purchaser to recover earnest money deposited under agreement, any right to rescind on ground of vendor's failure to procure title insurance was waived.

S. Laz Lansburgh, San Francisco, for appellant.

Cyril Appel, Ivores R. Dains and George Liebermann, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

S. Laz Lansburgh, as assignee of and substituted for the original plaintiff Timothy S. Sheehan, appeals from a judgment denying his recovery of an amount of $20,000 paid by said Sheehan to Market Street Railway Co. on the purchase price of $400,000 for certain real property at Market and Valencia streets in San Francisco.

The agreement to sell, consisting of a uniform deposit receipt for $10,000 dated September 20, 1947, and an approval of seller signed within ten days thereafter, required purchaser to pay an additional deposit of $10,000 upon the approval of seller, and to examine title and report valid objections thereto not later than December 30, 1947; seller would have ninety days thereafter to remove them and give purchaser written notice of removal and purchaser five days after removal to pay the balance of the purchase price to City Title Insurance Company, seller to deliver to said title company a grant deed "conveying good title insured as such by said title company." If an objection were not timely removed purchaser could elect to terminate the agreement and have the deposit returned; if purchaser defaulted the agreement would terminate and forfeiture of the deposit be the sole remedy of seller. Time was made of the essence.

Purchaser paid the additional deposit, ordered title research by the named title company, and on December 29, 1947, reported ten objections to the title of which only the last one is still relevant. It reads: "10. Project for extension of Gough Street from Market to Otis Street, with contemplation of purchase of portion of this property therefor, as shown by preliminary plans on file in the office of the Department of Public Works." In relation to other objections seller, who previously on December 29, 1947, had deposited a grant deed with the title company, notified purchaser on February 9, 1948, that a decree establishing title as to all persons had been obtained in the San Francisco Superior Court and had been recorded, but with respect to the asserted tenth objection seller evidently could take no measures. On April 2, 1948, purchaser informed seller of his election to terminate the agreement on the ground that some of the objections specified had not been removed and could not be timely removed and demanded return of the deposit. The return was refused and this action was commenced soon thereafter.

The amended complaint contained over and above a count for money had and received one based on the failure to remove the tenth objection quoted above and alleging that defendant did not have good title insured as such by the named title company and was unable to deliver a deed conveying such title. With respect to the Gough Street project it was alleged, and the truth of these allegations was stipulated at the trial, that on July 28, 1947, the Board of Supervisors of the City and County of San Francisco adopted a resolution declaring that public interest and necessity demanded the carrying out of said project and that it would require the incurring of a bonded debt; that on September 22, 1947, said Board of Supervisors adopted an ordinance calling a special election to be held on November 4, 1947, to submit the incurring of said bonded debt to the voters, which ordinance was approved by the Mayor on September 23, 1947, and that in said special election on November 4, 1947, the proposition authorizing the incurring of said bonded indebtedness was adopted by the electors with the required majority. It was moreover proved that at the time the objection was made there was on record in the office of the Department of Public Works a preliminary map of the project dated November 26, 1947, from which it could be seen that a part of the planned extension would be within the boundaries of the property to be sold, and also that the part to be taken amounted to a little over 30,000 square feet. (The total area of the property to be sold was 3.08 acres or over 130,000 square feet.) The fact is not disputed (although its relevancy is) that on July 26, 1948, more than three months after the filing of this action, condemnation proceedings with respect to the above-mentioned part of the property were commenced as part of the carrying out of the project. At the end of the trial it was stipulated that the basis of recovery was limited to the quoted tenth specification of objections. The findings were to the effect, among other things, that plaintiff's objections, especially the one numbered 10, were not valid, that defendant had good title and that the grant deed it deposited with the title company on December 29, 1947, conveyed good title; that the title company did not refuse to insure good title and that on April 2, 1948, when plaintiff elected to rescind he himself was in default.

[1, 2] Appellant's main contention is that the preliminary steps taken by the city which showed a contemplated future acquisition of part of the property in behalf of the Gough street extension made respondent's title defective or at least doubtful and therefore not marketable. He points out that in California the pendency of condemnation proceedings at the time fixed for performance, though commenced after the making of the agreement to sell, is considered an encumbrance upon the title which permits the purchaser to rescind as he is not required to accept the award instead of the real property for which he had contracted, Hunt v. Inner Harbor Land Co., 61 Cal.App. 271, 214 P. 998; Ogren v. Inner Harbor Land Co., 83 Cal.App. 197, 256 P. 607; Block v. Citizens Trust Etc. Bank, 57 Cal.App. 518, 207 P. 510, and further that a title must not only be free of actual defects but also of reasonable doubt and probable litigation. New York and Pennsylvania cases like Forster v. Scott, 136 N.Y. 577, 32 N.E. 976, 18 L.R.A. 543 and Ritter v. Hill, 282 Pa. 115, 127 A. 455, are cited for the proposition that filing of a map of a proposed street constitutes an encumbrance on the land even before condemnation proceedings have been commenced. The probability of condemnation proceedings make it at least doubtful that the purchaser will be able to retain the property and makes litigation nearly certain.

[3-6] We see serious flaws in this reasoning. It is the condition of the title at the time fixed for performance which determines the rights of the parties to the agreement to sell. 8 Thompson on Real Property, 535; Craig v. White, 187 Cal. 489, 202 P. 648; 55 Am.Jur. 717. When it is said that reasonable doubt or probable litigation are sufficient to make a title not marketable that expression refers to dubious defects, encumbrances, outstanding claims or color of title in others, which if upheld would prove the title defective at the time of performance. This applies to all cases cited in that respect by appellant. In Muller v. Palmer, 144 Cal. 305, 77 P. 954, the title of vendor depended upon a patent which by court decision had been declared erroneous and legal title vested again in the United States prior to the agreement to sell and the defect was only definitely cured four years after the closing time. In Koshland v. Spring, 116 Cal. 689, 48 P. 58, it was questionable whether certain parts of the land had prior to the contract to sell been dedicated as public highways and whether at the time for performance there were still easements to that effect. In Culligan v. Leider, 65 Cal.App. 2d 51, 149 P.2d 894, it was dubious whether at the time of performance as extended there were still unlocated roving easements outstanding as not excepted encumbrances. In Snowden v. Derrick, 14 Cal.App. 309, 111 P. 757, the expression referred to is dictum as the defects existing at the time for performance were admitted. In the present case to the contrary it cannot be said that at the time for performance, as which we may consider the first three months of 1948, there was any claim of right of the city and county, dubious or not, outstanding in connection with the contemplated future condemnation of part of the property. Neither the presence of the provisional map in the office of the Department of Public Works, nor the authorization of the incurring of a bonded debt for the Gough Street extension project brought any change in the legal relations of the city and county and the owner with respect to the property. The city and county had still in the property in question no

more than the same inchoate right of eminent domain which it had in all other property within its boundaries, a right which clearly is not an encumbrance or defect of title. This fact also distinguishes our case from New York and Pennsylvania cases like Forster v. Scott and Ritter v. Hill, supra. In those states a statute provided that the owner was not entitled to compensation for any improvement made after the filing of an official map on any terrain within the lines of a street plotted on such map. Thus the filing of the map had a legal significance and impeded the free use of the property because thereafter building could only take place at the risk of losing its costs without compensation, Forster v. Scott, 136 N.Y. 577, 32 N.E. 976, 977. Such restriction could well be considered an encumbrance. The same applies to all other cases in which the preliminary measures have some restricting legal effect. In California the filing of a map has no such effect and there is even no evidence that the map in the case before us was in any way official or ever recorded or publicly filed.

[7, 8] It would seem that the first step with regard to condemnation which in California can be said to affect the legal relation of the owner to the property or to constitute an encumbrance is the issuance of summons, which marks the commencement of the proceedings and requires the filing of a lis pendens (§ 1243, C.C.P.), and at the date of which the right to compensation and damages accrues and as of which date the value of the property taken and the damages are measured (§ 1249, C.C.P.). Hunt v. Inner Harbor Land Co., Ogren v. Inner Harbor Land Co. and Block v. Citizens Trust Etc. Bank, supra, are authorities for the proposition that the actual institution of condemnation proceedings between the date of the contract to sell and the time for performance make the title bad as a matter of law, notwithstanding the fact that the condemnation proceedings may still be abandoned by the plaintiff (§ 1255a, C.C.P.) and title has not yet passed to him (§ 1253, C.C.P.). The rejection by these cases of the rule followed in some other jurisdictions that institution of condemnation proceedings after the agreement to sell is a risk of the purchaser as equitable owner (Annotation 46 A.L.R. 818) is in line with the rejection in this state of the rule that accidental destruction of the property after agreement to sell should for the same reason be borne by him. Conlin v. Osborn, 161 Cal. 659, 120 P. 755. Nevertheless there remains some doubt whether in this state institution of condemnation proceedings before the closing day necessarily justifies rescission by purchaser, because the Supreme Court in denying a hearing in the Hunt case, supra, and two companion cases placed its ruling upon the ground that the property had been actually condemned and taken, the vendor presumably had received full compensation and that his answer was in effect a consent to the rescission of the contract by the purchaser, 61 Cal.App at page 274, 214 P. 989; 25 Cal. Jur. 639. In the present case not only the circumstances stated by the Supreme Court are not shown but at the time set for performance no condemnation proceedings had been commenced and the only defect said to exist at that crucial time was the probability of the beginning of such suit at some indefinite time in the future. If such condemnation suit materializes after the time for performance, the injury should as a rule be suffered by the then owner and not deflected in advance to the seller who at any rate bears more risk in California than in some other jurisdictions.

[9, 10] It is true that as a matter of fact long before the actual institution of condemnation proceedings relating to part of a property the possibility of such action shown by preliminary steps or plans or even discussion or rumors may influence the value of the property and its fitness for some intended use advantageously or disadvantageously. It is conceivable that under certain circumstances the influence may be such as to justify rescission by the purchaser, for instance on the theory of frustration, material failure of consideration, mistake or fraud. But in this case no factual basis for any of these theories is alleged or proved. Appellant's theory is that the reasonable probability of condemnation in the indefinite future is a cloud upon the title which if not expressly exempted makes the title bad and permits the purchaser to affirm or rescind the contract at his election independent of the purchaser's knowledge or lack of knowledge of that probability at the time of the contract, independent of the purpose for which he wished to acquire the property, independent of any detrimental effect of the probability or the later effectuation of the taking on the intended use or on the value of the property. Appellant has not cited any authority for this theory in a situation where, as in this case, the measures taken prior to the time for performance had no restricting legal effect whatever on the owner's rights. We have found none and see no reason to initiate a rule which seems unnecessarily inflexible and prejudicial to the owner, whose title would be branded unmarketable during the period, possibly extending over years, from the time that condemnation in the future becomes reasonably probable or certain until the actual institution of proceedings, a detriment which he can in no way remove and for which he cannot obtain compensation. We conclude that the seller's title was not defective as a matter of law.

[11] Appellant argues that in this case seller had not only agreed to convey good title, but good title insured as such by the named title company, that said title company in its report to the purchaser mentioned the Gough street project as an objection, that said objection was not removed and that therefore the title company would not issue a policy insuring good title and respondent was unable to convey title so insured. Evidently to negative this contention the trial court made findings to the effect that the named title company did not refuse to insure good title and that the clause relating to the Gough street project was inserted in its amended title report at the request of appellant and did not constitute a valid objection. These findings are supported by substantial evidence:

Cyril Appel, attorney and vice-president of respondent, testified that officers of the title company had on three occasions declared their willingness to issue the policy and Lee Nathan, assistant secretary of the title company, testified that the eighth clause of the final report, identical with appellant's tenth objection quoted herein, was added to the original report delivered earlier to the parties, that he made a notation that said clause was requested by T. Sheehan, the purchaser "as a matter of information" and that the report showed what the property was subject to as of the date of delivery.

[12] Appellant argues that it was not sufficient that the title company did not refuse to insure title but that it was respondent's duty to make arrangements with the title company for such insured title. Appellant does not state clearly whether he contends that respondent under the agreement made should have paid for the title insurance policy or not. If he was under no duty to pay for the insurance it is not clear what further "arrangement" respondent should have made, other than ascertaining that the company was willing to issue the policy. According to the above evidence the company was willing to do so and respondent was informed of that fact. The court found after having taken evidence in that respect that respondent was not required to procure for appellant a policy of title insurance from the named company. Appellant contends that the finding is directly contrary to the provision of the contract. We need not decide whether in view of the evidence there was support for the finding as the finding is not decisive of any issue in the case. Appellant's rescission of April 2, 1948, was solely based on unremoved objections to the title and at the end of the trial it was stipulated that only the unremoved objection with respect to the Gough street project was the basis of the action. Even if appellant had been entitled to rescission on the ground of respondent's failure to procure an insurance policy, independent of the validity of said objection and of the company's willingness to insure good title, such ground would have been waived. Actually there was no dispute between the parties as to the manner in which the title insurance policy should be paid or procured but only with respect to the Gough street

project objection. That point having been decided against appellant the judgment must be affirmed.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

98 Cal.App.2d 672

ANGUS et al. v. ROTH et al.

PROTEX-A-KAR CO. v. ANGUS-PAGE MACHINE CO.

ROTH et al. v. ANGUS et al.

Civ. 17325.

District Court of Appeal, Second District, Division 3, California.

July 28, 1950.

Action by James S. Angus against Jack Roth, and another, wherein Kenneth E. Page filed a complaint as a plaintiff in intervention and the Protex-A-Kar Company, a corporation, filed a complaint in intervention against the Angus-Page Machine Company, a partnership, and others, for damages for breach of a written contract to manufacture pressure sprayers. The Superior Court of Los Angeles County, Paul E. Eymann, J., entered judgment in favor of plaintiff Angus and plaintiff in intervention Kenneth E. Page and defendant Roth and plaintiff in intervention Protex-A-Kar Company appealed. The District Court of Appeal, Vallée, J., held that the award of damages for breach of contract was sustained by the evidence.

Affirmed.

1. Sales 🔑384(6)

An award of $7,944.59 for damages suffered as a result of a breach of a contract to manufacture pressure sprayers was sustained by the evidence.

2. Appeal and error 🔑994(3)

Resolution of inconsistencies and contradictions in testimony of a witness was for trial court and not for District Court of Appeal.

Hibbard & Kleindienst, Charles E. Schaaf, all of Los Angeles, for appellants.

Fred W. Chase, Glendale, for respondent.

VALLÉE, Justice.

Appeal by defendant Jack Roth and plaintiff in intervention Protex-A-Kar Co., a corporation, from a judgment against them in favor of plaintiff James S. Angus and plaintiff in intervention Kenneth E. Page for $7,944.99 in an action for damages for breach of a written contract to manufacture pressure sprayers. It is conceded that the evidence supports a judgment for respondents. The only question is whether it supports the amount of damages awarded.

Angus and Page were partners. The contract, dated July 25, 1946, provided that Angus manufacture and deliver 25,000 pressure sprayers at a unit price of $1.05 and that Roth and Cone should order from Angus $2000 worth of special tooling to be used in manufacturing the sprayers. On August 5, 1946, Roth and Cone assigned to Protex-A-Kar Co., all their rights under the contract and the latter assumed all of their obligations.

The court found that in performing the contract Angus expended $14,052.81; that he had received $5,694.59 and appellants had paid $413.62 for dies used and ordered by Angus. $5,694.59 plus $413.63 equals $6,108.22. Judgment was for $7,944.59, which is $14,052.81 minus $6,108.22.

Angus testified that the reasonable value of materials and tools used in the work was $7,628.51. Prior to suit he had submitted a statement to one of the defendants showing materials and tools used as $7,628.51. On cross-examination he testified that some of the items making up the $7,628.51 included value of labor but the figure did not include all of his labor charges; that the $7,628.51 was not a final statement, it was only a statement of parts delivered.

[1, 2] As we have said, the court found that Angus expended $14,052.81. The manner in which this figure was computed does not appear. Apparently the $7,628.51 was included in it. Appellants argue that because Angus said on cross-examination that

some labor was included in the $7,628.51, the finding is not supported by the evidence. The argument is without merit. Angus testified to the figures making up the amount found by the court to have been expended. That evidence is sufficient to sustain the finding as to damages. Resolution of inconsistencies and contradictions, if there were any such in his testimony, was for the trial court, not this court. The rule as to conflict of the evidence applies to cases of inconsistencies and contradictions in the testimony of a witness. Weintraub v. Soronow, 115 Cal.App. 145, 149, 150, 1 P.2d 28; Farmers' Bank of Camarillo v. Goodrich, 90 Cal.App. 717, 721, 266 P. 550; Dowd v. Joyce, 85 Cal.App. 377, 380, 259 P. 368.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

98 Cal.App.2d 651

GOULD et al. v. WILSON et al.

Civ. 17938.

District Court of Appeal, Second District, Division 1, California.

July 27, 1950.

Action by William Albert Gould and others against Alexander J. Wilson and others. From the judgment and order of the Los Angeles Superior Court the defendants appealed. The District Court of Appeal, Per Curiam, granted a motion to dismiss consolidated appeals for failure to comply with the rules.

Appeals dismissed.

Appeal and error 🔑554(2)

Where appellants elected to file a settled statement and failed to comply with the mandatory provisions of rule relating thereto and were denied relief from their default and no engrossed settled statement was filed the consolidated appeals should be dismissed. Rules on Appeal, rule 7.

W. N. MacAdam, Los Angeles, for appellants.

Oscar S. Elvrum, Los Angeles, for respondents.

PER CURIAM.

Respondents move to dismiss the within consolidated appeals.

The record reflects that on May 5, 1949, notice of appeal to the Supreme Court from the judgment was filed. Notice to the clerk to prepare clerk's transcript and notice of election to file a settled statement in lieu of reporter's transcript was filed May 13, 1949. On May 26, 1949, notice of appeal to the Supreme Court from the minute order of May 16, 1949, was filed. On June 2, 1949, notice to the clerk to prepare clerk's transcript thereon was filed. Respondents' notice to the clerk for additions thereto was filed June 13, 1949. By stipulation filed August 19, 1949, the foregoing appeals were consolidated. The time within which to prepare clerk's transcript was extended to September 26, 1949, on which last-named date such transcript was filed.

Appellants applied to the Supreme Court for relief from default, which petition was denied February 27, 1950. Subsequently, the consolidated appeals here in question were transferred to this court.

By reason of the foregoing record, we are satisfied that after electing to file a settled statement pursuant to Rule 7 of Rules on Appeal for the Supreme Court and District Courts of Appeal, appellants having failed to comply with the mandatory provisions of said rule, having been denied relief from default, and no engrossed settled statement having been filed up to this time, the consolidated appeals should be dismissed. It is so ordered.

LEWIS v. SOUTHERN PAC. CO. et al.

Civ. 14298.

District Court of Appeal, First District, Division 2, California.

July 10, 1950.

Hearing Denied Sept. 7, 1950.

Action by Sears Lewis against Southern Pacific Company and others for injuries sustained by plaintiff when door of box car which plaintiff and fellow employee were attempting to close by means of a pinch bar fell on plaintiff. The Superior Court of Contra Costa County, Hugh H. Donovan, J., entered judgment on a verdict in favor of plaintiff as reduced with consent of plaintiff and defendants appealed. The District Court of Appeal, Dooling, J., held that the evidence warranted inference that named defendant had negligently delivered to plaintiff's employer a box car with defective door guides and that such negligence was proximate cause of injury and that whether plaintiff was contributorily negligent was a question for jury.

Judgment affirmed.

1. Appeal and error 🔑996

Implied findings of jury must be affirmed if supported by any substantial evidence or any reasonable inference which may be drawn from the evidence, and if either of two inferences may be reasonably drawn, implied finding cannot be disturbed if supported by one of them.

2. Railroads 🔑282(5)

In action against railroad for injuries sustained by plaintiff when struck by falling door of box car which plaintiff and another were attempting to close, evidence warranted inference that railroad had negligently delivered to plaintiff's employer a box car with defective door guides and that such negligence was proximate cause of injury.

3. Railroads 🔑278(2)

Attempting to close door of box car by use of a pinch bar instead of calling employer's train crew, as was the practice when a door would not close, did not constitute negligence as a matter of law so as to preclude recovery for injuries sustained when door fell on workman.

4. Railroads 🔑282(9)

Whether workman attempting to close door of box car by use of pinch bar was negligent in not observing defective door guides and realizing the danger was properly question for jury in action against railroad for injuries sustained by workman when door fell on him.

5. Negligence 🔑136(9)

Contributory negligence is a question of law only when court is impelled to say that from the facts reasonable men could draw but one inference, pointing unerringly to negligence of plaintiff contributing to his injury.

6. Evidence 🔑359(1)

A photograph which was taken 20 minutes after door of box car fell on workman and which showed bent condition of door guides was admissible in action against railroad for injuries sustained by workman to show condition of car immediately after door fell.

7. Trial 🔑255(4)

Failure to instruct jury as to limited purpose for which photograph was admitted in evidence was not error in absence of request for such instruction.

8. Appeal and error 🔑1069(1)
Trial 🔑312(3)

Action of trial judge in giving to bailiff, without summoning counsel, the instructions opened to the one which jury had requested be reread to it and instructing bailiff to tell foreman to read that instruction was highly irregular but did not constitute prejudicial error, though the particular instruction was copied by foreman and all the instructions remained with jury during deliberations, where none of the other instructions were read by jurors and the particular instruction in question merely outlined the order in which jury should consider the issues presented.

9. Appeal and error 🔑1069(1)

Where it clearly appears that no prejudice has resulted from court's irregular communication to jury during its deliberations, the error cannot be deemed prejudicial.

Carlson, Collins, Gordon & Bold, Robert Collins, Frederick Bold, Jr., Steven H. Welch, Jr., all of Richmond, for appellant.

Bernard E. Allard, Franklin C. Stark, Stanley E. Sparrowe, all of Oakland, Nichols, Richard & Allard, Stark & Champlin, Oakland, of counsel, for respondent.

DOOLING, Justice.

Defendant appeals from a judgment entered on the verdict of a jury. The jury returned a verdict of $27,500 which was reduced by plaintiff's consent to $22,500 pursuant to an order denying a motion for new trial conditioned on such consent.

Plaintiff, an employee of the Union Oil Company, was injured by the door of a box car falling upon him while he and a fellow employee were attempting to close it. The box car had been delivered by defendant to the Union Oil Company at its plant on March 6, 1947. It was loaded by the Oil Company and on March 11 plaintiff and his fellow employee were engaged in closing the door. The door would not move and the fellow employee took a pinch bar and with it was applying pressure forward on the door while plaintiff was attempting to pull it manually, when the door fell outward from the top upon plaintiff causing his injuries. The complaint counted on defendant's negligence in furnishing the box car in a defective condition.

Since appellant argues that there is no evidence to sustain a finding of its negligence and that the evidence shows without conflict that the casualty occurred solely as the result of the negligence of respondent and his fellow employee a somewhat detailed recital of the evidence is necessary.

The door is suspended at its top upon what is described in the evidence as a channel Z iron, the upper edge of the door having a metal lip which fits into the depression of the Z iron extending into it from 1 inch to 1½ inches. The bottom of the door is held in place by five steel door guides or brackets which curve upward at their outer ends thus holding the door in place. When closed the door rests upon three of these door guides and as it opens its weight is carried successively by two or three of such guides. Immediately after the door's fall it was discovered that two of the guides were bent downward, the center guide being just about flat and the one immediately to its left as one faces the car being bent down from 1¼ to 2 inches below its normal curved condition. There was evidence that, if the center guide was in the same condition before the fall of the door as afterwards, when the door reached a certain position over this guide it would fall outward as it did.

The car was inspected immediately before its delivery to the Union Oil Company by two of appellant's inspectors, one of such inspectors examining each side. The inspectors had no independent recollection of the particular car but testified that in making such inspection they regularly examined the doors. The inspection was made after the train was made up and the particular train of which this car formed a part contained 14 cars. The inspection commenced at 9:05 and the train pulled out at 10 o'clock. A record kept by one of the inspectors showed that a defective brake shoe had been discovered on the car in question which the inspectors had replaced. This operation "takes about five to seven minutes, according to how hard they are to put on."

From the time the car was delivered to the Union Oil Company it remained continuously alongside the company's loading platform and the door remained open. In loading, a steel plate was placed between the platform and the floor of the car, which was above the door guides and did not touch them. Neither plaintiff nor his fellow employee observed the condition of the door guides before the accident. In forcing the door with the pinch bar the fellow employee testified that at no time did he put the pinch bar between the car and the door or exert any outward pressure on the door. The end of the bar was placed against rivet heads on the side of the car and the pressure applied to the edge of the door. The door guides were rusty and after the fall of the door there were no marks of any kind observed on the defective door guides.

[1] This court must affirm the implied findings of the jury if supported by any

substantial evidence or any reasonable inference which may be drawn from the evidence, and if either of two inferences may be reasonably drawn the implied finding cannot be disturbed if supported by one of them. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123; Webster v. Board of Dental Examiners, 17 Cal.2d 534, 539–540, 110 P.2d 992; Hamilton v. Pacific Elec. Ry. Co., 12 Cal.2d 598, 603, 86 P.2d 829.

[2] We cannot hold that the evidence above recited is not open to the reasonable inference that the box car was delivered by defendant with the door guides in the same defective condition as they were found immediately after the fall of the door. The inspectors had no independent recollection of the particular car. They examined a fourteen car train in 55 minutes or less and 5 to 7 of these minutes were spent in replacing a brake shoe on this particular car. The car stood at the loading platform continuously after delivery with the door open. The guides were rusty and no fresh marks were found on them. The fellow employee testified that he exerted no outward pressure on the door. The jury might reasonably conclude that a rusty guide could not be bent several inches by the falling door, which is appellant's theory, without some marks appearing thereon and might discount the inspectors' testimony in view of the facts that they had no independent recollection of their inspection, that they might have been distracted by the discovery and replacement of the defective brake shoe on this particular car, and that being employees of appellant they had an interest in asserting the carefulness of their inspection. From these and the other facts the jury might reasonably infer that the appellant had negligently delivered a car with a defective door guide and that this was the proximate cause of respondent's injury.

[3–5] The main contention of appellant as to the negligence of respondent and his fellow employee is based on the theory that the use of the pinch bar forced the door outward causing it to leave the channel of the Z iron and fall outward from the top and that its pressure on the guide bars in falling was what bent them downward. If the jury believed the testimony of the fellow employee that he only exerted pressure laterally against the edge of the door, as they were entitled to do, the fall of the door could not be explained in this fashion. The fact, adverted to, that if they could not close a door it was their practice to call the Oil Company's train crew does not show their negligence as a matter of law in attempting to close the door as they did instead of calling the crew. Whether they should, acting as persons of ordinary care and prudence, have observed the defective guides and whether if they had they should with their knowledge have realized the danger were properly questions for the jury. "'Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury.'" Dwelly v. McReynolds, 6 Cal.2d 128, 133, 56 P.2d 1232, 1235.

A photograph taken twenty minutes after the door fell was introduced showing the bent door guides. When it was offered the following occurred:

"Mr. Collins: I am objecting to the picture. * * * You have no knowledge as to whether that was the condition of the door guides before the accident, do you?

"A. No.

"Mr. Collins: We will object on the ground it doesn't show the condition at the time of the accident. * * *

"The Court: I think the objection should be overruled, Mr. Collins. I think that was taken at or near the time of the happening."

[6, 7] The action of the court was not error. The photograph was admissible to show the condition of the car immediately after the door fell from it. Appellant argues, however, that the court should have instructed the jury, although no request for such instruction was made, "that the condition of the guide rails as therein depicted could not be used to prove their condition before the door fell." We cannot see how the jury could have been misled. The evidence clearly showed that the picture was

taken after the mishap. The opposing theories were presented to the jury as to whether the fall of the door bent the guides or the guides were already bent and permitted the door to fall. In any event appellant having asked for no such instruction is not now in a position to complain that none was given. "[I]t is not the duty of the judge to instruct the jury as to the limited purpose for which the evidence is admitted unless requested to do so." 24 Cal.Jur. 762.

[8] After the jury had retired in the courtroom, because the only jury room was occupied by a jury from another department, the foreman sent word to the judge by the bailiff that the jury desired a designated instruction reread to them. Without summoning counsel the judge opened the instructions, which were bound together in some fashion, to the particular one requested, gave them to the bailiff and instructed the bailiff to tell the foreman to read that instruction. The instructions remained in the courtroom with the jury until they returned their verdict. When the verdict was returned one of plaintiff's instructions was found among the exhibits in the case. The action of the trial judge in this respect was highly irregular error, Nelson v. Southern Pacific Co., 8 Cal.2d 648, 655, 67 P.2d 682, but we are satisfied after an examination of the record that no prejudice resulted.

The particular instruction requested by the jury reads:

"Upon retiring to the jury room you should first consider the question of the legal responsibility for the accident which forms the basis of this action, having in mind that all issues must be established by a preponderance of the evidence.

"You should determine:

"First, whether or not the defendant was negligent as charged in the plaintiff's complaint;

"Secondly, whether or not such negligence, if such is your finding, was a proximate cause of plaintiff's injuries, if any.

"Thirdly, whether or not the plaintiff was himself negligent as charged in the defendant's answer, and

"Fourthly, whether or not such contributory negligence, if any, of the plaintiff proximately contributed to the plaintiff's injuries, if any."

Immediately after the jury returned its verdict and before the jury was discharged, the foreman and each of the other jurors was questioned as to what had occurred in the jury room. The foreman stated that he had read the instruction above quoted to the other jurors and had copied the four steps therein outlined on four slips of paper. He and each of the other jurors stated that none of them had read the plaintiff's instruction which had been found among the exhibits, none of them had read any other instruction than the one above quoted, and none of them had read any other book or paper that was in the court room.

The particular instruction read by the foreman to the jury and copied by him simply outlined the order in which the jury should consider the several questions presented to them and we cannot see that any prejudice can have resulted from their having this before them in writing. Appellant suggests that this instruction did not present its theory that the casualty was the sole proximate result of the negligence of respondent and his fellow employee. The plain answer is that the jury must have found that the proximate cause was appellant's negligence and in doing so necessarily excluded the theory suggested by appellant.

[9] The court said in Nelson v. Southern Pacific Co., supra, at page 655 of 8 Cal.2d at page 686 of 67 P.2d: "Any other method of communication is held to go to the substance of the right of trial by jury and because of its nature is deemed to be prejudicial except in very exceptional circumstances." Nevertheless when it so clearly appears that no prejudice has resulted from the court's irregular communication to the jury, the error cannot be deemed to be prejudicial. Santina v. General Petroleum Corp., 41 Cal.App.2d 74, 77–78, 106 P.2d 60; Day v. General Petroleum Corp., 32 Cal.App.2d 220, 237–238, 89 P.2d 718;

Tice v. Pacific Elec. Ry. Co., 36 Cal.App. 2d 66, 72–74, 96 P.2d 1022, 97 P.2d 844.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

OPPENHEIMER v. CLIFTON'S BROOKDALE, Inc., et al.

Civ. 17580.

District Court of Appeal, Second District, Division 1, California.

July 12, 1950.

Rehearing Denied July 31, 1950.

Hearing Granted Sept. 7, 1950.*

John G. Oppenheimer brought action against Clifton's Brookdale, Inc., and another for false imprisonment. A judgment for defendants following the sustaining of general and special demurrers to third amended complaint without leave to amend was entered by the Superior Court of Los Angeles County, William B. McKesson, J., and the plaintiff appealed. The District Court of Appeal, Doran, J., held that the third amended complaint failed to state facts sufficient to constitute a cause of action.

Affirmed.

1. Pleading 🔑225(1)

Where original complaint admitted that plaintiff was duly convicted of offense of battery for which he alleged a wrongful arrest and imprisonment, and amended complaint failed to incorporate a negation of the assumption that the admitted battery was committed in defendants' presence, so that defendants lawfully made the arrest and delivered plaintiff to a peace officer as required by statute, and it did not appear that if plaintiff had been granted right to make additional amendment to complaint any improvement could have been accomplished in such respect, trial court properly sustained general and special demurrers to the amended complaint without leave to amend. Pen.Code, §§ 837, 847.

2. Pleading 🔑48, 187

A plaintiff assumes responsibility of stating a cause of action, and a demurrer is the proper remedy to test sufficiency of a complaint.

John G. Oppenheimer, in pro per.

Harry A. Keithly, Los Angeles, for respondents.

DORAN, Justice.

This is an action for false imprisonment. Following the sustaining of general and special demurrers to the third amended complaint without leave to amend, judgment was entered for the defendants whereupon plaintiff instituted the present appeal.

The gravamen of the action, according to appellant's brief, is contained in Paragraph VI of the third amended complaint which alleges:

"That on the said 12th day of November, 1948, and during the nighttime, and while the said plaintiff was in said cafeteria so procuring food to be eaten therein, the defendants and each of them, who were then and there acting within the scope of their agency and employment, summoned police officers of the City of Los Angeles * * * and caused and instigated plaintiff's arrest on an alleged misdemeanor charge, without a warrant, and that by reason thereof, plaintiff was incarcerated and deprived of his liberty for a period of five days, all to his damage in the sum of $50,000."

Appellant's original complaint, after alleging that defendants "caused to have plaintiff arrested", avers,

"That by reason of such acts caused, without any overt act by plaintiff, he (plaintiff) was tried in Division 19 of the Municipal Court * * * on or about January 10, 1949, whereon the basis of false testimony, deceit, perjury, trickery, and other means, used by said Defendants, * * * plaintiff was adjudged guilty of violating Section 242 P.D., (Battery), and the charge of violating Section 415 P.C.

---

* Dismissed Feb. 19, 1951.

(Disturbing the Peace) was dismissed on motion of the Court".

It is argued in appellant's brief that the allegations contained in the third amended complaint state facts sufficient to constitute a cause of action; that therefore the court erred in sustaining the demurrer without leave to amend.

The respondents' brief, however, submits that the demurrer was properly sustained, and that the third amended complaint, "When taken in connection with the admissions of the original complaint, shows that (1) the arrest was justified and lawful, and (2) that defendants were not responsible for plaintiff's further detention". Respondents then cite Wennerholm v. Stanford, University School of Medicine, 20 Cal. 2d 713, 716, 128 P.2d 522, 524, 141 A.L.R. 1358, and Zakaessian v. Zakaessian, 70 Cal. App.2d 721, 724, 161 P.2d 677, holding in the language of the Wennerholm case that "If any verified pleading contains an allegation which renders a complaint vulnerable, the defect cannot be cured simply by omitting the allegation, without explanation, in a later pleading". Applying this principle to the present case it is submitted that since "It thus appears beyond cavil that on such occasion plaintiff committed a misdemeanor for which he was then arrested and thereafter tried and convicted * * * he cannot now escape the effect of such admission in his original complaint".

It is further argued by respondents that "the third amended complaint was insufficient because of its failure to negative circumstances justifying the arrest". On this point is cited Dillon v. Haskell, 78 Cal. App.2d 814, 816, 178 P.2d 462, 463, where the reviewing court said: "A complaint for unlawful imprisonment which fails to allege facts under which the arrest would be unlawful is insufficient. The present complaint did not negative all or any of the named factual situations in which plaintiff's arrest would have been lawful". The respondents' brief also avers that "Defendants were not responsible for the alleged circumstances of plaintiff's detention or the alleged failure to take him before a magistrate following his lawful arrest".

[1] As hereinbefore noted, the original complaint admits that appellant was duly convicted of the offense for which appellant alleges a wrongful arrest and imprisonment. Moreover, appellant "is perfectly willing to be bound by the allegations of the original complaint (and they may be 'read into' his third amended complaint, if that suits defendants' fancy and abuse)". In view of this situation it is not an unreasonable assumption, as respondents' brief suggests, that the admitted battery for which appellant was convicted, was committed in respondents' presence; that the latter then lawfully made the arrest as provided for in Section 837 of the Penal Code and delivered appellant "to a peace-officer" as required by Section 847. And if this is all that occurred, there was no false imprisonment.

Under these circumstances and the apparent lawfulness of the arrest, it was incumbent on the appellant by way of amendment, to incorporate some proper explanation or negation which would clarify the situation and indicate that a cause of action existed. This was not done, and after appellant's several attempts at amendment, it must be assumed that it could not be done. There is no reason to believe that, had appellant been granted a fourth amendment, any improvement could or would have been accomplished in this respect.

[2] Nothing is presented in appellant's briefs which will justify a reversal of the judgment rendered. Appellant was extended ample opportunity to present a sufficient complaint; two different judges have passed on and ruled against the pleadings offered, with the final result that the demurrer to the third amended complaint was sustained without leave to amend. While as noted in the appellant's brief, "The rules for demurrer were not designed to permit defendants to evade the natural consequences of their unlawful actions", it is likewise true that a plaintiff assumes the responsibility of stating a cause of action, and that a demurrer is the proper remedy to test the sufficiency of a complaint. The cases cited by appellant are inapplicable to the present

situation and do not support the contentions made.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

98 Cal.App.2d 413

STILLER v. GESKE et al.

Civ. 14184.

District Court of Appeal, First District, Division 2, California.

July 13, 1950.

Rehearing Denied Aug. 12, 1950.

Hearing Denied Sept. 7, 1950.

Meta Stiller brought action against Florence Geske and another for conversion of furniture and furnishings in a hotel. A judgment for plaintiff was entered by the Superior Court, City and County of San Francisco, Frank T. Deasy, J., and the defendants appealed. The District Court of Appeal, Nourse, P. J., held that verdict for plaintiff was unauthorized in absence of any evidence as to value of the furniture and furnishings at time of the conversion.

Judgment reversed.

Trover and conversion 🔑40(6)

A verdict of $5,000 in favor of plaintiff for general damages for conversion of furniture and furnishings in hotel was unauthorized, in absence of any evidence as to value of the furniture and furnishings at time of the conversion.

Fabian D. Brown, Harold Furst, San Francisco, for appellants.

Hallinan, MacInnis & Zamloch, Ralph Wertheimer, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued in damages for the conversion of the furniture and furnishings in a hotel located at 403 First Street, in San Francisco. The cause was tried to a jury and a verdict of $5000 returned for general damages. Punitive damages were denied.

There is no material controversy as to the facts upon which the judgment rests; the chief attack by the appellants is that there is no evidence at all of the value of the property and hence no evidence to sustain the verdict, since the verdict was obviously based on that value. With this contention we must agree.

Appellants were the owners of the leasehold interest in the hotel, the good will, and all the furniture used in its operation. On July 15, 1946, they sold to respondent for the sum of $4500 "all of the furniture, furnishings, leasehold interest and good will of the certain hotel business."

Respondent paid part of the purchase price and, at the time of the ouster, owed $1,507.71. At the same time she reimbursed appellants in the sum of $250 which was the amount paid by appellants to the landlord as security for payment of rent under the lease.

The trial court instructed the jury on two occasions that the furniture alone was purchased by plaintiff for $4750. The instructions read: "* * * and this furniture, which you know was bought the year previously for $4750, on the whole transaction, there was $1,507.71 that was due." "* * * and again I say there is only $1,507.71 due on this furniture which originally cost $4,750." This was double error. There was no evidence of the purchase price of the furniture alone. Even if the $4500 paid for the entire interest could be treated as evidence of that value the second error was the inclusion in the purchase price of the sum of $250 which was a return of the deposit which appellants had paid the landlord as security for the lease. The respondent took possession of the premises on July 15, 1946, and operated the hotel until February 20, 1947, under a new lease. She failed to make the profit which she had expected and offered evidence in her own case that her failure was due largely to a continued state of intoxication.

But on this appeal she argues that she was so intoxicated at the time of the original sale that appellants took an unfair advantage of her, and there is an intimation that fraudulent representations as to the income and profits from the operation of the hotel induced her to make the purchase.

This was something she did not sue for. She alleged that the furniture alone was valued at $5000 and put her case on that ground without any proof of value.

Here the trial court properly instructed the jury that damages for the conversion were to be based primarily on the value of the furniture at the time of the conversion and then arbitrarily determined that value by an erroneous calculation and without competent proof.

Judgment reversed.

DOOLING, J., concurs.

Hearing denied; CARTER, J., dissenting.

---

98 Cal.App.2d Supp. 841

PEOPLE v. HAHN.
Cr. A. 2609.

Appellate Department, Superior Court,
Los Angeles County, California.
July 3, 1950.

Samuel Simpson Hahn was convicted in the Municipal Court of the City of Los Angeles, Clarke E. Stephens, J., of failure to yield the right of way to a pedestrian who was lawfully in the crosswalk at which the defendant had been halted by a traffic stop signal, and he appealed. The Appellate Department of the Superior Court, Los Angeles County, Per Curiam, held that evidence sustained the conviction.

Judgment of conviction affirmed.

1. Automobiles 🔑335

Under statute providing that when "go" signal appears vehicular traffic shall proceed but shall yield right of way to other vehicles and to pedestrians lawfully within intersection or adjacent crosswalk, motorist is not required to wait until crosswalk is clear, but has a duty to wait only if necessary to avoid interference with pedestrian. Vehicle Code, § 476.

2. Automobiles 🔑356

Under statute providing that when "go" signal appears vehicular traffic shall proceed but shall yield right of way to other vehicles and to pedestrians lawfully within intersection or adjacent crosswalk, whether a motorist who has proceeded without waiting until a pedestrian, walking at a normal speed, has crossed in front of him, has failed to do his duty, is a question of fact. Vehicle Code, § 476.

3. Automobiles 🔑335

Under statute providing that when "go" signal appears vehicular traffic shall proceed but shall give right of way to other vehicles and to pedestrians lawfully within intersection or adajacent crosswalk, the pedestrian's right of way is not to be measured in fractions of an inch nor tested by split seconds, since he is entitled not to just as much space as his body and clothing occupy, but to as much as is required to afford him safe passage, safe to his heart as well as safe to his limbs. Vehicle Code, § 476.

4. Automobiles 🔑355(1)

Evidence sustained conviction for failure of motorist to yield right of way to pedestrian lawfully in crosswalk at which motorist had been halted by traffic stop signal. Vehicle Code, § 476.

Saul Ross, Los Angeles, for appellant.

Ray L. Chesebro, City Attorney, Donald M. Redwine, Assistant City Attorney, and Philip E. Grey, Deputy City Attorney, all of Los Angeles, for respondent.

PER CURIAM.

The defendant appeals from the judgment that followed his conviction on a charge of having failed to yield the right of way to a pedestrian who was lawfully in the crosswalk at which the defendant had been halted by a traffic signal saying "Stop." As debated by the parties to this action, the important question before us, and to which they desire us to give an explicit answer, is this: Must a driver of a motor vehicle, who is waiting at an intersection's crosswalk because the traffic signal is against him, continue to wait, after the "Go" signal appears, until all the pedestrians in the crosswalk have passed before him? Although we agree with the appellant that this question should be answered in the negative, we nevertheless are affirming the judgment, for we find the crucial question not to be the one over which the parties have struggled.

We quote the pertinent provisions of section 476, Vehicle Code, upon which defendant's conviction rests: "Whenever traffic is controlled by official traffic control signals exhibiting the words 'Go,' 'Caution,' or 'Stop,' or exhibiting different colored lights successively, one at a time, or with arrows, the following colors only shall be used, and said terms and lights shall indicate and apply to drivers of vehicles and pedestrians as follows:

"(a) Green alone or 'Go.'

"1. Vehicular traffic facing the signal shall proceed straight through or may turn right or left or make a semicircular or U turn unless a sign at such place prohibits any such turn. But vehicular traffic, including vehicles turning right or left, shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited."

[1] It will be noted, reverting to the question deemed important by the parties, that the requirement of the statute is not that vehicular traffic shall continue to remain motionless until those lawfully in the intersection or an adjacent crosswalk have passed by, but only that it shall yield the right of way to them. We have had occasion to consider the meaning of "yield the right of way" in People v. McLachlan, 1939, 36 Cal.App.Supp.2d 754, 93 P.2d 280, and People v. Noland, 1948, 83 Cal.App. Supp.2d 819, 189 P.2d 84. We stated in the McLachlan case, page 36 Cal.App.Supp.2d at page 758, 93 P.2d at page 282: "* * * it is clear that when a pedestrian crossing a roadway in a crosswalk is so far from the path of an approaching automobile and proceeding in such manner that no interference between them is reasonably to be expected, the driver of the automobile need not wait for it to develop." Applying these words to the possibilities of the question under consideration, we are mindful that not infrequently a pedestrian, lawfully in the crosswalk because he entered it while the signal indicated "Go", see People v. Hawkins, 1942, 51 Cal.App.Supp.2d 779, 124 P.2d 691, is but a relatively short distance from his point of entrance, and so far distant from the waiting motor vehicle that the latter can proceed to make use of that portion of the highway lying within the crosswalk without interfering with the right of the pedestrian to use it when he reaches it. The duty placed upon the driver is not so expressed that he is required to wait until the crosswalk is clear; his duty is to wait only if necessary to avoid interference with the pedestrian.

[2] Whether or not a driver of an ordinary passenger car—who has proceeded without waiting until a pedestrian, walking at a normal speed, has crossed in front of him—has failed to do his duty, is a factual question involving at least two factors: the distance that the pedestrian is from the path the vehicle will take, and the rate at which he is coming. A running boy and a hobbling arthritic cripple obviously create different problems. In some cases the pedestrian will have been so close to the waiting motor vehicle that beyond any speculation the vehicle could not proceed without interference with the pedestrian's right of way. In other cases the pedestrian will have been so far away that no doubt exists that the vehicle's movement did not interfere with that of the pedestrian. In between these clear cases come those where the answer is not so readily given. The question remains, however, one of fact, and that is: Who had the right of way? "Questions of right of way arise between two users of the highway only when there is danger of a collision between them if both proceed on their respective ways without delay." People v. McLachlan, supra, 36 Cal.App.Supp.2d 754, 757, 93 P.2d at page 282.

[3] In answering the question the evident purpose of the statute, which is to secure safe passage for the pedestrian, should be kept in mind. His right of way is not to be measured in fractions of an inch nor tested by split seconds. He is entitled not to just as much space as his body, clothes and buttons require, but to as much as will afford him a safe passage, one that can be taken without either physical interference or such a threat of interference that will reasonably cause him to step back or hesitate in his going. The pedestrian's heart, as well as his body, should be free from attack.

[4] In the case before us it appears that defendant's car was stopped at the east crosswalk of a north and south street, near the north curb of the street on which he was driving. Two car lanes lay between him and the center line of the roadway. By the time the signal turned to "Go" a pedestrian had reached and just crossed the center line on his way north towards the defendant. The pedestrian, then, had some twenty feet to traverse before reaching the lane in which defendant's car was standing. Was the defendant under a duty, in order to avoid any interference with the pedestrian's safe journey across the street, to wait until he had walked the twenty feet, and then on in front of defendant's car? This was the crucial question before the trial court, and while the decision is a close one, we are not ready to say that the affirmative answer given was without support in the record.

The judgment of conviction is affirmed.

98 Cal.App.2d 437

DILLON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 17762.

District Court of Appeal, Second District, Division 1, California.

July 13, 1950.

Proceeding by John T. Dillon against the Superior Court of the state of California, in and for the county of Los Angeles, and Mary E. Dillon, to review an order transferring an action to the municipal court for trial. The District Court of Appeal, Drapeau, J., held that the Superior Court did not lose jurisdiction by virtue of enactment of the statute increasing the jurisdiction of the municipal court to include actions involving $3,000.

Order annulled.

White, P. J., dissented.

1. Courts ⚿42(1)

Where there is a statutory change of jurisdiction of a court and no clearly expressed intention to the contrary, statute will be held to operate prospectively rather than retrospectively.

2. Courts ⚿52

Court which had jurisdiction of action when commenced does not lose that jurisdiction by subsequent change of law cutting down its jurisdiction.

3. Courts ⚿52

Where action had been begun in the Superior Court to recover money due in the amount of $2,501, enactment of statute increasing jurisdiction of the municipal court to include actions involving $3,000 did not deprive the Superior Court of jurisdiction of the action. Code Civ.Proc. § 89.

◆

Will H. Winston, Long Beach, for petitioner.

Harold W. Kennedy, Co. Counsel, and Wm. E. Lamoreaux, Dep. Co. Counsel, Los Angeles, for respondents.

DRAPEAU, Justice.

On June 10, 1949, petitioner commenced an action in the respondent court against Mary E. Dillon to recover money due him in the amount of $2,501.00. On October 1, 1949, an amendment to section 89 of the Code of Civil Procedure became effective whereby the jurisdiction of the municipal court was increased to include actions involving $3,000.00. When said cause came on for trial on April 3, 1950, the trial judge of his own motion transferred it to the municipal court upon the ground that respondent court did not have jurisdiction to try the same by reason of the amount involved.

By the instant proceeding, petitioner seeks to annul the order of transfer.

Respondents interposed a general demurrer to the petition, and here urge that the amendment to section 89, supra, divested respondent court of jurisdiction to try the action which involved less than $3,000.00.

Petitioner maintains that the jurisdiction of the superior court to try cases pending before it was not affected by the amendment, and relies upon the rule that a statute is not retroactive in operation unless the legislative intent to the contrary is clearly expressed.

There is nothing in the section here under consideration which discloses any intent to make it retrospective in its scope.

The identical question was before the court in Architectural Tile Co. v. Superior Court, 108 Cal.App. 369, 371, 291 P. 586, 587, after the 1929 amendment to the municipal court act became effective giving such court exclusive jurisdiction of "1. All cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars or less."

[1] It was there held that in cases of statutory change of jurisdiction, in the absence of a clearly expressed intention to the contrary, every statute will be held to operate prospectively rather than retrospectively. "It is much more reasonable and logical to assume that the Legislature intended that the statute should have no effect upon pending litigation than to indulge in the presumption that they intended to deprive those litigants of their rem-

edies whose actions were filed and against which the statute of limitations would have run, except for their prior commencement."

[2, 3] A court which had jurisdiction of an action when commenced does not lose that jurisdiction by a subsequent change of law cutting down its jurisdiction. Berg v. Traeger, 210 Cal. 323, 292 P. 495; Wheaton v. Superior Court, 108 Cal.App. 702, 292 P. 499.

In Berg v. Traeger, supra, the supreme court construed an amendment to the municipal court act effective August 14, 1929, as having the effect "of depriving the District Courts of Appeal of jurisdiction over appeals from the superior courts in any action within the jurisdiction of the municipal courts; but, at the time the amendment became effective, there were pending and undetermined before the several divisions of the District Courts of Appeal many appeals from judgments of the municipal courts, and it therefore became necessary to determine what effect, if any, the change of jurisdiction resulting from said amendment had upon appeals duly perfected prior thereto. * * *

"While it is the general rule that a cause of action or remedy dependent on statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute [citing authorities], it is equally well settled and is a fundamental rule of statutory construction that every statute will be construed to operate prospectively, and will not be given retrospective effect, unless the intention that it should have that effect is clearly expressed. [Citing authorities.] There is nothing in the 1929 amendment of section 29 of the Municipal Court Act, supra, indicating that it was intended to have a retroactive operation. The better reasoned cases, we believe, are those that support the view that the change in the appellate jurisdiction of the District Courts of Appeal, in so far as appeals from judgments of municipal courts are concerned, was not intended to apply retroactively, and hence does not take from the appellate courts jurisdiction of appeals perfected at the time the amendment became effective." [210 Cal. 323, 292 P. 496.]

Again in People v. Allied Architects' Ass'n, 201 Cal. 428, 437, 257 P. 511, 514, the rule regarding retroactive construction is thus stated: "No statute or constitutional provision shall be so construed as to give it a retroactive effect, to divest individuals of rights vested previous to its passage, or to affect pending litigation, unless such intent is expressly declared or necessarily implied in the language of the provision to be construed."

For the reasons stated, the order transferring the instant action to the Municipal Court is annulled.

DORAN, J., concurs.

WHITE, Presiding Justice.

I dissent.

We are not here confronted with a situation wherein the superior court sought to dismiss an action properly filed with it because after such filing jurisdiction of the subject matter was by legislative action reposed in the municipal court. The action of the superior court in transferring the instant cause to the municipal court is not therefore fraught with the dangers of injustice pointed out in Architectural Tile Company v. Superior Court, 108 Cal.App. 369, 371, 291 P. 586, and referred to in the majority opinion.

It seems to me elementary that if jurisdiction is the "authority to hear and determine a cause", Lange v. Superior Court, 11 Cal.App. 1, 4, 103 P. 908, 909, then, after the amendment to section 89 of the Code of Civil Procedure became effective respondent court was bereft of power to render a judgment. As was said by this court in Re Cavitt, 47 Cal.App.2d 698, 701, 118 P.2d 846, 848, "Jurisdiction is fundamental, and as heretofore pointed out, must be continuing in the court throughout the proceeding, because it is jurisdiction alone that gives the court power to hear, determine and pronounce judgment upon the issues before it."

In so far as the case of Berg v. Traeger, 210 Cal. 323, 292 P. 495, 496, cited in the majority opinion, is concerned, we are not now dealing with a case where final judgment was rendered prior to the aforesaid change in the statute. Such a case would present a distinct question which is not before us. And, in the Berg v. Traeger case, supra, it is conceded that the general rule is that in the absence of a saving clause, a cause of action or remedy dependent upon the statute "falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute * * *".

A perusal of the cases in this state discloses two distinct lines of authority—1. that unless the intention of the legislature is clearly expressed that the statute shall be construed to operate retrospectively, it will be construed to operate prospectively, and, 2. that jurisdiction is continuing and must prevail throughout the proceeding.

I would affirm the order and permit the case to be tried in the municipal court, to which tribunal jurisdiction was by legislative enactment transferred without a saving clause.

98 Cal.App.2d 388

In re KEVIL'S ESTATE.

WEAVER et al. v. SPERRY.

Civ. 17625.

District Court of Appeal, Second District, Division 2, California.

July 11, 1950.

Proceeding in the matter of the estate of George Mason Kevil. Petition by Carl D. Weaver, as administrator, for settlement of his final account and decree of distribution, opposed by Kenneth Sperry, assignee of George William Kevil. From an order of the Superior Court of Los Angeles County, Joseph M. Maltby, J., settling objections to the final account, and from an order denying a motion to set aside an order settling objections to the account and decree of distribution, and an order denying a motion for new trial, Venice Kevil appealed. The District Court of Appeal, Wilson, J., held that where deceased was declared presumptively dead and there was accrued pay standing to his credit as a member of the navy, and Venice Kevil as his mother received her half of the estate in advance of administration, the probate court properly offset the amount she had already received as against her entire share of the estate.

Order settling objections to final account of administrator and decree of distribution affirmed. Appeals from other orders dismissed.

1. Army and navy 🔑50
Descent and distribution 🔑6

Under the statute respecting settlement of accounts of deceased personnel of the Navy and Marine Corps, inasmuch as the power to pass laws regulating succession to property is reserved to the states under the Tenth Amendment, statute must be regarded as procedural in nature and not as a statute of succession. 34 U.S.C.A. § 941a; U.S.C.A.Const. Amend. 10.

2. Army and navy 🔑50

The purpose of the statute respecting a settlement of accounts of deceased personnel of the Navy and Marine Corps is to settle and dispose of amounts due deceased personnel where no probate is contemplated, so that any balances remaining to credit of any deceased member may be distributed to the heirs entitled to succeed thereto under the laws of descent and distribution. 34 U.S.C.A. § 941a.

3. Executors and administrators 🔑43, 294

Where a member of Navy was declared officially dead and on that date there was accrued pay standing to his credit and he left surviving a father and mother and mother received her half of the estate in advance of administration, mother held such amount subject to order of the administrator when one was appointed, and probate court properly offset the amount the mother had already received as against her entire share of the estate of deceased. 34 U.S.C.A. § 941a; Probate Code, § 630 et seq.

4. Executors and administrators 🔑314(12), 510(2)

Appeals from an order denying a motion to set aside an order settling objections to final account of administrator and decree of distribution and from an order denying a motion for new trial were dismissed, as such orders are nonappealable.

Shibley, Wanzer & Litwin, Long Beach, for appellants.

Kenneth Sperry, Long Beach, for respondent, in propria persona.

WILSON, Justice.

This is an appeal from an order settling objections to final account of administrator and decree of distribution. There are also purported appeals from (1) the "order denying motion to set aside and vacate order settling objections to final account of administrator and decree of distribution" and (2) the order denying motion for a new trial, which orders are nonappealable.

Decedent at the time of his death was in active service in the United States Navy. He was officially placed upon a "missing status" in 1942, and was subsequently declared dead, the presumptive date of his death being July 25, 1945. On that date there was accrued pay standing to his credit in the amount of $5,729.20. Thereafter decedent's mother, appellant Venice Kevil, filed her claim with the Navy Department and there was distributed to her, pursuant to section 941a of Title 34 U.S.C.A.[1], Act of Feb. 25, 1946, 60 Stat. 30, the sum of $2,864.60, representing one-half of the accrued pay. She was informed that the other half was reserved for the surviving father and that the balance could be allowed to a duly appointed legal representative of her son's estate, regardless of the status of the father. After receiving this communication Mrs. Kevil requested her brother, appellant Carl D. Weaver, to petition for letters of administration. Letters were issued to him on June 10, 1947. The inventory and appraisement was filed on October 5, 1948, showing the total assets in the estate as cash in the sum of $2,864.60. This sum represented the remaining balance of the accrued pay accredited to decedent which the administrator received from the government.

Decedent's father, who resides in Virginia, retained respondent to represent him and executed an assignment of his interest in the estate to respondent. The latter advised the administrator that decedent's mother had already received one-half of the estate directly from the Navy Department and requested that he make a demand upon her for the amount she had received and in the event she failed to remit that such amount be offset against her share of the estate in any petition for distribution.

Thereafter the administrator filed his first and final account alleging that the entire estate of decedent consisted of the sum of $2,864.60 and asked that the estate be divided one-half to the mother and one-half to the father. He failed to call the court's attention to the fact that decedent's mother had received a similar amount from the United States Navy. Respondent filed objections alleging that the decedent at the time of his death was serving in the United States Navy and that the true amount of his estate, which was represented by accounts due him at the time of his death, was the sum of $5,729.20, one-half of which had already been paid to the mother.

---

[1] Section 941a reads as follows: "In the settlement of the accounts of deceased officers or enlisted persons of the Navy and Marine Corps where no demand is presented by a duly appointed legal representative of the estate, the accounting officers may allow the amount found due to the decedent's widow, widower, or legal heirs in the following order of precedence: First, to the widow or widower; second, if decedent left no widow or widower, or the widow or widower be dead at time of settlement, then to the children or their issue, per stirpes; third, if no widow, widower, or descendants, *then to the father and mother in equal parts;* fourth, if either the father or mother be dead, then to the one surviving; fifth, if there be no widow, widower, child, father, or mother at the date of settlement, then to the brothers and sisters and children of deceased brothers and sisters, per stirpes: *Provided,* That this section shall not be so construed as to prevent payment from the amount due to the decedent's estate of funeral expenses, provided a claim therefor is presented by the person or persons who actually paid the same before settlement by the accounting officers." (Emphasis added.)

The court found that the entire estate of decedent consisted of pay due him from the United States Navy in the sum of $5,729.20; that one-half thereof had already been paid to the mother, Ora Venice Kevil, pursuant to section 941a of Title 34 of the United States Code Annotated; that by virtue of collusion between the administrator and Ora Venice Kevil, the facts were not brought to the attention of the court and that the administrator had sought to have distributed to the mother three-fourths of the estate instead of the one-half to which she was legally entitled under the laws of descent and distribution.

The sole question to be determined is whether there should have been included in decedent's estate the sum of $2,864.60 paid directly to appellant Venice Kevil by the United States government pursuant to section 941a of Title 34 of the United States Code Annotated.

It is appellants' contention that the amount shown in the first and final account of the administrator represents the total amount of decedent's estate and that it must be distributed in accordance with section 220 of the Probate Code; that Venice Kevil is not indebted to the estate and that the money paid to her was never a part of the estate but was paid to her by the government on its own determination as to who was entitled to it.

Appellants assert that section 941a of the United States Code Annotated is not applicable since the statute was passed after decedent's death and that whatever rights his estate may have in the matter were fixed as of July 25, 1945.

The payment to appellant Venice Kevil was made pursuant to the provisions of section 941a inasmuch as it is the only statute under which such payment could have been made. Section 941 of the United States Code Annotated which was in effect at the date of decedent's death, and which was repealed at the time section 941a was enacted, provided for the settlement of accounts in a similar manner "where the amount due the decedent's estate is less than $500."

[1, 2] Counsel have cited no cases and we are unable to find any construing section 941a. Inasmuch as the power to pass laws regulating succession to property is reserved to the states under the Tenth Amendment to the Constitution of the United States, the statute must be regarded as procedural in nature and not as a statute of succession. It is only in those cases in which no legal representative makes a demand therefor that the accounting office is permitted to pay to the heirs of a decedent any amount due to him. The obvious purpose of the statute is to settle and dispose of amounts due deceased members of the armed forces where no probate is contemplated to the end that any balances remaining to the credit of any such deceased member may be distributed to the heirs entitled to succeed thereto under the laws of descent and distribution. The statute recognizes the primary right of a legal representative of the estate to demand and receive the amount due and does not require that any such amount be allowed to anyone except a legal representative.

[3] Had there been no administration of decedent's estate the accrued pay standing to his credit would have been distributed by the government equally between his father and mother. And if decedent's mother had caused an administrator to be appointed instead of filing her claim the full amount would have been paid to such administrator upon demand and the mother and father would have shared equally in the estate. Appellant cannot accept the one-half to which she is entitled and then by means of probate proceedings obtain a total of three-quarters of decedent's estate. When she received her half of the estate in advance of administration she held it subject to the order of the administrator in the event one was appointed. The statute is comparable to section 630 et seq. of the Probate Code and although Venice Kevil was entitled to receive her share of the money directly from the Navy Department, she did not thereby obtain title to the

fund. See Brezzo v. Brangero, 51 Cal.App. 79, 196 P. 87. It was therefore proper for the probate court to offset the amount she had already received as against her entire share of the estate. In re Moore's Estate, 96 Cal. 522, 529, 530, 31 P. 584; In re Estate of Bennett, 13 Cal.2d 354, 358, 90 P.2d 84, 126 A.L.R. 771.

[4] Order settling objections to final account of administrator and decree of distribution affirmed. Appeals from other orders dismissed.

MOORE, P. J., and McCOMB, J., concur.

98 Cal.App.2d 441

BERNSTEIN et al. v. PILLER et al.
Civ. 17607.

District Court of Appeal, Second District, Division 2, California.
July 13, 1950.

Rehearing Denied July 28, 1950.

Hearing Denied Sept. 7, 1950.

Fritzi C. Bernstein and Max A. Kuplan, jointly, individually, as copartners, and trading under the fictitious name and style of Credit Security National Company, brought action against Emanuel A. Piller and others for an injunction, accounting, and damages, for alleged conspiracy to use plaintiffs' secret business system, solicit plaintiffs' customers whose names were allegedly obtained from secret list, and to induce plaintiffs' employees to leave plaintiffs' employ. The Superior Court of Los Angeles County, William B. McKesson and Arnold Praeger, JJ., rendered a judgment for the defendants, and plaintiffs appealed. The District Court of Appeal, McComb, J., held that complaint was demurrable.

Affirmed.

1. Appeal and error ⚷854(3)

On appeal from a judgment entered after sustaining of a demurrer, order in general terms sustaining demurrer must be affirmed if demurrer was well taken as to any of the grounds stated therein.

2. Pleading ⚷18

In pleading, the essential facts on which a determination of the controversy depends should be stated with clearness and precision so that nothing is left to surmise.

3. Pleading ⚷192(2)

Mere recitals, references to or allegations of material facts are subject to special demurrer for uncertainty, where they are left to surmise.

4. Pleading ⚷192(2)

In action by partners for injunction, accounting, and damages for alleged conspiracy by a former partner and former employees of partnership to use partnership's secret business system, to solicit partnership's customers whose names were allegedly obtained from secret list, and to induce partnership's employees to leave partnership's employ, complaint was specially demurrable because of failure to give the names of partnership's employees whom the former partner and former employees had endeavored to induce to leave partnership's employ, because it did not give the names of any customers or clients whose names were allegedly obtained from secret list, and because it did not give the names of customers whom former partner and former employees had attempted to induce or actually induced to sever business relationships with partnership.

◆

Jacob W. Silverman and Robert Licker, Los Angeles, for appellants.

Samuel De Groot, Beverly Hills, and Harold L. Newman, Los Angeles, for respondents.

McCOMB, Justice.

From judgments of dismissal entered after plaintiffs failed to amend their complaint within the time allowed upon the sustaining of demurrers to the complaint, plaintiffs appeal. The complaint in three counts sought an injunction, an accounting and damages for an alleged conspiracy and wrongful use of plaintiffs' secret lists and processes.

Facts: It was alleged in the complaint that defendant Piller had been a former partner of plaintiffs in the collection service business. The other defendants were former employees of plaintiffs. In January, 1948, defendant Piller sold his entire interest in the partnership to plaintiffs. In January, 1949, defendants formed a partnership for the purpose of conducting a general collection and collection service business. In addition to the foregoing facts plaintiffs specifically alleged in each count of the complaint:

"XXIX

"That on or about said 1st day of January, 1949, and continuing to the present, all Defendants and in particular Defendants Emanuel A. Piller, Daniel D. Benedett, Carol E. Weber, Harry R. Tiegs, Mary Ellen Hill and Mercedes Correl Tapia maliciously and corruptly did pursue and do continue to pursue a course of unfair and vicious trade practices directed against Plaintiffs and unconscionably and wantonly did violate and do continue to violate the rights of Plaintiffs, as follows:

"1. That Defendants have utilized, and done business under the certain fictitious name and style, to wit, '*Credit* Bureau *National* Company.'

"2. That Defendants have falsely and fraudulently represented to various customers and clientele of Plaintiffs and to others that Defendant Emanuel A. Piller had been forced and frozen out of said partnership previously existing between Plaintiffs and said Piller.

"3. That Defendants have endeavored to induce various employees of Plaintiffs to leave the employ of Plaintiffs and to enter the employ of Defendants.

"4. That Defendants have utilized and employed in their said business said secret process, formula, method and system of Plaintiffs.

"5. That Defendants have solicited customers and clientele obtained from said secret and confidential list of Plaintiffs' customers.

"6. That Defendants have attempted to induce and entice and have actually induced and enticed various of said Plaintiffs' customers and clientele to sever their business relationships with Plaintiffs and instead to patronize Defendants.

"7. That Defendants are still continuing and will continue to solicit and entice Plaintiffs' customers."

Defendants filed special demurrers to the complaint on the ground of uncertainty in "that it cannot be ascertained from the allegations contained in paragraph XXIX, subparagraph 3 thereof, how the defendants have endeavored to induce various employees of plaintiffs to leave the employ of plaintiffs and to enter the employ of defendants, and the names of * * * That it cannot be ascertained from the allegations contained in paragraph XXIX, subparagraph 5 thereof, what customers the defendants have solicited.

"That it cannot be ascertained from the allegations contained in paragraph XXIX, subparagraph 6 thereof, what customers the defendants have attempted to induce and entice and have actually induced and enticed, to sever their business relationships with plaintiffs and instead to patronize the defendants."

These demurrers were sustained and plaintiffs were given leave to amend. Plaintiffs having failed to amend within the time allowed by the court, the present judgments were entered from which the appeal has been taken.

Question: Did the trial court properly sustain the special demurrers to the complaint?

[1-3] This question must be answered in the affirmative and is governed by these rules:

(1) On appeal from a judgment entered after the sustaining of a demurrer the order of the trial court if in general terms must be affirmed by an appellate court if the demurrer is well taken as to any of the grounds stated therein. (Haddad v. McDowell, 213 Cal. 690, 691, 3 P.2d 550; Jensky v. State Bd. of Equalization, 67 Cal.App.2d 612, 614, 155 P.2d 87; Metzenbaum v. Metzenbaum, 86 Cal.App.2d 750, 752, 195 P.2d 492.)

(2) In pleading, the essential facts upon which a determination of the controversy depends should be stated with clearness

and precision so that nothing is left to surmise. (Philbrook v. Randall, 195 Cal. 95, 103, 231 P. 739.)

(3) Mere recitals, references to or allegations of material facts which are left to surmise are subject to a special demurrer for uncertainty. (Corum v. Hartford Acc. & Ind. Co., 67 Cal.App.2d 891, 894, 155 P.2d 710.)

[4] Applying the foregoing rules to the facts of the instant case it is evident that the trial court's orders and judgments must be sustained. The orders sustaining the demurrers were general in their terms and therefore under rule (1) supra, if properly taken on any ground stated therein must be affirmed. Under rules (2) and (3) supra, the complaint was uncertain in paragraph XXIX, subdivisions 3, 5 and 6 because it does not give (a) the names of the employees of plaintiffs or any of them whom defendants endeavored to induce to leave plaintiffs' employ, (b) the names or any of them of the customers or clients defendants allegedly obtained from the secret and confidential list of plaintiffs' customers, and (c) the names of the customers or clients of plaintiffs whom defendants had attempted to induce or had actually induced to sever their business relationships with plaintiffs.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; CARTER, J., dissenting.

GONSALVES v. HODGSON et al.

Civ. 17038.

District Court of Appeal, Second District, Division 2, California.

July 12, 1950.

Rehearing Denied July 28, 1950.

Hearing Granted Sept. 7, 1950.*

Action by Frank Gonsalves, Jr. and others, against Frank W. Hodgson and others, copartners doing business under the firm name of Hodgson-Green-Haldeman Shipbuilders and another, individually and as a party in interest with the plaintiffs, to recover damages for breach of a written contract to build a fishing vessel, for damages for fraud in inducing the contract, and for damages for loss of profits which would have been earned had the vessel been built according to terms of the contract. The Superior Court, Los Angeles County, Frank M. Smith, J., rendered judgments for the plaintiffs, and the defendants appealed. The District Court of Appeal, McComb, J., held that instructions given by the court were prejudicially conflicting.

Judgments reversed with directions to enter a judgment in favor of each defendant on each count of the complaint, and all other appeals dismissed.

1. Appeal and error 🔑**870(6)**

Order denying motion for new trial may be reviewed on appeal from judgment.

2. New trial 🔑**39**

Where instructions are inconsistent or contradictory, new trial should be granted.

3. New trial 🔑**10**

If objection that instructions are conflicting and inconsistent is raised on motion for new trial, new trial should be granted regardless of who requested that instructions be given.

4. Contracts 🔑**284(2)**

Where contract provides for arbitration, arbitration or unsuccessful attempt to secure it is condition precedent to right to maintain action for breach.

5. Appeal and error 🔑**1072**

In action for breach of written contract to build fishing vessel, where court gave instructions directing verdict for defendants on each of three counts at defendants' request, and directing verdict for defendants because plaintiffs had not submitted dispute to arbitration, but court also gave instruction that parties had waived arbitration and that jury could determine issues between the parties, denial of motion for new trial on ground that instructions were conflicting was prejudicial error.

6. Election of remedies 🔑**3(1), 5**

Where purchasers brought action for breach of written contract to build fishing vessel and also for fraud in inducing the contract and for loss of profits which would have been earned if vessel had been built according to contract, remedies were inconsistent, and plaintiffs were properly required to make election as to which they would pursue.

---

* Subsequent opinion 237 P.2d 656.

7. Election of remedies 🔑3(2)

Where purchasers brought action for breach of written contract to build fishing vessel, for fraud in inducing the contract and for loss of profits which would have been earned if vessel had been built according to contract, and purchasers elected to sue on first and third causes, purchasers waived right to rescind contract and recover damages for fraud.

8. Contracts 🔑284(2)

Where contract for construction of fishing vessel provided that dispute between purchaser and builder should be referred to a named person and that his decision should be final and binding, and evidence disclosed that though builders had insisted upon compliance with provision for reference, purchasers had not complied and had not attempted to do so, purchasers were not entitled to maintain action for breach of contract and loss of profits which would have been earned if vessel had been built according to contract.

◆

Hansen & Sweeney, Victor R. Hansen, J. E. Simpson, Los Angeles, for appellants.

Roland G. Swaffield, Long Beach, for respondents

McCOMB, Justice.

From judgments in favor of plaintiffs after trial before a jury in an action to recover (a) damages for breach of a written contract to build a fishing vessel, (b) damages for fraud in inducing the contract, and (c) damages for loss of profits which would have been earned had the vessel been built according to the terms of the contract, defendants appeal.

Facts: December 21, 1943, defendants, under the firm name of Hodgson-Greene-Haldeman Shipbuilders, entered into a contract with plaintiffs to build for the latter a tuna fishing vessel to be named "Liberty Bell".* So far as material here the contract contained these provisions:

"It is estimated that the cost of the construction of said vessel 'Liberty' hereunder will be approximately One Hundred Ninety Thousand Dollars ($190,000.00). It is expressly understood, however, that the Builder does not guarantee the correctness of this estimate and if said cost exceeds or is less than said sum of One Hundred Ninety Thousand Dollars ($190,000.00) Buyers shall nevertheless be bound and obligated to pay to Builder the cost of said construction as herein set forth and all other money agreed to be paid to Builder as herein set forth. * * *

"Should any part of the vessel fabricated by Builder fail through defects in workmanship or through defective lumber within thirty (30) days after delivery of said vessel, Builder will replace such parts as may so fail, provided that said vessel be brought to Builder's Long Beach shipyard for such replacement. Builder shall not be liable for damages or delays caused by such defective workmanship or defective parts of lumber, and in this connection it is agreed that the liability of Builder under all guarantees, either express or implied, is specifically limited to the replacement free of charge for labor and defective lumber at Builder's Long Beach shipyard of parts as may fail through defective workmanship or lumber within said thirty (30) days period as aforesaid. Builder shall not be responsible for defects in any machinery, equipment or fittings manufactured and supplied by others and Buyers shall look to the manufacturers and suppliers thereof for any redress.

"Buyers shall have the right at any time to inspect the said vessel and the progress being made in the construction thereof and shall further have the right to have any person of their choosing make inspection and examination of the vessel in its various states of construction, said person to be such as will meet with the requirements of the United States Government for admission into Builder's shipyard. Should Buyers or any of them or said person, if any, so chosen not be satisfied with the construction, he shall immediately so notify Builder in writing setting forth the nature and character of the complaint in sufficient detail so as to fully communicate the same to Builder. *If the parties cannot settle the dispute between themselves, the same shall be referred to P. Banning Young and his decision thereon shall be final and binding upon all parties hereto. Should said P. Banning Young not be living, or should he be unable to act, said dispute shall be immediately referred to any other competent marine surveyor, engineer or architect mutually acceptable to all parties hereto. Unless any complaint is so reduced in writing, it shall be conclusively presumed that said vessel is being constructed in a manner satisfactory to Buyers and Buyers shall be precluded from thereafter raising any objections thereto;* provided, however, passage of tests provided for herein shall not be excused." (Italics added.)

---

* This agreement read as follows: (See footnote following opinion.)

The vessel was constructed, delivered to plaintiffs, and on its voyage to San Diego it was found that certain repair work was necessary, which repairs were made by plaintiffs in San Diego. The vessel was not returned to defendants for repair as provided in the contract. Also it is to be noted that the contract specifically provided that if the plaintiff did not call to defendants' attention in writing claimed defects in the construction of the vessel during the time the same was being built any such defects were deemed waived.

Thereafter plaintiffs instituted the present action. After a trial which consumed many days, the judge instructed the jury as follows:

I

"You are instructed as a matter of law that since the contract for the construction of the boat 'Liberty Bell' is not between the plaintiffs and the defendants Frank W. Hodgson, Burch E. Greene, Manola H. Greene, Henry F. Haldeman, Clara B. Haldeman and M. R. Mackaig, co-partners doing business under the firm name of Hodgson-Greene-Haldeman Shipbuilders, that said defendants are not liable under any of the causes of action of plaintiffs' complaint and your verdict will be in favor of the defendants, and all of them, on all three causes of action of plaintiffs' complaint. (Given at request of defendants)"

In addition to the foregoing instruction the court gave numerous other instructions which cover 92 pages of the Reporter's Transcript on appeal and which instructions included the following:

II

"* * * Where compliance with such provisions is a condition precedent to the right to sue for breach of contract, the plaintiffs are barred from recovering if they have not submitted such matters to such arbitrator. In the present case there is no evidence that the plaintiffs submitted any matters or disputes as to whether the vessel 'Liberty Bell' was being constructed in accordance with the contract to P. Banning Young, the arbitrator named in the contract, and you will therefore find a verdict in favor of the defendants. (Given at request of defendants)"

This instruction was directly contrary to the following instruction which was also given:

III

"* * * You are instructed that none of the parties to this litigation have made any demand for any arbitration of any of the issues involved in this action and by reason thereof the parties have waived any arbitration which may have been provided by the contract and none of the parties to this action can now claim any right of arbitration provided for in said contract. The issues involved in this action must be determined by the Court and jury. (Given at request of plaintiffs)"

The evidence disclosed that defendants affirmatively pleaded the right to arbitration and that plaintiffs never sought an arbitration or took any steps to have their dispute submitted to arbitration in accordance with the terms of the contract. The jury returned a verdict in favor of plaintiffs on each count of the complaint. Thereafter the trial judge denied defendants' motion for a new trial.

Question: Were the instructions prejudicially conflicting?

This question must be answered in the affirmative and is governed by these rules:

[1] 1. An order denying a motion for a new trial may be reviewed on appeal from the judgment. (Caldwell v. Caldwell, 80 Cal.App.2d 378, 384, 182 P.2d 258; Litvinuk v. Litvinuk, 27 Cal.2d 38, 42, 162 P.2d 8; Bramble v. McEwan, 40 Cal.App.2d 400, 416, 104 P.2d 1054.)

[2] 2. Where instructions are inconsistent or contradictory a new trial should be granted. (Buttrick v. Pacific Elec. Ry. Co. 86 Cal.App. 136, 141, 200 P. 588; Galway v. Guggolz, 117 Cal.App. 639, 643, 4 P.2d 290; Southern Pacific L. Co. v. Dickerson, 65 Cal.App. 722, 726, 225 P. 5; Ellis v. Jewett, 18 Cal.App.2d 629, 634, 64 P.2d 432. Cf. Sebrell v. Los Angeles Ry. Corp., 31 Cal.2d 813, 817, 192 P.2d 898; Van Fleet v. Heyler, 51 Cal.App.2d 719, 734, 125 P.2d 586; Pittam v. City of Riverside, 128 Cal.App. 57, 67 et seq., 16 P.2d 768.)

Clearly instruction I, directing a verdict for each of the defendants on each count, was inconsistent and contrary to other instructions permitting the jury to return verdicts in favor of plaintiffs. Likewise instruction II directing a verdict in favor of defendants because plaintiffs had not submitted the dispute to arbitration was directly contrary to instruction III which told the jury that the parties had waived the right to demand arbitration and that the jury could determine the issues involved between the parties.

[3] The rule that a party may not complain that instructions are inconsistent where it appears that the inconsistency arises through the giving of instructions at his request which are inconsistent with instructions given at the request of the other party, if the latter are pertinent to the issues of the case and are *correct statements of the law,* (Treadwell v. Nickel, 194 Cal. 243, 271, 228 P. 25; Barkhaus v. Producers Fruit Co., 192 Cal. 200, 210, 219 P. 435; Ketcham v. Modesto Irrigation District, 135 Cal.App. 180, 194, 26 P.2d 876) is not applicable in the present case for two reasons:

First: In the cases just cited the rule was applied on appeal from a judgment. In the instant case a different rule is applicable since the ruling here being considered is a ruling of the trial court in denying a motion for a new trial, and in such case if the instructions are conflicting and inconsistent a new trial should be granted regardless of who requested the instructions be given. (Cf. cases cited under rule 2, supra.)

[4] Second: The rule announced in Treadwell v. Nickel, Barkhaus v. Producers Fruit Co., and Ketcham v. Modesto Irrigation District, supra, is applicable only when the instruction requested by respondent (in this case plaintiffs) is a "correct statement of the law." (Sampson v. Hughes, 147 Cal. 62, 64, 81 P. 292.) In the present case the third instruction quoted above which was in conflict with the second instruction hereinbefore set forth was not a correct statement of the law. Where a contract provides for an arbitration, arbitration or an unsuccessful attempt to secure one is a condition precedent to the right to maintain an action for breach of the contract. (Clogston v. Schiff-Lang Co., Inc., 2 Cal.2d 414, 416, 41 P.2d 555; Collier & Wallis, Ltd. v. Astor, 9 Cal.2d 202, 206, 70 P.2d 171.)

[5] In the case at bar the sixth paragraph of the contract of the parties specifically provided for arbitration of a dispute between them, and the evidence discloses that there was not any such arbitration, nor any attempt upon the part of plaintiffs to obtain one. Hence instruction III was not a correct statement of the law.

In view of the fact that it was prejudicial error not to grant defendants' motion for a new trial, the judgments must be reversed and it becomes necessary to a final determination of the case (Sec. 53, Code Civ. Proc.) to consider two additional questions:

[6, 7] *First: Can plaintiffs maintain their first and third causes of action and also the second cause of action?*

This question must be answered in the negative. Counts one and three were predicated upon an affirmance of the contract and sought damages for breach thereof, while count two was predicated upon damages for fraud for inducing the contract. These remedies are inconsistent and plaintiffs were required to make an election as to which remedy they would pursue. (House v. Piercy, 181 Cal. 247, 251, 183 P. 807; Fulmele v. Los Angeles Inv. Co., 51 Cal. App. 417, 420, 196 P. 923. Having elected to sue on counts one and three, this constituted a waiver of their rights to rescind the contract and recover damages for fraud in inducing the contract. (Carter v. Carr, 139 Cal.App. 15, 26 et seq., 33 P.2d 852; Merrill v. Merrill, 103 Cal. 287, 290, 35 P. 768, 37 P. 392. Cf. Murphy v. Hellman Commercial etc. Bank, 43 Cal.App. 579, 587, 185 P. 485; also Connelly v. J. D. Millar Realty Co., 131 Cal.App. 67, 70, 20 P.2d 781. Therefore the trial judge should have directed a verdict in favor of each defendant on count two of the complaint.

[8] *Second: Did the record show a total absence of proof of an essential element of plaintiffs' alleged cause of action in count one and also count three of the complaint?*

This question must be answered in the affirmative. As shown above the contract which was the basis of the cause of action alleged in counts one and three provided that a dispute between the parties should be referred to P. Banning Young, and that his decision thereon should be final and binding. The evidence disclosed that though defendants had insisted upon compliance with this provision of the contract, plaintiffs had not complied with it nor attempted to do so. As compliance with the provision for arbitration or an unsuccessful attempt to procure arbitration was a condition precedent to plaintiffs' right to maintain an action for breach of the contract, there was a total absence of proof of an essential element of the causes of action attempted to be alleged in counts one and three of the complaint, and a judgment should have been directed in favor of defendants and each of them. (Clogston v. Schiff-Lang Co., Inc., and Collier & Wallis, Ltd. v. Astor, supra.)

In view of our conclusions it is unnecessary to determine other questions argued by counsel.

The judgments are reversed with directions to the trial court to enter a judgment in favor of each defendant on each count in the complaint. All other appeals are dismissed.

MOORE, P. J., and WILSON, J., concur.

---

* This agreement read as follows:

"Agreement

"This Agreement, made and entered into this 21st day of December, 1943, by and between

"Hodgson-Greene-Haldeman Shipbuilders, a copartnership of which Frank W. Hodgson, Burch E. Greene, Manola H. Greene, Henry F. Haldeman and Clara B. Haldeman are copartners, hereinafter referred to as 'Builder'.

"and

"Frank Gonsalves Jr., Francisco Gonsalves, Salvador Carlos, Ernest G. Andrade, Frank Hodgson, Frederic Strumm, and Rudi F. Kettler jointly and severally, all citizens of the United States and qualified to enter into this agreement and to own the hereinafter described vessel, hereinafter referred to as 'Buyers'.

"Whereas, the aforesaid Frank W. Hodgson heretofore at his then shipyard constructed a 'tuna clipper' or 'bait boat' which is now called 'Viking' and owned by Anthony D. Madruga and other co-owners; and

"Whereas, it is the desire of Buyers that Builder construct for them a fishing vessel similar in type and construction to said 'Viking', which said vessel, for the purpose of this contract, is herein called 'Liberty', provided that said 'Liberty' shall be about one hundred five feet long; and

"Whereas, Builder is engaged in the business of constructing vessels and operating a shipyard at Long Beach, California.

"Now, Therefore, It Is Hereby Mutually Agreed by and between the parties hereto as follows:

"1. Builder agrees to construct for Buyers at the Long Beach shipyard of Builder a fishing vessel (herein called 'Liberty') similar in type and construction as the aforesaid 'Viking', provided however, that said 'Liberty' shall be about one hundred five feet long. Said 'Liberty' shall be complete in all respects, including the installation of propelling machinery and shall be built in accordance with the best shipbuilding practices followed in the construction of 'tuna clippers' and all work shall be done in a proper and workmanlike manner, and shall pass the customary inclination test and customary approval by a competent marine insurance surveyor for insurance purposes.

"The size, shape, and details of construction of the 'Liberty' shall be under the direction and control of Frank W. Hodgson. If any dispute arises during construction concerning whether or not said 'Liberty' is similar to said 'Viking', said dispute shall be referred to P. Banning Young, and his decision thereon shall be final and binding upon all parties hereto. Should said P. Banning Young not be then living or should he be unable to act, said dispute shall be referred to any other competent marine surveyor mutually acceptable to all parties hereto. The charges of any such marine surveyor in settling any disputes hereunder shall be paid for equally by the parties hereto.

"No plans and specifications were prepared or used in the construction of said 'Viking' and inasmuch as said 'Viking' is not now and will not be continuously available for inspection, and the parties hereto realize that they must rely upon the memory of Frank W. Hodgson to construct a vessel similar to the 'Viking', and agree that any deviation in the construction of the 'Liberty' from that of the 'Viking' will not be deemed a dissimilarity unless such deviation would materially alter the general outlines, type, location of machinery, compartments, and superstructure. Changes in details of construction shall not be deemed a dissimilarity if said construction is in accordance with the best shipbuilding practices followed in the construction of 'tuna Clippers' as aforesaid.

"Builder is to prepare working plans during the construction of said 'Liberty' and said Frank W. Hodgson shall certify thereto that if said 'Liberty' is built in accordance with said plans that she will satisfy the requirements of this agreement as to similarity with the 'Viking' as above set forth. Rudi F. Kettler and Frank Gonsalves, Jr. shall also certify said plans. These plans are always to remain in the possession of Builder and are only to be used in the case of the death or incapacity of Frank W. Hodgson for the completion of said 'Liberty'.

"Builder shall furnish a completion bond to be issued by a reliable surety company acceptable to Buyers provided such a bond can be obtainable. Buyers shall pay Builder upon request the amount of premium or cost of said bond, the amount of which premium or cost shall be in addition to the cost of construction of said vessel, but Buyers shall not pay Builder a sum of money equal to ten percent (10%) of cost of said bond.

"2. It is understood and agreed between the parties hereto that said Vessel 'Liberty' is to be constructed by Builder and paid for by Buyers on a cost plus a ten per cent (10%) of cost basis.

"Buyers agree to pay Builder for the construction of said vessel 'Liberty', her engines, tackle, furniture and apparel, the following sums of money.

"(1) the amount paid by Builder for direct labor; and

"(2) the burden for overhead expenses of Builder which shall be fifty per cent (50%) of the amount of the direct labor, and

"(3) the cost to Builder delivered at its yard of all material, equipment and machinery of every kind and description ordered by Builder for the construction and testing of said 'Liberty', but all rebares, discounts and refunds, if any, obtained by Builder in the purchase thereof shall be applied in reduction of the cost thereof; and

"(4) a sum of money equal to ten per cent (10%) on the aggregate of the above three items.

"The term 'amount paid by Builder for direct labor' as used herein shall include all wages and salaries paid by Builder prior to any deductions or withholds to those certain of its employees who perform work or services on and chargeable to the construction, completion and delivery of the vessel, her engines, tackle, furniture and apparel, including the prefabrication and preparation of materials, launching, inclination test, trial trips, drafting and lofting, wages of foreman and assistant (hull) superintendent in charge of any part of the construction of said vessel, wages of timekeepers and cleanup men, all in accordance with the present accounting practices of Builder, as explained in book published by Builder, dated January 1, 1943, and entitled: 'How to Charge Your Time'. Wages of Cranemen, lumber carrier, drivers and truckmen while actually engaged in work pertaining to the construction of said vessel as aforesaid shall be charged to direct labor but the use of equipment and tools shall not be so charged.

"In addition to the above cost of construction, Buyers shall also pay to Builder Old Age Benefit and Social Security Taxes, Unemployment Insurance Taxes, excise taxes, transportation taxes, personal property taxes, and any and all other taxes of whatsoever nature which may be incurred by Builder in the construction of said vessel under any existing laws or any law enacted and effective during and before the completion of this agreement, provided, however, that Buyers shall not pay Builder a sum of money equal to ten per cent (10%) of these taxes.

"As an aid in the determination of the cost of said direct labor Builder agrees to establish and keep a separate time clock and set of time cards that will be used only in connection with recording the amount of time and direct labor used in the construction of said vessel 'Liberty' and a fishing vessel known as 'Viking No. 2' and a fishing vessel known as 'Monarch No. 2', and each of said time cards must be countersigned each day by the foreman in direct charge of the construction of said vessel. Buyers may appoint a timekeeper who may be selected at the option of the Buyers from among the employees of the Builder, or may be hired by the Buyers and placed on the Builder's payroll.

"It is estimated that the cost of the construction of said vessel 'Liberty' hereunder will be approximately One Hundred Ninety Thousand Dollars ($190,000.00). It is expressly understood, however, that the Builder does not guarantee the correctness of this estimate and if said cost exceeds or is less than said sum of One Hundred Ninety Thousand Dollars ($190,000.00) Buyers shall nevertheless be bound and obligated to pay to Builder the cost of said construction as herein set forth and all other money agreed to be paid to Builder as herein set forth.

"3. Buyers agree to pay to Builder upon the execution hereof the sum of Five Thousand Dollars ($5,000.00), receipt of which is hereby acknowledged by Builder. This Five Thousand Dollars ($5,000.00) is an advance payment on the money to be due Builder under the terms of this agreement and shall be credited by Builder on the final payment or payments owed by Buyers to Builder hereunder.

The Builder shall render to Buyers monthly an itemized statement showing the money expended hereunder during said month by Builder for material, machinery, and equipment used in the construction of said vessel. At the time of submitting said itemized bill, Builder shall also deliver to Buyers a duplicate bill of all materials, equipment and machinery purchased by Builder, which bill shall state upon the face thereof that the same has been paid by Builder. Buyers agree to pay said bill within five (5) days after the presentation thereof.

"Builder shall render to Buyers weekly an itemized statement showing the money expended during said week for direct labor, and said bill shall also show and include the amount of burden. Buyers agree to pay said bill within five (5) days after the presentation thereof.

"In the event Builder furnishes a completion bond the above statements shall also show and include the amount of ten per cent (10%) of the costs of said material, machinery and equipment and of said direct labor and burden as above provided for which amount shall be paid concurrently with the payments of said statements for material, machinery, equipment, direct labor and burden.

"In the event Builder does not furnish a completion bond the said amount of said ten per cent (10%) shall be paid by Buyers to Builder upon completion of the construction of said vessel and before or simultaneously with delivery of said vessel to Buyers; provided, however, that delivery to Buyers shall not be evidenced or taken to mean that Builder has been so paid.

"4. Copies of all purchase orders for material and equipment shall be furnished by Builder to Rudi F. Kettler weekly but his approval thereon shall not be required with the exception, however, that purchase orders for the main and auxiliary engines, ice machines, heat exchanger, all generators pumps and motors, switchboard and voltage regulator, shall be first approved in writing by said Rudi F. Kettler before said orders are placed. Provided, further, that should said Rudi F. Kettler disprove in writing any purchase order for any material or equipment before said purchase order has been dispatched by Builder, said purchase order shall not be placed until approved by Rudi F. Kettler, provided that Builder shall not be liable for any damage or loss due to any delay resulting therefrom. Said purchase orders shall show that the material specified therein is ordered specifically for 'Liberty' and shall show the price thereof.

"It is agreed that the lumber to be used in the construction of said 'Liberty' shall be purchased locally unless Buyers direct otherwise in writing.

"It is understood that if Buyers so desire Builder will purchase such fishing gear as may be designated in writing by Buyers if obtainable, and that Buyers will pay Builder the cost of said fishing gear plus ten per cent (10%) of said cost for so doing.

"Builder further agrees to place in charge of the construction of said vessel a person satisfactory to Buyers, if requested so to do by Buyers, it being understood, of course, in this connection that said Frank W. Hodgson will have general supervision and control of all stages of construction of said vessel to her completion.

"5. During all the time that said vessel is under construction and until it has been finally accepted by Buyers, Builder agrees to carry Builders' Risk Insurance and War Risk Insurance each in the amount of not less than $190,000.00. Unless included in said Builders' Risk Insurance, Builder shall obtain Collision Liability and Protection and Indemnity Liability Insurance. Such insurance shall include risk of loss or damage on the trial run. Said policies of Insurance shall be issued for the benefit and protection of the parties hereto. Builder shall also carry Workmen's Compensation Insurance. In addition to the above costs of construction Buyers shall pay Builder upon request the amount of the premiums on or costs of said insurance, provided, however, that Buyers shall not pay Builder a sum of money equal to ten per cent (10%) of these premiums or costs.

"6. Builder will conduct an inclination experiment on said vessel. The result of said inclination experiment shall be given to the Buyers before Builder holds the trial run and before delivery of the vessel is offered to Buyers. Builder shall conduct a trial run of said vessel on which trial run Buyers, or such of them as desire to attend, shall be present, and on or after said inclination test and trial run the Buyers may demand such changes in said vessel as may be necessary to comply with the terms of this agreement.

"Upon completion of said vessel, she shall be delivered to Buyers at the Builder's shipyard at Long Beach, California. Builder shall execute and deliver to Buyers at the time of delivery of said vessel a Carpenter's Certificate to Buyers, Buyers shall pay Builder all money due Builder by reason of and under this agreement, provided, however, that delivery to Buyers shall not be evidence or taken to mean that Builder has been so paid in full. Upon delivery of said vessel to Buyers, and acceptance thereof, Builder shall be relieved of all liability and responsibility, if any, thereto, except as may otherwise be herein provided.

"Should any part of the vessel fabricated by Builder fail through defects in workmanship or through defective lumber within thirty (30) days after delivery of said vessel, Builder will replace such parts as may so fail, provided that said vessel be brought to Builder's Long Beach shipyard for such replacement. Builder shall not be liable for damages or delays caused by such defective workmanship or defective parts of lumber, and in this connection it is agreed that the liability of Builder under all guarantees, either express or implied, is specifically limited to the replacement free of charge for labor and defective lumber at Builder's Long Beach shipyard of parts as may fail through defective workmanship or lumber within said thirty (30) days period as aforesaid. Builder shall not be responsible for defects in any machinery, equipment or fittings manufactured and supplied by others and Buyers shall look to the manufacturers and suppliers thereof for any redress.

"Buyers shall have the right at any time to inspect the said vessel and the progress being made in the construction thereof and shall further have the right to have any person of their choosing make inspection and examination of the vessel in its various states of construction, said person to be such as will meet with the requirements of the United States Government for admission into Builder's shipyard. Should Buyers or any of them or said person, if any, so chosen not be satisfied with the construction, he shall immediately so notify Builder in writing setting forth the nature and character of the complaint in sufficient detail so as to fully communicate the same to Builder. If the parties cannot settle the dispute between themselves, the same shall be referred to P. Banning Young and his decision thereon shall be final and binding upon all parties hereto. Should said P. Banning Young not be living, or should he be unable to act, said dispute shall be immediately referred to any other competent marine surveyor, engineer or architect mutually acceptable to all parties hereto. Unless any complaint is so reduced in writing, it shall be conclusively presumed that said vessel is being constructed in a manner satisfactory to Buyers and Buyers shall be precluded from thereafter raising any objections thereto; provided, however, passage of tests provided for herein shall not be excused.

"It is agreed and understood that Builder warrants that the place of construction of said vessel shall be available until the said vessel is fully completed unless such building site is condemned, destroyed or made useless by any acts of war, God, or the elements, such as set forth in paragraph 8 hereof.

"Builder agrees to comply with all the laws, statutes, ordinances, rules and regulations of the United States of America, State of California or any political subdivision thereof as may be applicable to or effect the construction of said vessel hereunder and to pay and discharge, when due, all taxes as herein provided.

"It is further understood that upon completion of said vessel, Builder shall give a warranty that said vessel, her engines, tackle, furniture and apparel, and every part thereof, is free and clear of and from any and all debts, encumbrances, claims and liens, charges, assessments and levies of whatsoever kind or nature, maritime or otherwise, all of which shall be paid and discharged when due, in accordance with the terms hereof, provided, however, that failure of Buyers to pay Builder the money agreed to be paid hereunder, at the time and in the manner set forth, shall be sufficient to excuse Builder from paying all costs then incurred in the construction of said vessel until Buyers have paid Builder therefor in compliance with this agreement.

"7. Builder shall keep separate books of account in which shall be entered all items pertaining to direct labor charges and material costs which shall reflect all charges to Buyers and receipts of money from Buyers under the terms hereof. Said books of account shall be kept in accordance with good accounting practices and shall be open at all reasonable times during business hours to the inspection of Buyers, their attorney or agents, and to the auditor of French Sardine Company or to whomsoever said corporation may designate in writing, addressed to Builder. Builder shall deliver to said corporation, or its auditor, a monthly statement of disbursements and charges hereunder including payroll and burden.

"8. Said vessel 'Liberty' shall be completed by September 1, 1944, provided, however, Builder shall not be liable for any default hereunder or delay in the construction of said vessel or the performance of the terms, covenants, and conditions on Builder's part to be performed hereunder if such default, delay or nonperformance is caused by or is due to any contingency beyond Builder's control, or caused by the delay or default or nonperformance of any supplier or manufacturer with whom Builder may contract to furnish and deliver any material, equipment or machinery necessary in the construction of said vessel, including war, acts of war, sabotage, bombing, fires, strikes, riots, floods, earthquakes, acts of God, delays in transportation, blockades, embargoes, acts, demands or requirements of the United States Government or any state or political subdivision thereof, or occasioned by command, restraint, condemnation or requisition of the United States Government, or any political subdivision thereof; provided, however, that as soon as any such cause is removed and no longer exists, Builder shall thereupon continue to carry out and perform the terms, covenants and conditions of this agreement on Builder's part to be performed.

"9. It is understood that this agreement is to be executed by Rudi F. Kettler and Frank Gonsalves, Jr. as agent of the Buyers, and each of them, and said agents warrant that they have authority so to do and that they have authority to act for and represent Buyers and each of them, in all things hereunder.

"10. All parties hereto agree that this agreement, or any interest herein, shall not be assigned by any party hereto without the written consent of all the parties executing this agreement, nor shall this agreement be modified except by a memorandum in writing executed by all the parties executing this agreement.

"In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

"Hodgson-Greene-Haldeman Shipbuilders.
" By Burch E. Greene
" Burch E. Greene
" By Frank W. Hodgson
" Frank W. Hodgson
" 'Builders'

"Frank Gonsalves Jr., Francisco Gonsalves, Salvador Carlos, Ernest G. Andrade, Frank Hodgson, Frederic Strumm, and Rudi F. Kettler
" By Frank Gonsalves Jr.
" Frank Gonsalves Jr.
" By Rudi F. Kettler
" Rudi F. Kettler
" 'Buyers' "

PEOPLE v. AUMAN et al.

Civ. 17546.

District Court of Appeal, Second District,
Division 2, California.
July 13, 1950.

Judgment Vacated Aug. 10, 1950.*

The People, acting by and through the Department of Public Works, brought condemnation proceedings against J. E. Auman and others and Leland D. O'Connell and Guy J. Levingston, doing business under the firm name of Boyles-Snyder Company, and others. The Superior Court of Los Angeles County, Ingall W. Bull, J., rendered a judgment adverse to Leland D. O'Connell and Guy D. Levingston, doing business under the firm name and style of Byles-Snyder Company, and others, and they appealed. The District Court of Appeal, McComb, J., held that appellants were not entitled to compensation for the taking of their leasehold interest in the realty condemned, and that they were not entitled to recover damages for value of trade fixtures left on the premises, or for the cost of removing and relocating fixtures taken away.

Affirmed.

1. Eminent domain 🔑79
Novation 🔑6

Where lease provided that if leased premises were taken by eminent domain lessor could terminate lease, and state brought condemnation proceedings against lessor, and lessor gave notice of termination to lessee, and state acquired title by deed of grant from owner and thereafter entered into a rental agreement with lessee providing that such rental agreement should cancel any prior lease, rental agreement between state and lessee was a novation, rights of parties were covered solely by such new agreement, original lease was void, and lessee was therefore not entitled to compensation from the state for the taking of the lessee's leasehold interest.

2. Eminent domain 🔑82

Where lessor terminated lease pursuant to terms of lease when state instituted condemnation proceedings, and state then made a short lease of premises to lessee, lessee was not entitled to recover damages from the state for value of trade fixtures which lessee left on the premises, though fixtures were removable.

3. Eminent domain 🔑95

Where lessor terminated lease pursuant to terms of lease when state instituted condemnation proceedings, and state then made a short lease of the premises to the lessee, lessee was not entitled to recover from the state the cost of removing and relocating fixtures.

◆

William H. Wadsworth and Edgar L. Fraser, Los Angeles, for appellants.

George C. Hadley, San Francisco, Hodge L. Dolle, R. B. Pegram, John N. McLaurin, and Charles Glass, Jr., all of Los Angeles, and Warren P. Marsden, Sacramento, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff in a condemnation action, defendants O'Connell and Levingston appeal.

Facts: Plaintiff filed a complaint in eminent domain on June 18, 1948, at which time a summons was served on the owner of the fee, J. E. Auman. Defendants at the time occupied the premises under a written lease expiring March 31, 1949. Paragraph 3 of article 4 of the lease reads in part as follows: "That if the leased premises are * * * taken in whole or in part by eminent domain * * * so as to be * * * reduced in space * * *, the Lessor may, on written notice to Lessee within 15 days from date of such damage, terminate this lease, * * *."

On June 24, 1948, Mr. Auman delivered to defendants a written notice stating that he had been served with a summons in a condemnation proceeding and elected to terminate his lease with defendants in accordance with the terms of paragraph 3, article 4.

On or about July 25, 1948, plaintiff acquired title to the property which was the subject of the condemnation suit by grant

---

* Subsequent opinion 223 P.2d 260.

deed from the owner. Thereafter defendants entered into a rental agreement with plaintiff dated August 3, 1948, covering the property in question for the period from July 25, 1948 to October 1, 1948. This lease contained the following clause: "(11) In the event there is any prior existing lease or rental agreement between tenant and State (or its predecessor in interest) covering the subject property, it is agreed and understood that this rental agreement shall cancel and terminate said prior lease or rental agreement as of the effective date of this rental agreement."

Questions: First: *Were defendants entitled to compensation for the taking of their leasehold interest on the property being condemned?*

[1] This question must be answered in the negative. By the action of plaintiff's grantor defendants' lease was terminated. By the agreement of August 3, 1948, defendants expressly recognized and agreed to the termination of the prior lease. Hence defendants did not have any property taken in the condemnation proceeding since at the time of trial they had no interest in the property.

The agreement of August 3, 1948, constitutes a novation, and the rights of the parties were covered solely by the new agreement, the original lease being void and of no effect. (Eckart v. Brown, 34 Cal.App.2d 182, 187, 93 P.2d 212.)

Second: *Were defendants entitled to recover damages for (1) the value of trade fixtures left in the premises, or (2) the cost of removing and relocating the fixtures taken away?*

[2, 3] This question must also be answered in the negative. (1) Since it is conceded that all the machinery and equipment installed on the premises by defendants were removable fixtures, the fact that defendants chose to leave some of them on the premises did not constitute the taking by plaintiff of defendants' property. Therefore compensation was properly denied defendants for such fixtures. (2) The cost of removing and relocating fixtures is not a compensable item in a condemnation proceeding. (County of Los Angeles v. Signal Realty Co., 86 Cal.App. 704, 710 et seq. 261 P. 536; Central Pac. R. Co. of California v. Pearson, 35 Cal. 247, 263.)

Hence the trial court properly disallowed defendants' claim for such items.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

---

98 Cal.App.2d 595

ABBOTT v. MILLER.

Civ. 17331.

District Court of Appeal, Second District, Division 3, California.

July 25, 1950.

Hearing Denied Sept. 21, 1950.

Action to quiet title and to remove cloud from title to realty by Ruth E. Abbott against John E. Miller. The Superior Court of Los Angeles County, Ben Rosenthal, J., entered judgment for the plaintiff, and the defendant appealed. The District Court of Appeal, Shinn, P. J., held that where divorced wife acquired husband's interest in contract for purchase of realty and paid all the consideration for the realty and grantor named both husband and wife as grantees instead of deeding realty to wife alone, husband's apparent interest was subject to resulting trust in favor of wife and grantor's mistake made husband an involuntary trustee for benefit of wife and husband was under duty to unconditionally convey his apparent legal title to wife.

Judgment affirmed.

1. Trusts 🔑81(2)

Where divorced wife acquired husband's interest in contract for purchase of realty and paid all the consideration for the realty and grantor named both husband and wife as grantees instead of deeding realty to wife alone, husband's apparent interest was subject to resulting trust in favor of wife, and grantor's mistake made husband an involuntary trustee for benefit of wife, and husband was under duty to unconditionally convey his apparent legal title to wife. Civ. Code §§ 853, 2224.

2. Appeal and error ⚷1073(1)

In action to quiet title and to remove cloud from title, defendant was not injured by judgment for plaintiff, notwithstanding that judgment would have been in better form if it had required defendant to convey his apparent legal title to plaintiff, where it was conclusively shown that defendant had no interest except the naked legal title, which he held without right and in trust for plaintiff.

◆

Jerrell Babb, Los Angeles, for appellant.

G. Verne Ivey, Los Angeles, for respondent.

SHINN, Presiding Justice.

In this action to quiet title and to remove a cloud from the title to Lot 40, Tract 12068, in the county of Los Angeles, judgment was for plaintiff and defendant appeals.

The complaint contained a conventional cause of action to quiet title. The second cause of action alleged that plaintiff was formerly married to defendant and divorced from him; prior to the divorce they were purchasing the real property on contract; defendant conveyed to plaintiff all his right, title and interest in and to the property, which conveyance was duly recorded; in the interval between the interlocutory and the final decrees, defendant brought suit to determine the interests of the parties in the property, which action was tried and resulted in a judgment in favor of plaintiff herein; subsequent to the conveyance to her of defendant's interest in the property, plaintiff has paid the balance of the purchase price in full; on June 25, 1946, the seller, Ed Krist Company, through inadvertence and mistake and contrary to plaintiff's instruction executed a deed to the property naming plaintiff and defendant as grantees; the deed was duly recorded and constitutes a cloud upon plaintiff's title. Defendant answered, claiming to be the owner of a half interest in the property. The action was tried, evidence was introduced by the parties, and the court found the facts to be as alleged in the complaint. Defendant represented himself at the trial. He appealed on the judgment roll and has caused to be included in the record a copy of the judgment in the former action and a copy of the deed from Ed Krist Company to himself and plaintiff. He has employed an attorney on the appeal.

[1, 2] In his brief defendant contends that the complaint failed to state a cause of action. This contention is without merit. Aside from the fact that the first count of the complaint stated a cause of action to quiet title, the facts alleged in the second cause of action, if proved, were sufficient to entitle plaintiff to the relief that was awarded by the judgment. Plaintiff acquired defendant's interest in the contract of purchase, paid all the consideration for the property, and the grantor, instead of deeding to plaintiff alone, named both parties as grantees. Defendant's apparent interest was subject to a resulting trust in favor of plaintiff. Civ. Code, sec. 853; 25 Cal.Jur. 178; Rest., Trusts, sec. 440. The mistake of the grantor in drafting the deed furnishes an independent ground for relief. Defendant having gained an apparent interest in the property through the grantor's mistake, held such interest as an involuntary trustee for the benefit of plaintiff. Civ. Code, sec. 2224. The judgment is supported by the findings that the facts were as alleged in the second cause of action. These findings would have required a conclusion of law that defendant held the legal title to the interest in question in trust, and under a duty to convey it unconditionally to plaintiff. The judgment would have been in better form if it had required defendant to convey his apparent legal title to plaintiff. However, the effect of the present judgment is the same, and since it was conclusively shown that defendant has no interest, except the naked legal title, which he holds without right, he is not injured by the judgment. Kittle v. Bellegarde, 86 Cal. 556, 564, 25 P. 55; Jones v. Jones, 140 Cal. 587, 591, 74 P. 143; Crouse-Prouty v. Rogers, 33 Cal.App. 246, 249, 164 P. 901.

Inasmuch as the judgment is sustainable under the second cause of action, it is unnecessary to discuss defendant's argument that plaintiff as an equitable owner could not recover under her first cause of action to quiet title. It is immaterial also whether the issues in the present action had been determined in plaintiff's favor in the former action.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

---

98 Cal.App.2d 491

SNYDER v. COTTON et al.

Civ. 17888.

District Court of Appeal, Second District, Division 1, California.

July 17, 1950.

Action by Irving J. Snyder against Samuel J. Cotton and Mickey Beckenfeld. The defendants filed a cross complaint. The trial court entered judgment for the plaintiff and the defendants appealed and the plaintiff moved to dismiss the appeal. The District Court of Appeal, Drapeau, J., held that where judgment was entered November 18, 1949, and on June 7, 1950 a motion to dismiss the appeal was filed and on that date no reporter's transcript had been filed and no denial was made of the plaintiff's showing that repeated requests had been made to counsel to perfect appeal, time which had elapsed in case was too long and appeal would be dismissed.

Appeal dismissed.

1. Appeal and error 🔑901

An appellate court has power to relieve parties from default under rules on appeal but an affirmative showing must be made to be relieved from default. Rules on Appeal, rule 53(b).

2. Appeal and error 🔑801(1)

The right to a dismissal of an appeal for delay in filing transcript of record is determined by facts as they exist when notice of motion is given.

3. Appeal and error 🔑787

Where judgment was entered November 18, 1949, notice of appeal was filed December 21, 1949 and on June 7, 1950 plaintiff moved to dismiss appeal and a defendant filed an affidavit dated June 14, 1950 averring that in March and April he had negotiated directly with plaintiff's counsel to settle case and therefore did not pay all reporter's fees but that all reporter's fees had been paid on date of affidavit, but no denial was made of plaintiff's showing that repeated requests had been made to defendant's counsel to perfect appeal, time which elapsed in case was too long and appeal would be dismissed. Rules on Appeal, rule 53(b).

Altagen, Rubin & Umann, Los Angeles, for appellant Beckenfeld.

Wood, Crump, Rogers, Arndt & Evans, Los Angeles, for respondent.

DRAPEAU, Justice.

In this case judgment was entered November 18, 1949; notice of appeal was filed December 21, 1949; notice to Clerk for preparation of clerk's and reporter's transcripts was filed January 12, 1950. Payment for clerk's transcript was received April 7, 1950; clerk's transcript on appeal was filed March 31, 1950.

June 7, 1950, motion to dismiss appeal was filed. On that date no reporter's transcript had been filed.

Appellant Beckenfeld himself filed an affidavit, dated June 14, 1950, averring that during March and April he was negotiating directly with counsel for respondent to settle the case; that he was reasonably sure it could be settled, and therefore, did not pay all of the reporter's fees; that all of the reporter's fees had been paid on the date of the affidavit.

Counsel for appellant filed no affidavit. And no denial was made of respondent's showing that repeated requests had been made to counsel to perfect the appeal.

[1] While an appellate court has the power to relieve parties from default under the rules on appeal, Jarkieh v. Badagliacco, 68 Cal.App.2d 426, 156 P.2d 969, an affirmative showing must be made under Rule 53(b) to be relieved from default. Caldwell v. Harvey, 85 Cal.App. 2d 104, 192 P.2d 62.

[2] The right to a dismissal of an appeal for delay in filing the transcript of record is determined by the facts as they exist when the notice of motion is given. Murphy v. Krumm, 21 Cal.2d 846, 136 P. 2d 8.

[3] The time which elapsed in this case is too long. Myers v. Johnson, 89 Cal. App.2d 800, 201 P.2d 884.

The appeal is dismissed.

WHITE, P. J., and DORAN, J., concur.

98 Cal.App.2d 444

GILBERT v. GILBERT.

Civ. 17668.

District Court of Appeal, Second District, Division 2, California.

July 13, 1950

Action by Belle Gilbert against Jacques S. Gilbert, wherein defendant filed an application for modification of an order requiring him to pay plaintiff $125 per month for support of minor children. The Superior Court of Los Angeles County, Ray P. Brockmann, J., entered an order denying the application, and defendant appealed. The District Court of Appeal, McComb, J., held that denial of application was abuse of discretion in view of decrease in income of defendant and his inability to practice his profession.

Order reversed.

1. Divorce ⚷309

Denial of application for modification of order requiring physician and surgeon to pay mother of his two minor children $125 per month for their support was abuse of discretion in view of evidence of father's inability to practice profession due to his physical condition, his need of an operation, and decrease in his income from almost $300 to approximately $82 per month.

2. Divorce ⚷245(1, 3)

Trial court may modify an order for alimony because of changed circumstances, and the propriety of such a modification rests largely in the discretion of trial court.

3. Divorce ⚷308

Order requiring father to make monthly payments to mother of his minor children for their support should be predicated upon his ability to pay as well as upon the necessity of the children.

4. Evidence ⚷333(7)

In proceeding by father for modification of order requiring him to make monthly payments to mother of his minor children for their support, a letter from war department dated more than four years before entry of order and showing that unhealthy physical condition of father existed prior to such date was admissible not as evidence of the truth of matter stated therein but to show father's good faith in relying on his physical disability as ground for modification of order.

5. Divorce ⚷309

In proceeding by father for modification of order requiring him to make monthly payments to mother of his minor children for their support, evidence that mother had received money from lodgers was admissible, since the amount of mother's income, regardless of source, was material as bearing upon the amount necessary for father to contribute to children's support.

◆

Eugene L. Wolver, Los Angeles, for appellant.

No appearance for respondent.

McCOMB, Justice.

From an order refusing to grant defendant's application for modification of an order providing for the payment of alimony, defendant appeals. There is no appearance on behalf of respondent.

Facts: Pursuant to stipulation of the parties, on January 26, 1949, the trial court ordered defendant to pay plaintiff $125.00 per month for the support of his two minor children. On such date defendant's monthly average income was $297.09. At the time of the hearing of the motion for modification his average income had fallen to $82.69. In addition the undisputed evidence disclosed that defendant, a physician and surgeon, was a patient in the Veterans Administration, Wadsworth Hospital, wearing a brace, and that his ability to practice his profession depended on the amount of pain he was suffering. The evidence also disclosed that defendant was in need of an operation since he was suffering from a ruptured inter-vertebral disc; that at the time of the hearing he was unable to continue the general practice of medicine due to his physical condition; that except for his medical equipment valued at a few hundred dollars he had no assets except (a) accounts receivable of which only $50 was collectible, (b) a motor vehicle the value of which was less than the chattel mortgage thereon.

Question: Did the trial court abuse its discretion in denying defendant's application for a modification of the order by which he was paying alimony for the support of his children?

[1, 2] This question must be answered in the affirmative. The law is settled that the court may modify an order for alimony because of changed circumstances, and the propriety of such a modification rests largely in the discretion of the trial court. (Triest v. Triest, 67 Cal.App.2d 320, 322, 154 P.2d 2.

[3] The trial judge stated at the conclusion of the hearing after he had suggested that both parties agree to a modification of the order so that defendant would pay $100 per month, "I cannot make an award of less than that. I do not care if he cannot pay a thing I would not make it less than that. He is not going to be relieved of it until he dies. Anything less than that would not be possible." Clearly the court refused to consider competent evidence and ignored the correct rule of law. His order should have been predicated upon the *ability of defendant to pay* as well as upon the necessity of the minor children. From the undisputed evidence and the trial court's statement this rule was not applied in the instant case.

In view of the fact that upon a rehearing questions pertaining to admissibility of the evidence will arise, we hold that:

[4] 1. The court erred in not receiving as evidence a letter from the war department dated August 3, 1944, which showed that the unhealthy physical condition of defendant existed prior to said date. Such letter would have tended to show defendant's good faith in relying upon his present physical disability. It would be admissible not as evidence of the truth of the matter stated in the letter but as evidence of the information upon which defendant acted, thus tending to show his good faith or lack thereof. (Central Heights Improvement Co. v. Memorial Parks, Inc., 40 Cal.App.2d 591, 609, 105 P.2d 596; Cope v. Davison, 30 Cal.2d 193, 200, 180 P.2d 873, 171 A.L.R. 667.

[5] 2. Defendant offered to prove that plaintiff had received money from roomers in her house. Clearly such evidence was admissible since the amount of the mother's income, no matter from what source received, was material as bearing upon the amount necessary for the father to contribute to the children's support.

The order is reversed.

MOORE, P. J., and WILSON, J., concur.

98 Cal.App.2d 485

PEOPLE v. OWENS.
Cr. 816.

District Court of Appeal, Fourth District,
California.
July 14, 1950.

William Arnold Owens was convicted in the Superior Court of Tulare County, Glenn L. Moran, J., of grand theft and second-degree burglary, and from the judgment of conviction and an order denying a new trial, he appealed. The District Court of Appeal, Barnard, P. J., held that the evidence was sufficient to sustain the convictions.

Judgment and order affirmed.

1. Burglary ⟹41(1)
Larceny ⟹65

Evidence sustained conviction on charges of grand theft and second-degree burglary relating to the theft of two diamond rings.

2. Burglary ⟹41(1)

Evidence that defendant entered jewelry store with intent to steal diamond ring sustained conviction on charge of second-degree burglary, though he did not take the ring.

◆

J. M. Lopes, Visalia, for appellant.

Fred N. Howser, Attorney General, Gilbert Harelson, Deputy Attorney General, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with grand theft of a diamond ring, in each of two counts, and in three other counts with second degree burglary. His motion for a directed verdict having been denied he rested without presenting evidence or taking the stand. A jury found him guilty on all five counts. An application for probation and a motion for a new trial were denied. He was sentenced on all five counts, the sentences on the grand theft charges to run consecutively and the others concurrently. He appeals from the judgment and the order denying a new trial.

It is first contended that the evidence is insufficient to sustain the judgment as to any of the charges. One charge of grand theft and one charge of burglary relate to a diamond ring worth $1200 taken from a jewelry store in Lindsay on August 12, 1949. A son of the jeweler, who was alone in the store at the time, testified that he saw a man looking at diamonds in the window; that this man came in and asked to see a diamond ring in a "fish tail" mounting; that the man looked at several rings from the showcase; that he went to the window for another whereupon the man said there was nothing in the window he liked; that as he returned from the window this man said "Well, I like that, my wife is in the car down in front of the bank, and I will go down and get her and bring her back to see it"; that the man then hurriedly left; that there were several other rings on the counter at the time; and that he later discovered that this ring was gone.

[1] The evidence clearly discloses that later that same day the appellant sold the missing ring to one Coleman for $450. When he was arrested two months later the appellant told the officers that he had never heard of a man named Davis, and denied that he had been involved in any ring transaction with either Davis or Coleman. Later, he admitted to them that he had sold a ring to Coleman for $450 but claimed that he did this for Davis who had promised him $50 for making the sale. While the clerk in this jewelry store believed that the appellant was the man who had thus looked at rings, he was unable to positively identify him. The other evidence removes any reasonable doubt, which might otherwise appear, in this connection. The evidence supports the judgment as to these counts.

Another grand theft count and another burglary count relate to the taking of a $775 diamond ring from a jewelry store in Dinuba on August 15, 1949. This jeweler testified that on this occasion the appellant asked to see a "fish tail" ring about ½ a carat in size; that he showed him one ring but appellant said it was larger than he wanted; that he left this ring on the counter and went to the window to get a smaller one, which he showed to the appellant; that the appellant said the smaller one was exactly what he wanted and that he would like his wife to see it; that after a little further conversation the appellant said he would bring his wife in to see it "either tonight or tomorrow morning" and then hurriedly left; that he set the ring boxes in the case and walked to the watch counter; that one of his clerks remarked that something was funny, so he returned to the diamond counter; that he then found that the larger ring he had shown the appellant was gone; and that there were no customers in the store from the time the appellant left until the ring was missed. This witness and two of his clerks positively identified the appellant as the man who was in the store. Ample evidence appears in this connection.

[2] The other count related to an incident in another jewelry store in Lindsay about the middle of August, 1949. The jeweler testified that the appellant asked to see a diamond ring about ½ carat in size; that he looked for a particular ring in the showcase on the counter and in the window; that while he was at the window he noticed the end of a ring box in appellant's left hand; that appellant's hands were at his side, his left hand being cupped; that he said "Oh, you have it there" and appellant replied "Yes, I was looking at it"; that the appellant then put his hands on the counter and had this lady's ring in his right hand and the box in his left hand; that appellant then said he wanted a larger ring, about a carat in size, and he showed him one which the appellant said he liked very much; and that appellant then said he would return with his sister, and left. He and his wife both identified the appellant as the man who had been in the store. Coleman also testified that a few days after he bought the other ring from the appellant the appellant asked him if he would be interested in a lady's diamond ring. While the appellant did not take the ring in this instance, his method of operation was the same at all three places and he offered no explanation of his unusual actions. The evidence justifies the inference that the appellant entered all three of these stores with the intent to steal diamond rings, and sufficiently supports the judgment with respect to this count.

It is further contended that the court erred in denying motions for a directed verdict and for a new trial. These points are also based upon the claimed insufficiency of the evidence and require no further consideration.

The judgment and order are affirmed.

MUSSELL, J., concurs.

---

98 Cal.App.2d 424

BAKER v. BAKER.

Civ. 14400.

District Court of Appeal, First District,
Division 2, California.

July 13, 1950.

Rehearing Denied Aug. 12, 1950.
Hearing Denied Sept. 7, 1950.

Divorce action by Irene Baker against Charles B. Baker, also known as Charles Benton Baker, in which plaintiff charged extreme cruelty and defendant filed a cross-complaint charging extreme cruelty. The Superior Court, Contra Costa County, Harold Jacoby, J., entered a judgment awarding an interlocutory decree to plaintiff and giving her part of the community property and counsel fees but no alimony, and plaintiff appealed on the ground that the failure to award her more than half of the community property and alimony was a breach of discretion. The District Court of Appeal, Nourse, P. J., held that since the value of the various parcels of community property was conflicting and the parties waived findings, the District Court of Appeal would assume that the trial court found every fact essential to support the judgment and would not weigh the evidence to determine what was true or false but would search the record for the purpose only of determining whether there was substantial evidence supporting judgment and would resolve all doubts in favor of the judgment.

Judgment affirmed.

1. Divorce ⚿253

Where wife sought a division of the community property in her complaint in divorce action, the burden was on her, in the Superior Court, to prove the value of the various parcels so that a proper award could be made.

2. Appeal and error ⚿948

Without seeing or hearing the witnesses, the District Court of Appeal should not weigh the evidence to determine what is true and what is false, and when the trial court is charged with a breach of discretion in the manner in which it weighed the evidence the appellant must show more than that there was a conflict in the evidence.

3. Divorce ⚿286

Where wife's complaint in divorce action sought division of community property but evidence of value of various parcels of community property was conflicting and counsel failed to clarify such values and parties waived findings, on wife's appeal on ground of failure of trial court to award her more than half of community property and alimony, District Court of Appeal would assume that trial court found every fact essential to support the judgment and would not weigh the evidence to determine what was true or false but would search the record for the purpose only of determining whether there was substantial evidence supporting judgment and would resolve all doubts in favor of the judgment.

◆

Breece W. Sloan, Oakland, Franklin A. Dill, San Francisco, for appellants.

Bernheim & Sugarman, Richmond, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for divorce charging extreme cruelty. Defendant answered and filed a cross-complaint charging extreme cruelty. The trial court awarded an interlocutory decree to plaintiff and gave to her a part of the community property, and counsel fees, but no alimony. Plaintiff's appeal rests wholly on the ground that the failure to award her more than half of the community property and alimony was a breach of discretion.

The evidence of the value of the various parcels of community property was conflicting and, though the trial court repeatedly urged counsel to clarify those values, they did not do so. Appellant was given the home place and furniture. Respondent was given two small houses of approximately equal value, a worthless automobile and a trailer in which he lived. A balance of $1000 due from sale of property was equally divided. Appellant frankly states that there was no proper evidence before the trial court as to the value of the three houses and asks that the matter be referred to a referee to take such evidence.

[1] This is not the time nor the place to take such evidence. Appellant sought a division of the community property in her complaint and the burden of proof was on her, in the superior court, to prove the value of the various parcels so that a proper award could be made. However there is some evidence of value, meagre and conflicting though it may be, which supports the award and the only question open to debate now is whether there was an abuse of discretion in the division, without alimony.

The parties waived findings and it is not the function of the reviewing court under these circumstances to weigh the evidence. The operative rule covering the right of the reviewing court to assume that the trial court found every fact essential to support the judgment is fully discussed in Childers v. Childers, 74 Cal.App.2d 56, 168 P.2d 218. The opinion cites Dee v. Dee, 34 Cal.App. 658, 659, 168 P. 588, where it was said that: "Since the findings were waived, it must be assumed that the court found against the plaintiff all of the facts necessary to sustain the judgment. Bruce v. Bruce, 16 Cal.App. 353, 357, [116 P. 994]."

[2] This is the rule applicable here. The evidence of values was sharply conflicting. Without seeing or hearing the witnesses this court should not weigh the evidence to determine what is true and what is false. And when the trial court

is charged with a breach of discretion in the manner in which it weighed the evidence the appellant must show more than that there was a conflict in the evidence.

[3] Our judgment rests on this ground: When findings of fact have been waived the reviewing court will assume that the trial court found every fact essential to support the judgment, and when a transcript of the evidence is before the reviewing court it will not weigh the evidence to determine what is true and what is not, but it will search the record for the purpose only of determining whether there is substantial evidence supporting the judgment and will resolve all doubts in favor of the judgment. This function of the reviewing court is fully discussed in Re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; and Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

98 Cal.App.2d 434

BOBBIO v. BERTONE.

Civ. 14425.

District Court of Appeal, First District,
Division 2, California.
July 13, 1950.

Delfina Bobbio brought an action against Stefano Bertone to recover damages for personal injuries suffered in falling down the stairs of an apartment house owned by the defendant. The Superior Court, City and County of San Francisco, Alfred J. Fritz, J., entered judgment for the defendant, and the plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that the evidence sustained the trial court's finding that plaintiff had been negligent and its judgment denying recovery.

Affirmed.

1. Landlord and tenant 🔑169(8)

In action by tenant's visitor against owner of apartment house to recover damages for personal injury suffered in falling down stairs of apartment house, evidence sustained finding of trial court that carpet on stairway had been in good condition and that visitor had been negligent and careless in descending stairs, and evidence supported judgment denying recovery.

2. Appeal and error 🔑1010(1)

Where there is substantial evidence to support findings and judgment of trial court, they cannot be disturbed by reviewing court upon appeal.

3. Appeal and error 🔑1060(2)

In action by tenant's visitor against owner of apartment house to recover damages for personal injuries suffered in falling down stairs of apartment house, where line of questioning objected to attempted to show that visitor, probably due to type of shoes she was wearing, had tendency to trip and fall, and sought to elicit testimony regarding fall visitor had taken while walking on street prior to accident, and subject was dropped upon trial court's interposition of remark that he didn't think it was material, attempt to introduce such evidence was not prejudicial.

4. Appeal and error 🔑1050(1)

In action by tenant's visitor against owner of apartment house to recover damages for personal injuries sustained in fall down stairs of apartment house, where testimony objected to attempted to show visitor's tendency to trip and fall by showing other accidents occurring to visitor at other times or places, but such tendency of visitor was not reflected in trial court's finding or judgment, admission of such evidence did not provide sufficient grounds for reversal.

5. Trial 🔑395(1)

In action by tenant's visitor against owner of apartment house to recover damages for personal injuries suffered as result of fall down apartment stairway, finding by trial court that visitor was familiar with steps and was negligent and careless in descending same at time of her accident was sufficient finding to cover question of contributory negligence raised by owner in his answer to complaint.

* * *

Frank J. Needles, Edmund J. Holl, San Francisco, for appellant.

Allen Spivock, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff appeals from the judgment for defendant in a personal injury action tried without a jury.

The accident occurred on December 21, 1943, when plaintiff Delfina Bobbio fell down the stairs upon leaving the apartment of a friend whom she had been visiting. The apartment house located at 3030 Larkin Street, San Francisco, was owned by Stefano Bertone, defendant herein.

The complaint alleged defendant negligently and carelessly permitted the carpet put down and maintained by defendant as covering on the stairway to become so worn, defective and out of repair as to become dangerous to the lives of persons traversing the hall ways, lobbies and stairway and that plaintiff "was caused to trip upon the defective carpet and was precipitated down the stair case" thereby suffering personal injuries.

The trial court found: "That plaintiff's said injuries were sustained while descending said steps when her foot missed a step as she was not looking forward but towards her left side and talking to said tenant. That plaintiff had been a frequent visitor to said apartment house and was familiar with said steps and was negligent and careless in descending same at the time of her said accident. That there was no defect in the carpet on said steps so as to constitute any negligence on the part of said defendant." In accordance with the findings the trial court gave judgment that Delfina Bobbio take nothing by her complaint therein.

Appellant seeks a reversal of the judgment on the following grounds: (1) That the evidence was insufficient to justify the decision and judgment of the trial court. (2) That the trial court committed error in law in admitting into evidence other accidents occurring to plaintiff at other times or places than the time and place at issue. (3) That the decision is against law for the failure of the trial court to make findings upon material issues.

[1, 2] (1) The evidence is conflicting as to the condition of the carpet on the stairs, but there was substantial evidence given that the carpet was in good condition, and also that appellant was looking back toward the head of the stairs where her friend was standing when she fell. Where there is substantial evidence to support the findings and judgment of the trial court they can not be disturbed by a reviewing court upon appeal. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Banducci v. Banducci, 63 Cal.App.2d 600, 605, 147 P.2d 73; Keegan v. Kaufman Bros., 68 Cal.App.2d 197, 201, 156 P.2d 261.

[3, 4] (2) As his second ground for reversal counsel for appellant states that to prove contributory negligence respondent offered testimony, over the objection of appellant, to show Mrs. Bobbio had had previous falls and contends that the question of the conduct of appellant at other times and places was not in issue and should not have been allowed. The line of questioning to which appellant objected attempted to bring out that Mrs. Bobbio, probably due to the type of shoes she was wearing, had a tendency to trip and fall, and sought to elicit testimony regarding a fall she had had while walking on the street a few days prior to the accident, the subject of this action. But before counsel for respondent could complete this line of questioning the trial court interposed the following remark: "I don't think it is very material. Is that all of this witness?" And the subject was dropped. In view of the remark of the trial judge we fail to see where the attempt to introduce such evidence was prejudicial to the cause of appellant or that it had any material bearing on the case and it does not provide sufficient grounds for reversal, since such tendency of plaintiff is not reflected in the judgment.

[5] (3) On the third point raised by appellant—the failure of the trial court to make findings upon material issues—appel-

lant made the following statement: "However, in the findings made by the trial Court, the element of whether or not any carelessness on the part of plaintiff proximately and directly contributed to any injuries sustained by plaintiff is entirely omitted." Appellant is in error. The trial court found: "That plaintiff * * * was familiar with said steps and was negligent and careless in descending same at the time of her said accident," which finding is sufficient to cover the question of contributory negligence raised by defendant in his answer to the complaint.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

98 Cal.App.2d 393

In re PARKER'S ESTATE.

STEWART et al. v. SAN DIEGO TRUST & SAVINGS BANK et al.

Civ. 3983.

District Court of Appeal, Fourth District, California.

July 11, 1950.

Hearing Denied Sept. 7, 1950.

Proceeding in the matter of the estate of Alice M. Parker, deceased, wherein the San Diego Trust & Savings Bank, executor of the estate, filed its first account, petition for instructions and an order for ratable distribution. The Superior Court, San Diego County, Robert B. Burch, J., ordered that the federal estate tax should be paid out of the so-called Parker Estate Property, and Katherine Dudley Stewart and others, residuary beneficiaries of the estate, appealed. The District Court of Appeal, Mussell, J., held that the trial court's finding that the clause in the will providing that property passing in probate of estate or by reason of testatrix' death should be delivered free from all federal estate tax included property over which testatrix exercised general power of appointment by will was reasonable and therefore binding upon the District Court of Appeal.

Affirmed.

1. Internal revenue 🔑1746

Direction in will that "every legacy, bequest, devise and interest given under this will and any codicil to it, and any property passing in the probate of my estate or by reason of my death, shall be delivered free from all federal estate tax and all inheritance tax imposed by any state, territory or district of the United States" meant that property passing by exercise in will of general power of appointment was to be distributed free from federal estate tax.

2. Wills 🔑440

In construction of wills intent of testator must be ascertained and if that intent can be clearly conceived, and is not contrary to some positive rule of law, it must prevail, and where language of will is clear and unambiguous, courts have no power to speculate as to testator's intention.

3. Internal revenue 🔑1746
Wills 🔑736

Under statute providing for proration of taxes paid except in cases where testator otherwise directs in his will, any language fairly indicating that testator does not intend proration will suffice, without necessity for further elaboration as to which legatees or devisees shall be charged. Probate Code, § 970.

4. Internal revenue 🔑1746

Words in will providing "any property passing in probate of my estate or by reason of my death, shall be delivered free from all federal estate taxes," were sufficient to show that testatrix intended that her residuary estate should bear all such taxes and to avoid effect of statute providing for proration of taxes paid unless otherwise directed. Probate Code, § 970.

5. Appeal and error 🔑1008(3)

When construction given instrument by trial court appears to be reasonable and consistent with intent of party, appellate court will not substitute another interpretation even though it seems equally tenable.

6. Appeal and error ⚷1008(3)
Internal revenue ⚷1746

Where testatrix had been given power under will of another to convey corpus and remainder of trust in such manner as she should direct in her last will, and testatrix had provided by her own will that "any property passing in the probate of my estate or by reason of my death shall be delivered free from all federal estate tax * * * and such taxes shall be paid out of the residue of my estate" trial court's interpretation of will as requiring that appointive property be distributed free from federal estate tax was reasonable and binding upon District Court of Appeal.

◆

Wm. D. Morrison, San Diego, for appellants.

Whelan & Whelan and Vincent Whelan, San Diego, for respondent Susan Tyler Cramer.

George H. Stone and Glen H. Munkelt, San Diego, for respondent San Diego Trust & Savings Bank.

MUSSELL, Justice.

The last will and testament of Alice M. Parker, deceased, was admitted to probate in the county of San Diego on August 13, 1948. The decedent, by this instrument and three codicils thereto, disposed of her own estate and of a trust estate created by the last will of Myron T. Gilmore, over which Alice M. Parker had power of appointment and of testamentary disposition.

In the Parker estate, a United States tax return was filed, in which both properties of Alice M. Parker and the Gilmore trust were included and a federal estate tax was assessed thereon as a unit.

The third codicil to the will of Alice M. Parker, as far as applicable here, provides as follows:

"First: That paragraph 'Sixth' of my said Will be revoked and in lieu thereof I provide:

"'Sixth:' Every legacy, bequest, devise and interest given under this Will or any Codicil to it, and any property passing in the probate of my estate or by reason of my death, shall be delivered free from all Federal Estate Tax and all Inheritance taxes imposed by any state, territory, or district of the United States. Such taxes shall be paid out of the residue of my estate."

The trial court, in its decree settling first account, petition for instructions and order for ratable distribution, ordered "that the Federal Estate Tax paid in the sum of $11,521.82 and any additional federal estate tax that may be found due should, by reason of the gift of tax contained in Paragraph 6 of said Will, as amended by Third Codicil, be paid out of the so-called Parker Estate property".

The appellants, residuary beneficiaries of the estate of Alice M. Parker, appeal from the quoted portion of the decree.

The question here presented is whether the trial court properly interpreted the quoted provision of the third codicil of the Parker will.

The will of Myron T. Gilmore was admitted to probate in San Diego County June 23, 1939. By the terms of this instrument, a greater part of the decedent's property was given and devised to the San Diego Trust and Savings Bank, in trust, to pay from the net income $250.00 per quarter to each of two beneficiaries for a period of two years and the entire net income was made available for distribution, except for the two beneficiaries, to Alice M. Parker during her lifetime. She was given power to convey the corpus and remainder of said property to such person, persons or charity and in such a way or manner as she should direct in and by her last will and testament, if any. In accordance with the terms of the will, the trustee paid the income and also a part of the corpus of the trust property to Alice M. Parker during her lifetime.

Subsequent to the death of Myron T. Gilmore, Alice M. Parker made her will on February 26, 1943, in which she disposed of her real and personal property and in the fifth paragraph thereof exercised the power of appointment and made distribution of the trust estate, as authorized under the Gilmore will, disposing of the entire trust estate. In the sixth paragraph of the Parker will it was provided that: "Every legacy, bequest, devise and interest given under this Will or any Codicil to it, shall be delivered free from inheritance taxes imposed by any state, territory or district of the United States. Such taxes shall be paid out of the residue of my estate."

The inventory and appraised value of Alice M. Parker's estate was $40,405.25, which, when standing alone, was not sufficient in amount to be subject to a federal estate tax. The Gilmore trust property had an inventory and appraised value of $272,508.54 and the aggregate value of the two properties was used as a base upon which the federal estate tax was exacted pursuant to the provisions of the United States Internal Revenue Code, 26 U.S.C.A.

Appellants' position is that, under the circumstances, the federal estate tax should be borne by the Gilmore trust property and the Parker estate property in proportion to the net assets of each of said properties.

It is admitted that the federal estate tax is one imposed on the privilege of transfer rather than on the right of succession and that the tax is computed on the basis of the value of the unit of the two properties.

As is argued by appellants, the Gilmore trust property, over which decedent Alice M. Parker exercised the power of appointment by virtue of the Gilmore Will, was not part of her property nor any part of her estate. Estate of Bowditch, 189 Cal. 377, 380, 208 P. 282, 283, 23 A.L.R. 735; Estate of Newton, Cal.App., 210 P.2d 551. In the Bowditch case, 189 Cal. at page 380, 208 P. at page 283, 23 A.L.R. 735, the court said: "'When a donor gives to another power of appointment over property, the donee of the power does not thereby become the owner of the property. The donee has no title whatever to the property. The power is simply a delegation to the donee of authority to act for the doner in the disposition of the latter's property.' (Citing cases.)"

In support of their contention that the federal estate tax should be borne proportionately to the net assets of each of the estate properties here involved, appellants rely principally on the holdings in three New Jersey cases: (1) Fidelity Union Trust Co. v. Suydam, 125 N.J.Eq. 458, 6 A.2d 392, 396; (2) Palmer v. Palmer, 135 N.J.Eq. 516, 39 A.2d 438; and (3) Phraner v. Stone, 137 N.J.Eq. 284, 44 A.2d 504; The language used in these cases relative to the payment of taxes was not as inclusive and specific as that used in the instant case. In the Fidelity case, the testatrix provided that her executor pay from the residue of her estate all inheritance or estate taxes, both state and federal, levied or assessed "against gifts herein made" [6 A.2d 395.] and it was held that the testatrix did not intend her express direction to pay taxes to cover so much of the federal estate tax as related to appointed property distributed under the will.

In the Palmer case, the will provided that "all estate, legacy, transfer, inheritance and succession taxes which may be imposed, chargeable or payable upon my estate, or any legacy, bequest or devise herein, * * * shall be a charge against and shall be paid from my residuary estate". [39 A.2d 444.] It was there held that the taxes therein mentioned included only taxes upon property passing by the will itself, and excluded all taxes upon property forming the subject matter of inter vivos trusts set up in the will.

In the Phraner case, the language used by the testatrix was as follows: "I direct that all inheritance or transfer taxes levied against my estate or any portion thereof shall be paid out of my residuary estate". [44 A.2d 506.] The court held that in disposing of her own estate, the testatrix did not intend by her direction in her will to pay taxes to cover that part of the federal estate tax relating to appointed property.

[1] In the instant case, the language used by the testatrix was that every bequest, devise and interest given under the will and any property passing in the probate of her estate or by reason of her death should be delivered free from all federal estate tax and all inheritance taxes imposed by any state, territory or district of the United States and that such taxes should be paid out of the residue of her estate. The language used may reasonably be said to include every legacy, bequest, devise and interest given under the will and any property passing in the probate of her estate or by reason of her death, including the appointive property disposed of in the will, and to mean that the appointive property was to be distributed free from the federal estate tax. Furthermore, there is no statement that the federal estate tax should be borne by the Gilmore trust property. All taxes were, by specific direction, to be paid out of the residue of the estate.

[2] The court, in the Phraner case, supra, in the commenting on the Fidelity and Palmer cases and others in New Jersey, stated that in each instance where the question had been presented, the courts of that state had decided the same by ascertaining the intention of the decedent. In the instant case, the intention of the testatrix expressed by the language of her will, particularly the quoted language in the third codicil relative to paragraph sixth of the will, is determinative of the controversy before us.

As was said in Estate of Major, 89 Cal. App. 238, at page 241, 264 P. 542, 543: "Primarily it may be said that in the construction of wills the cardinal rule to be observed is to ascertain the intent of the testator, and if that intent can be clearly conceived, and is not contrary to some positive rule of law, it must prevail. In the ascertainment of this intent, however, courts cannot make a will for a testator or attempt to improve upon the will which the testator actually made. It follows that a testator's intention must in all cases be ascertained from the words which he employs in his will, together with such extrinsic evidence as may be admissible. The question always before the mind of the court is not what the testator should have meant to do, or what words did he mean to use, but what did he mean by the words which he actually used." This rule is approved in Estate of Bourn, 25 Cal. App.2d 590, 602, 78 P.2d 193.

Where the language is clear and unambiguous, the courts have no power to speculate as to the testator's intention. Estate of Hartman, 21 Cal.App.2d 266, 270, 68 P.2d 744. In the instant case, in determining the intention of the testatrix, consideration must be given to the enactment of Section 970 of the Probate Code, which became effective August 4, 1943, after the execution of the original will of Alice M. Parker and before the execution of the third codicil on December 10, 1946. Said section provides in part as follows: "Proration of amount of tax paid. Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, trustee or other fiduciary has paid an estate tax to the Federal Government under the provisions of any Federal estate tax law * * * upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will * * * shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues."

Applying the provisions of said section to the instant case, the question here is whether the testatrix has "otherwise directed" in her will.

[3] In the Estate of Hotaling, 74 Cal. App.2d 898, 901, 170 P.2d 111, 113, the court, in commenting upon the effect of the words "except in a case where a testator otherwise directs in his will, stated: "The statute simply provides for proration 'except in a case where a testator otherwise directs in his will.' Any language fairly indicating that he does not intend proration would suffice, without further elaboration 'as to which legatees or devisees shall be charged', for as long as it is clear that he 'otherwise directs', the tax burden will re-

main, in any given case, where it has always rested, i. e., on the corpus or residue."

[4] In her will of February 26, 1943, Alice M. Parker made no provision for the payment of any federal tax and no reference was made to such taxes. At that time section 970 of the Probate Code was not in effect. When the third codicil was executed on December 10, 1946, the federal estate tax would, by operation of law, be equitably prorated among the persons interested in the estate, unless the testatrix "otherwise directed". This she did, by providing that all taxes, including the federal estate tax, were to be paid out of the residue of her estate. In order to free the legacies, bequests, devises and interests given under the will from the federal estate tax, the provision for payment thereof out of the residue of the estate must be given effect. The words "any property passing in the probate of my estate or by reason of my death, shall be delivered free from all federal estate tax" are all inclusive and are sufficient to show that the testatrix intended that her residuary estate should bear all such taxes. Instead of contemplating proration, these words "otherwise direct". Estate of Hotaling, supra, 74 Cal.App.2d at page 902, 170 P.2d 114.

In Isham v. New York Ass'n for Improving the Condition of the Poor, 177 N.Y. 218, 69 N.E. 367, under a will creating a trust, the beneficiary was empowered to dispose of the property by will and gave the same to various charitable institutions and directed her executor, after the payment of numerous bequests, to pay out of the residue any inheritance taxes due on any of the legacies, whether to the state or federal authorities. It was held therein that the various dispositions of the trust estate constituted legacies and that the transfer taxes were payable out of the residuary estate. The court there said, 69 N.E. on page 368: "Whether we regard the intention, as exhibited by the comprehensiveness of the language used by the testatrix in directing the payment of 'any and all transfer or inheritance taxes' out of her residuary estate, or whether we regard the effect and nature of the exercise by her of the power of appointment, it must be very clear that the appointees of the fund were to take their shares thereof without diminution through imposition of federal or state taxes upon the transfer. It may be true that they take under the execution of the power of appointment, and therefore through a source of title emanating from the will of this testatrix's father; but that does not affect the question presented, which is whether, in exercising the power, she has made a gift or a legacy to the extent of its exercise. * * * The effect of conferring a general power of appointment is to invest its donee with a power of disposition as broad as though she was disposing of her own property. In its exercise she in fact makes a gift or bequest to persons of her own selection."

[5] When the construction given an instrument by a trial court appears to be reasonable and consistent with the intent of a party, appellate courts will not substitute another interpretation thereof though it seems equally tenable. Estate of Boyd, 24 Cal.App.2d 287, 290, 74 P.2d 1049; Kautz v. Zurick Gen. A. & L. Ins. Co., 212 Cal. 576, 582, 300 P. 34; Estate of Duraind, 51 Cal.App.2d 206, 210, 124 P.2d 330.

[6] The trial court held that the third codicil to the Parker will directed the payment of the federal estate tax from the estate of Alice M. Parker as distinguished from the Gilmore trust estate and we cannot say that its interpretation was unreasonable. Under the circumstances here presented, such interpretation is binding upon us.

Decree affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.

98 Cal.App.2d 674

ROBBINS v. HOLTHER et al.

Civ. 17357.

District Court of Appeal, Second District, Division 3, California.

July 28, 1950.

Rehearing Denied Aug. 17, 1950.

Eva Robbins, also known as Eva M. Robbins, brought an action against James H. Holther and another, to recover on a promissory note. The Superior Court, Los Angeles County, Carl A. Stutsman, J., entered judgment for the plaintiff, and the defendants appealed. The District Court of Appeal, Shinn, P. J., held that the judgment on the note could not be affirmed because of the conflicting findings of the trial court.

Reversed.

1. Trial ⚷395(6)

It was improper and confusing for trial court to state material facts found in separate findings by reference to paragraphs of pleadings.

2. Bills and notes ⚷518(1)

In action to recover on note, where issue arose as to whether note had been given as purchase price for stock or stock had been pledged merely as collateral security for note, evidence sustained trial court's finding that payee of note owned stock, notwithstanding conflicting finding by trial court that plaintiff held such stock only as collateral security.

3. Fraud ⚷58(1)

In action to recover damages for fraud, evidence would not sustain trial court's finding that plaintiff had been defrauded by defendants.

4. Trial ⚷398

Where plaintiff brought one cause of action on note and another cause of action based on fraud, trial court's finding that note had been given as purchase price of stock was inconsistent with its finding that plaintiff had been defrauded by defendants' manipulation of affairs of corporation so as to render said stock worthless, and if defendants were liable on note they were not liable in damages.

5. Bills and notes ⚷132

Where note was given in consideration for stock, if parties understood and intended that note should be held conditionally and be returned if consent to transfer of stock should not be given by Commissioner of Corporations, transaction would have been conditional, notwithstanding that no condition was stated in agreement for sale of stock.

6. Bills and notes ⚷537(1)

In action to recover on note, where it was alleged that note had been given conditionally and that payee was under obligation to return note if Commissioner of Corporations should fail to consent to transfer of stock given in consideration of note, but no such condition was stated in agreement for sale of stock, question of fact was presented as to existence of condition.

◆

Victor Bewley and Kimball Fletcher, Jr., Los Angeles, for appellants.

John Moore Robinson, Alan G. Campbell and Robert M. Himrod, all of Los Angeles, for respondent.

SHINN, Presiding Justice.

In this action Eva M. Robbins was awarded judgment against James H. Holther and Helen M. Holther for $5,000, with interest at the rate of seven per cent per annum from July 30, 1947. The Holthers appeal.

In the first cause of action plaintiff set out a promissory note of defendants for $5,000, dated July 30, 1947, payable to plaintiff in 25 equal monthly instalments of $200, commencing on September 15, 1947, with interest from that date at the rate of three per cent per annum payable monthly. Default in the payment of any instalment would render the entire note immediately due. The complaint alleged that no part of the note had been paid. Defendants Holther did not deny the foregoing allegations.

In a second cause of action plaintiff attempted to state a case of fraud. It was alleged that plaintiff loaned $5,000 to James

H. Holther on December 15, 1946, that later Holther caused Perfect Products to be organized as a corporation and "caused fifty shares of the capital stock of said corporation to be issued to plaintiff for said sum of Five Thousand Dollars ($5,000.00) previously loaned and advanced to said defendant by plaintiff as aforesaid," and that no part of the sum had been paid. It was also alleged that defendants Holther later gave plaintiff the note for $5,000 as alleged in the first cause of action, and that plaintiff entered into an agreement to transfer the 50 shares of stock to James H. Holther. There were also allegations to the effect that Holther had fraudulently manipulated the affairs of Perfect Products so as to render the capital stock thereof wholly worthless, and that for her $5,000 loan to Holther plaintiff held only said promissory note.

There were three other causes of action, based upon the same transaction, but it is unnecessary to take them into consideration. The answer set up eight special defenses to the various causes of action. One of the defenses to the first cause of action was that the consideration for the note was plaintiff's agreement to transfer to James H. Holther 50 shares of the capital stock of Perfect Products, a California corporation, which agreement, it was alleged, was illegal for the reason that said 50 shares of stock could not be legally sold or transferred without the consent of the Commissioner of Corporations, which consent had not then been given. The issue to be determined under the first cause of action was whether the note was given as an inseparable part of an agreement that was illegal. The undisputed facts with relation to the first cause of action are the following: 50 shares of stock had been issued to plaintiff in accordance with a permit of the Commissioner of Corporations. As required by the permit, the stock had been placed in escrow and was not subject to a consummated sale or transfer without the consent of the Commissioner. By an undated agreement, presumably executed on the date of the note, July 30, 1947, plaintiff agreed to transfer the 50 shares of stock to James H. Holther who agreed to pay $5,300 for the same in 25 monthly payments of $200, and one payment of $300. This agreement was represented by Holther to the Commissioner of Corporations as conditioned upon the Commissioner's giving his consent to the transfer. Although consent of the Commissioner had not been obtained for transfer of the stock, plaintiff had signed a request for such consent on July 28, 1947, and the Commissioner approved the transfer September 29, 1947. Thereafter, James H. Holther promised in writing to comply with his agreement to pay plaintiff $5,000.

[1] Upon these simple issues the court made 47 findings, most of them by reference to the paragraphs of the pleadings. Comment on this improper and confusing method of stating the material facts found is unnecessary. The unfortunate consequences speak for themselves. We shall mention only the most important of the many contradictions and inconsistencies in the findings.

There are several specific findings that said promissory note "was, and is, void and was received as consideration for an interest in shares of stock of Perfect Products, a California corporation, in violation of the Permit for said shares issued by the Commissioner of Corporations of the State of California." The court also found that the note was not given as consideration for the purchase of the stock and "that said promissory note [being the identical note] is a legal, valid, and subsisting joint and several obligation of defendants James H. Holther and Helen M. Holther, and each of them, and is supported by adequate consideration therefor."

It was not pleaded by plaintiff that she held the stock only as collateral but that question seems to have arisen, as evidenced by the findings. The court found that during the month of September, 1946, plaintiff loaned $5,000 to a joint venture composed of James H. Holther, Robert Erwin Allen and Gary H. Bronneck. It was also found "That thereafter a Permit of the said Corporate Securities Commissioner of the State of California was secured and insofar as possible the said loan by plaintiff was changed so that plaintiff became insofar as possible the owner of stock in Perfect Products, a California corporation; that such ownership was not a collateral to said loan." However, the court made another finding, reading as follows: "[t]hat the interests of plaintiff in Perfect Products, a California corporation, as stockholder, are collateral to and merely as security for the indebtedness of said defendants, and each of them, to plaintiff in the amount of Five Thousand Dollars ($5,000.00)."

[2] The conflicting findings as to whether plaintiff owned the stock or held it only as collateral relate only to an evidentiary fact. There was substantial evidence that she owned it and the finding that she did own it cannot be disregarded. The main question was whether the note was given as the purchase price of the stock. The findings are that it was, and also that it was not. It must be that the trial judge depended too much upon counsel for the preparation of findings. Only inadvertence can account for the conflicts.

[3, 4] Although there was a general finding "that plaintiff has been defrauded by defendant James H. Holther, and Helen M. Holther," of the sum of $5,000, the facts found do not support this conclusion. Helen M. Holther was not accused of any fraudulent acts. There was no finding of damage. If defendants are liable on the note they are not liable in damages. The judgment is on the note and not for damages. It cannot be affirmed, for the reasons stated.

[5, 6] Plaintiff says that no sale of the stock was consummated and in this respect there was no violation of the permit; that she did not receive consideration for the stock, but held the note conditionally, and under a duty to return it if consent to the transfer should not be granted; that her agreement was a continuing offer, upon a condition that was met, as shown by Holther's representation to the Commissioner of Corporations and his letter to her promising to pay the note. There was no condition stated in the agreement for sale of the stock, but the transaction may, nevertheless, have been conditional if the parties so understood and intended. This is an important question of fact for the trial court and not one of law.

Plaintiff appears to have been the victim of gross imposition but the action must be retried for a proper determination of the issues.

The judgment is reversed; no costs on appeal.

WOOD and VALLÉE, JJ., concur.

---

98 Cal.App.2d 517

PEOPLE v. DAWSON.

Cr. 2656.

District Court of Appeal, First District,
Division 2, California.
July 21, 1950.

Hearing Denied Aug. 17, 1950.

Donald Dawson was convicted of an offense and after time for filing notice of appeal was long past, he moved to file a notice of appeal nunc pro tunc. The Superior Court, City and County of San Francisco, Preston Devine, J., denied the motion and the defendant appealed. The District Court of Appeal, Dooling, J., held that although the accused showed that after his conviction and before expiration of the time for filing notice of appeal, he was stricken with an illness which totally incapacitated him from filing such notice in pro per and that he had discussed it with his attorney who failed to file it, his motion to file an appeal nunc pro tunc made long after the time for filing notice of appeal would be denied, since the timely filing of notice of appeal is jurisdictional and subject to no qualification by reason of hardship.

Order affirmed.

1. Criminal law 🔑1081

Where motion to file notice of appeal nunc pro tunc from judgment of conviction was made long after time for filing notice of appeal therefrom had expired, although accused showed that after his conviction and before expiration of time for filing notice of appeal, he was stricken with an illness which totally incapacitated him from filing such notice in pro per and that he had discussed it with his attorney who failed to file it, motion would be denied, since the timely filing of notice of appeal is jurisdictional and subject to no qualifications by reason of hardship.

2. Criminal law 🔑1069(1)

In the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal even to relieve against mistake, inadvertence, accident or misfortune.

Donald Dawson, in pro per.

Fred N. Howser, Atty. Gen., C. A. Linn, Deputy Atty. Gen., Edmund G. Brown, Dist. Atty., Janet Aitken, Asst. Dist. Atty., San Francisco, for respondent.

DOOLING, Justice.

Appellant appeals from an order of the Superior Court denying his motion to file a notice of appeal nunc pro tunc. The time for filing notice of appeal from the judgment of conviction in his case was admittedly long past when the motion was made.

Appellant made a showing that after his conviction and before time for filing notice of appeal had expired he was stricken with an illness which totally incapacitated him from filing notice of appeal in pro per and that his attorney failed to file a notice although appellant had discussed such filing with him.

[1, 2] Our supreme court has repeatedly held the timely filing of a notice of appeal to be jurisdictional subject to no qualification by reason of hardship. People v. Behrmann, 34 Cal.2d 459, 211 P.2d 575; People v. Slobodion, 30 Cal.2d 362, 365–366, 181 P.2d 868; People v. Lewis, 219 Cal. 410, 413–414, 27 P.2d 73; Estate of Hanley, 23 Cal.2d 120, 122–123, 142 P.2d 423, 149 A.L.R. 1250. The rule is harsh in its application to a case like the present, but unless the supreme court sees fit to relax it we are bound to give it application. In Estate of Hanley, supra, 23 Cal.2d at page 123, 142 P.2d at page 424, the court said: "In the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal [citations], even to relieve against mistake, inadvertence, accident, or misfortune [citations]."

This case cannot be brought within People v. Slobodion, supra, 30 Cal.2d 362, 181 P.2d 868, where under the peculiar facts the court found a constructive filing of the notice of appeal. Under the circumstances it appears that appellant should have some avenue for relief in the courts, but the existing decisions make it clear that it cannot be by the late filing of a notice of appeal.

Order affirmed.

NOURSE, P. J., and GOODELL, J., concur.

---

98 Cal.App.2d 481

TALMADGE et al. v. MOORE et al.

Civ. 4118.

District Court of Appeal, Fourth District, California.

July 14, 1950.

Hearing Denied Sept. 11, 1950.

John W. Talmadge and Martha L. Talmadge sued Isabelle M. Moore and Mayme M. Moore to enjoin defendants from trespassing on realty, and defendants filed a cross-complaint. The Superior Court of San Bernardino County, A. D. Mitchell, J., rendered a judgment adverse to defendants, and defendants appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that boundary line between plaintiffs' and defendants' adjoining lands had not been established by agreement.

Judgment affirmed.

1. Appeal and error ⚿1011(1)

Findings of fact of trial court on conflicting evidence are binding upon District Court of Appeal.

2. Boundaries ⚿37(5)

Evidence that plaintiffs' predecessor in interest in land had boundary line surveyed, and that adjacent landowners acquiesced in building a fence along line as surveyed, and that plaintiffs' predecessor in title intended to claim up to true boundary line, irrespective of where fence was built, sustained finding that boundary line had not been established by agreement.

3. Boundaries ⚿48(2)

Where landowner acquiesces in building of fence by adjoining landowner along a specified line, and acquiescence is as to fence as a barrier and not as a boundary line, no agreed boundary line is established.

4. Boundaries ⚿46(1)

In order to establish an agreed boundary line an intention to accept the marked boundary as the true boundary must be shown.

◆

Taylor F. Peterson, San Francisco, for appellants.

Curtis & Curtis, San Francisco, for respondents.

MUSSELL, Justice.

Action for injunction to enjoin trespass on real property.

Plaintiffs and defendants own adjacent lots in Block 61 in the city of San Bernardino. Both lots front on "D" Street (a north and south street) in said city and extend westerly therefrom. Plaintiffs' lot is 250 feet in depth and that of the defendant 300 feet. The center line of the block running west from D Street is the boundary line separating the two properties and the controversy herein involves the location of this line on the ground. Both the complaint and cross-complaint, in describing the properties involved, refer by lot and block to the same common boundary line as separating them.

Plaintiffs brought this action to enjoin alleged actual and threatened trespass on their land by the defendants and the defendants in turn cross-complained to enjoin the plaintiffs from actual and threatened trespass on their land.

It is admitted that the parties own the lands as described in the complaint and cross-complaint and that the taxes have been paid by the parties as their interests appear of record.

The trial court found, among other things, that the parties own the property described in their respective pleadings; that the true boundary line separating the two properties is an east and west line bisecting said block 61, which line is delineated on the ground by certain iron pipes set in concrete by Charles L. Foulke, a licensed surveyor. Judgment was entered accordingly and the defendants were restrained and enjoined from entering up on the property of the plaintiffs.

From this judgment the defendants appeal, contending that the evidence is in sufficient to support the findings of fact and the judgment; that the boundary line between defendants' property and that of the plaintiffs was established by agreement by the predecessors in interest of the plaintiff on the one hand and the defendants on the other; that in 1919 a dispute and uncertainty existed as to the location of the boundary line; that a survey was made and the line located by agreement; that the agreement had been acted upon and acquiesced in until February, 1947; that the court erred in failing to find specifically upon the question as to defendants' right to use a driveway alleged to have been used by them for many years. The contention that the evidence is insufficient to support the findings and judgment is without merit.

There is substantial evidence that the parties owned their respective lots for many years but that the location of the boundary line was not actually marked on the ground until February 3, 1947, when Charles L. Foulke, whose qualifications as a licensed surveyor were admitted, made a survey of the property described in the complaint and as a result of such survey, set wooden stakes and later iron pipes along the line which he determined to be a true line dividing the properties. The evidence was sufficient to support the finding of the court that the true boundary line was as found and established by Mr. Foulke.

Defendants claim that in 1919 a dispute and uncertainty existed as to the location of the boundary line; that a survey was made and the line located by agreement; and that the agreement had been made and acquiesced in until February, 1947. However, the testimony of witness William C. Seccombe, a former owner of the property, relied upon to establish these facts, was that, as a prior owner of the property in 1919, he did not know where the line was, and being desirous of building a new fence, he called upon a surveyor to survey the line so that he could erect a fence on it; that the fence was subsequently erected and extended from the rear of his lot to within 60 or 70 feet of the west line of D Street; that an iron stake was driven in the ground at the southeast corner of the lot and that he had a conversation with the defendants prior to building the fence, the substance of which was that the line, as made by the survey, was satisfactory upon which to build it. He testified further that it was his intention to claim "clear up to the true property line, wherever it might be, irrespective of where the fence might be". This testimony indicates that the agreement, if any, between the defendants and Seccombe was not as to a boundary line but was that the fence, where it was built, was satisfactory. It is apparent that Seccombe intended to claim the full width of his property, regardless of the location of the fence. The field notes of the surveyor employed by Mr. Seccombe were not produced in court and the trial court apparently determined that the line, if any, marked on the ground at the time of the erection of the fence, was not shown to be different from that shown by the Foulke survey.

[1] At most, the testimony produced by defendants merely created a conflict in the evidence. The trial court's findings thereon, under the circumstances presented, are binding upon this court. Dillard v. McKnight, 34 Cal.2d 209, 209 P.2d 387; Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

[2-4] In support of defendants' contention that the court misapplied the law as to boundaries in the instant case, numerous cases are cited, including Price v. DeReyes, 161 Cal. 484, 119 P. 893; Young v. Blakeman, 153 Cal. 477, 95 P. 888; Moniz v. Peterman, 220 Cal. 429, 31 P.2d 353; Roberts v. Brae, 5 Cal.2d 356, 54 P.2d 698; and Martin v. Lopes, 28 Cal.2d 618, 170 P.2d 881. These cases hold generally that in order to establish an agreed boundary line, it is necessary to show that there was an uncertainty or belief of uncertainty in the location of the line; that there was an agreement, express or implied, fixing the line; and that there was an actual designation of the line upon the ground and occupation in accordance with such designation. The court found on conflicting evidence that the boundary line had not been established by agreement of the predecessors in interest of the parties; that there was no dispute as to the location of said line. Where, as here, the acquiescence in the fence was as a barrier and not as a boundary line, no agreed boundary line was established. Roberts v. Brae, supra, 5 Cal.2d at page 360, 54 P.2d 698. Furthermore, an intention to accept the marked boundary as the true boundary must be shown. Martin v. Lopes, supra, 28 Cal.2d at page 636, 170 P.2d 881. In the instant case the testimony of witness Seccombe, plaintiffs' predecessor in interest, was that he intended to claim "clear up to the true property line, wherever it might be, irrespective of where the fence might be". Under such circumstances we cannot hold that there was no substantial evidence to support the court's finding that the boundary line had not been established by agreement.

There was no error in failing to find specifically upon the question of the driveway as the judgment of the court did not restrict the defendants in the use of any of the property owned by them, and the description of the property in the answer and cross-complaint does not indicate that the defendants claim any land for a driveway or otherwise beyond the true boundary line between the lots involved.

The judgment is affirmed.

BARNARD, P. J., concurs.

98 Cal.App.2d 472

OSBURN v. WRIGHT.

Civ. 17261.

District Court of Appeal, Second District, Division 3, California.
July 14, 1950.

Rehearing Denied Aug. 7, 1950.

Hearing Denied Sept. 11, 1950.

Rosemary Osburn brought action against Howard W. Wright, as administrator with the will annexed of the estate of R. H. Hawn, deceased, for construction of agreement entered into by defendant's decedent with plaintiff's assignor. A judgment in favor of defendant was entered by the Superior Court of Los Angeles County, Walter H. Odemar, J., and the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that agreement by defendant's decedent for payment to plaintiff's assignor of $12,500 out of one-half of the sales of the residuum remaining after refining of crude oil and sumps wherein it was stored, when and if made, would be construed as intending that the $12,500 was to be paid from proceeds of future sales, if any, and that one-half of the funds deposited in court in prior action seeking to avoid a contract for sale of the residuum and thereafter turned over to defendant as administrator of estate of his decedent would not be applied on the indebtedness acknowledged by defendant's decedent.

Judgment affirmed.

1. Evidence 🔑77(1)

Where there was no evidence as to negotiations between defendant's decedent and plaintiff's assignor at time agreement was entered into by them, and neither plaintiff's assignor nor one who had been present at time of the negotiations and whose deposition was taken on plaintiff's behalf was questioned concerning any conversation had between defendant's decedent and plaintiff's assignor before or at time agreement was entered into, it was to be presumed that testimony of such witnesses as to discussions between defendant's decedent and plaintiff's assignor would not have been advantageous to plaintiff. Code Civ.Proc. § 1963, subd. 5.

2. Deposits in court 🔑9
Mines and minerals 🔑83

Agreement by defendant's decedent for payment to plaintiff's assignor of $12,500 out of one-half of the sales of the residuum remaining after refining of crude oil and sumps wherein it was stored, when and if made, would be construed as intending that the $12,500 was to be paid from proceeds of future sales, if any, and that one-half of the fund deposited in court in prior action seeking to avoid a contract for sale of the residuum and thereafter turned over to defendant, as administrator of estate of his decedent, should not be applied on the indebtedness acknowledged by defendant's decedent. Civ.Code, §§ 1647, 1649.

John C. Packard, Los Angeles, for appellant.

Chandler, Wright, Tyler & Ward, Los Angeles, for respondent.

SHINN, Presiding Justice.

This action involves the construction of the following agreement:

"September 24, 1945

"Robert A. Wallace,
"Los Angeles,
"California.

"Dear Sir:

"Heretofore, when I purchased certain property at Santa Maria, California, there was included in the sale certain residium which was and is now located in the earthen pits on the property. My agreement with you, which was made by my agent, D. P. Neill, was that you were to receive the sum of $25,000 out of the sale of one-half of the residuum. I have therefore paid you on account $12,500, which you acknowledged the receipt of. There is a balance due you of $12,500 out of one-half of the sales of the residium when and if made.

"I now agree to pay to your designated agent the sum of $12,500 out of one-half of the first sums realized from the sale of the residium, when and if made.

"In this agreement I am not to be limited in any way in making such sales.

"Please acknowledge this understanding by executing this letter in the place provided.

"R. H. Hawn
"R. H. Hawn

"Accepted:
"Robert A. Wallace
"Robert A. Wallace."

In February, 1944, Hawn acquired title to certain real property with a quantity of residuum located thereon which had been accumulated in the refinement of petroleum. Hawn's grantor, Silver Wing Oil Company, had previously made a contract with Five C Refining Company for the sale of the residuum, to be paid for as extracted at the rate of 13 cents per barrel. In making his purchase Hawn took title subject to, and agreed in writing to be bound by, the agreement of sale to Five C. However, he repudiated the Five C contract, refused to perform under it, and undertook to sell the residuum to one Neill. In the litigation which followed between Neill and Five C, the latter's contract was confirmed by the court and after affirmance of the judgment on appeal on April 17, 1947, Neill v. Five C Refining Co., 79 Cal.App.2d 191, 179 P.2d 818, something over $18,000 that had been deposited in court by Five C was paid to Howard W. Wright, as administrator with the will annexed of the estate of R. H. Hawn, deceased, Neill having on September 18, 1945, assigned to Hawn any interest he might have in the fund.

The judgment which confirmed the Five C contract was rendered on the 12th of September, 1945. The above quoted agreement between Hawn and Wallace was entered into September 24, 1945. Plaintiff, as assignee of Wallace, brought suit on the agreement for $12,500 after her claim for that amount against the estate of Hawn had been rejected. She contends for a construction of the agreement under which one-half of the sum on deposit in the case of Neill v. Five C Refining Co. would be payable to her, to be applied on the $12,500 indebtedness. The defendant, administrator with the will annexed, contends that the $12,500 was to be paid from the proceeds of future sales, if any should be made, and no part of it from funds that were, or might become payable by Five C. The trial court agreed with this construction, gave judgment for the defendant, and plaintiff appeals. The facts of the case are considerably involved. A history of the events that led to the present suit will be found in Neill v. Five C Refining Co., supra.

The agreement is unquestionably ambiguous, and would be somewhat difficult to interpret without a consideration of the surrounding circumstances and the relation of the parties at the time it was made. Civ. Code, sec. 1647. Hawn drew the agreement, and since he was the promisor, it should be interpreted in the sense in which he believed it to be understood by Wallace, the promisee. Civ.Code, sec. 1649. As we shall see, there was strong circumstantial evidence that the parties understood the agreement as the court understood it.

In the trial of the present action there was introduced into evidence the entire superior court file in Neill v. Five C Refining Co. Included in this file are voluminous pleadings and affidavits, all of which were for consideration by the trial court. They show quite clearly the claims that were being made by the various parties with respect to the ownership of the residuum at the time of the trial of that action. When Silver Wing sold the residuum to Hawn title was claimed by Maguire Oil & Refining Company. Wallace was president of Maguire. This company filed a complaint in intervention in Neill v. Five C Refining Co. asserting its title. Although Hawn had agreed to be bound by the contract between Silver Wing and Five C, he answered in Neill v. Five C Refining Co., denying that Five C ever acquired a valid right to purchase the residuum from Silver Wing, and asserting that he had acquired the same from Maguire Oil & Refining Company. Further evidence of Hawn's intention to escape from the Five C contract is furnished by the fact that on June 1, 1944, he entered into an agreement to sell the residuum to D. P. Neill for a price of $100,000 to be paid as the material was removed. That contract reads, in part, as follows:

"The undersigned contends that Five C Refining Company, a corporation, has illegally and wrongfully gone upon the premises and removed portions of said residuum, and converted the same to its own use, against the will and without the consent and in violation of the ownership of the undersigned.

"The undersigned, R. H. Hawn, has agreed to sell, and hereby does sell, all of his right, title and interest in and to said refinery, together with all equipment appurtenant thereto, and all of the residuum situate on the lands above described, to D. P. Neill; including all of the right, title and interest of the undersigned in and to the residuum unlawfully and illegally removed by said Five C Refining Company, together with the right to recover the same, or the value thereof, in an action for conversion against said Five C Refining Company.

"Payment for said refinery and residuum shall be made in the following manner:

"The sum of thirty cents (30¢) per barrel for all residuum removed by D. P. Neill or his nominee from the above premises shall be payable immediately by said D. P. Neill, whenever and as often as any residuum shall be removed from said sumps.

"Any sums collected by D. P. Neill from Five C Refining Company shall be forthwith paid and delivered to R. H. Hawn to apply on the purchase price herein specified. In any event, within ninety (90) days after D. P. Neill shall have recovered a judgment in any action against Five C Refining Company, determining that Five C Refining Company has no right, title or interest in or to any part of the residuum hereinabove described, and said judgment shall become final, D. P. Neill shall pay the sum of $100,000.00 to the undersigned, R. H. Hawn, less any sums which have theretofore been paid under the provisions of this agreement. Any and all payments to be made by D. P. Neill to R. H. Hawn hereunder shall be paid to J. M. Jackson, Trustee, State National Bank of Houston, Houston, Texas, and shall be credited to the account of R. H. Hawn with the Continental Bank and Trust Company.

"By the acceptance hereof and his signature hereon, D. P. Neill agrees to purchase said residuum and make payment therefor, at the times and in the manner herein set forth."

Neill also declined to recognize the Five C contract, and when he refused to allow Five C to remove residuum, and undertook to remove it himself, the conflict of interest resulted in Neill's bringing the above mentioned action against Five C for damages, and for conversion, in which the conflicting claims of the parties were asserted, as we have related.

Although it is stated in plaintiff's brief that Hawn had previously paid $12,500 to Wallace from sums received from Five C, we find no evidence in the record to sustain that statement. There was evidence that Five C did not remove any of the residuum between October, 1943, and October, 1944, and no evidence that Five C ever paid Hawn any sums directly. The money that was deposited in court in Neill v. Five C Refining Co. represented sums accrued for residuum removed between October, 1944, and August, 1945, under an injunction which prevented Neill and Hawn from interfering with Five C's operations.

[1] There was no evidence as to the negotiations between Hawn and Wallace at the time the quoted agreement was entered into. Neill was present at the negotiations and although his deposition was taken on behalf of the plaintiff he was not questioned concerning any conversations had between Hawn and Wallace before or at the time the agreement was entered into. Wallace was not called as a witness nor was his absence accounted for by plaintiff. It was to be presumed, under these circumstances, that the testimony of Neill and

Wallace as to the discussions between Hawn and Wallace would not have been advantageous to plaintiff. Code Civ.Proc., sec. 1963, subd. 5; People v. Kelly, 77 Cal. App.2d 23, 174 P.2d 342; Humiston v. Hook, 86 Cal.App.2d 101; Morley v. Malouf, 88 Cal.App.2d 680, 200 P.2d 159.

As recited in the agreement, Hawn had promised to pay Wallace $25,000 from one-half the proceeds of sales of residuum. Wallace (as we mentioned) was President of Maguire Oil & Refining Company. Both this corporation and Hawn were disputing and continued to dispute the title of Silver Wing and Five C to the residuum. They claimed it had a value far exceeding 13 cents per barrel. Under the Hawn-Neill agreement the latter was to pay 30 cents per barrel and all the parties claimed the value to be even greater. Both Hawn and Neill made affidavits in the case of Neill v. Five C Refining Co. that they had entered into an agreement to sell a large quantity for $1 per barrel, and Maguire Oil & Refining Company, by its complaint in intervention, asserted it to be worth $1.25 per barrel. Although there are many other collateral facts that might be recited those we have stated are sufficient to show the important circumstances under which the Hawn-Wallace agreement was made.

[2] We do not see how the trial court, in the light of all the evidence, could have construed the agreement as contended for by plaintiff. Although the Hawn-Wallace agreement was made after the superior court had confirmed the Five C agreement it was no doubt contemplated by both Hawn and Wallace that an appeal would be taken, since the judgment was adverse to the claims of Hawn, Neill and Maguire Oil & Refining Company. All the circumstances indicate that from the time Hawn acquired the property he intended to escape from the Five C agreement and to sell the residuum for a much larger price than Five C had agreed to pay. Wallace, as president of Maguire Oil & Refining Company, was active in the efforts of his company to defeat the claims of Five C. He also filed an affidavit in Neill v. Five C Refining Co. and was fully conversant with the contentions of Hawn and Neill with respect to the claimed unenforceability of the Five C agreement. The most significant feature of the Hawn-Wallace agreement is that although some $18,000 was on deposit with the clerk of the court at the time the agreement was made, it contains no provision for a division of that fund if the judgment should be affirmed on appeal. It would be difficult to believe this omission was the result of oversight. The further provisions that the $12,500 should be paid from one-half the receipts from sales "when and if made," and that Hawn was not to be restricted in making such sales, are in sharp conflict with the theory that Wallace was to receive one-half of any sums that might be received from Five C, whose rights were being contested by Hawn, Wallace and Neill. In our opinion the evidence all points toward the conclusion that Wallace understood it to be Hawn's purpose not only to reacquire the property from Neill, if, indeed, he had not already done so, but to apply on the $12,500 indebtedness only one-half of the sums received from future sales, if and when he should be in a position to make them. We can see no good reason for disturbing the interpretation placed upon the agreement by the trial court. It is supported not only by the terms of the writing, but also by the intentions of the parties which were reasonably to be inferred from the surrounding circumstances.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

98 Cal.App.2d 514

PEOPLE v. HART.

Cr. 2644.

District Court of Appeal, First District, Division 2, California.
July 21, 1950.

Rehearing Denied Aug. 4, 1950.
Hearing Denied Aug. 17, 1950.

Fred B. Hart was convicted in the Superior Court in and for the County of Alameda, Charles Wade Snook, J., of sexual perversion, and from an order denying his motion for new trial, he appealed. The District Court of Appeal, Dooling, J., held that evidence for the state established that complaining witness was an accomplice whose testimony was required to be corroborated, and that instruction providing that when crime is committed against will of complainant and without his consent, it is not necessary that his testimony be corroborated, was too broad.

Order reversed with directions to grant motion for new trial.

1. Criminal law ⟹507(7)

In prosecution for sexual perversion, testimony of witness for the state who at time of alleged act had his leg in a cast, that he did not resist defendant, who had a knife, because witness was afraid that he would rebreak his leg, was an "accomplice" whose testimony was required to be corroborated, because there was no showing that witness had reasonable cause to believe that his life would be in danger if he resisted. Pen.Code, §§ 26, subd. 8, 288a, 1111.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Accomplice".

2. Criminal law ⟹780(3)

In prosecution for sexual perversion, instruction that where crime is committed against will of a complainant and without his consent, it is not necessary that the testimony of the complainant be corroborated, was too broad, and jury should have been instructed in language of statute providing that all persons are capable of committing crimes, unless punishable with death, except persons, who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused. Pen. Code, §§ 26, subd. 8, 288a, 1111.

◆

Leo A. Sullivan and Myron Harris, Oakland, Fred B. Hart, Oakland, of counsel for appellant.

Fred N. Howser, Atty. Gen., David K. Lener, Deputy Atty. Gen., J. F. Coakley, Dist. Atty., and Folger Emerson, Deputy Dist. Atty., Oakland, for respondent.

DOOLING, Justice.

Defendant was convicted of the crime denounced by section 288a, Penal Code, committed upon the person of one M. Defendant appeals from the order of the court denying his motion for new trial. While many points are urged on the appeal we confine our consideration to only one of them which in our judgment is controlling.

M was a sailor under treatment at a Naval Hospital for a broken leg. His leg was confined in a rigid cast from hip to ankle. At 2:30 a. m. appellant was driving an automobile with a woman companion. He offered M a ride to his hospital. After proceeding a few blocks the car was stopped and both M and appellant left it briefly and then, according to M's testimony, appellant got into the back seat with M while the woman remained in the front seat. There appellant exhibited a knife which he kept passing from one hand to the other and proposed to M the commission of the act charged. M acquiesced and the act was performed.

Appellant argues that M was an accomplice within the meaning of sec. 1111, Penal Code, and that his testimony was not corroborated. It is the theory of the prosecution that M was not an accomplice because acting under coercion.

The coercion necessary to relieve an adult person from responsibility for a criminal act is defined in sec. 26, subd. 8, Penal Code, as follows: "All persons are capable of committing crimes except those belonging to the following classes: * * * Eight. Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused."

The last sentence of sec. 1111, Penal Code, defines an accomplice: "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

[1] Under this definition M is an accomplice unless the evidence is sufficient to support a finding bringing the case as to him within subd. 8, sec. 26, Penal Code, above quoted, i. e. that M did believe that his life would be endangered if he refused. People v. Martin, 13 Cal.App. 96, 108 P. 1034; People v. Coleman, 53 Cal. App.2d 18, 27–28, 127 P.2d 309; People v. Sanders, 82 Cal.App. 778, 785, 256 P. 251; People v. Villegas, 29 Cal.App.2d 658, 661, 85 P.2d 480; People v. Lindstrom, 128 Cal. App. 111, 112, 16 P.2d 1003.

The People argue that the evidence shows that M was afraid that if he resisted it would endanger his life. Not only did M not testify at any point that he feared that his life was in danger but he expressly twice testified:

"* * * I did participate because I was afraid to break my leg over again and didn't want to fight him back."

"I didn't want to break my leg over again."

A reading of the entire evidence satisfies us that it is not sufficient to support a finding that M actually believed that his life was in danger.

Cases such as People v. Westek, 31 Cal. 2d 469, 190 P.2d 9, are not in point because the witnesses were under the age of 14 years when the crimes upon their persons were committed. Pen.Code, sec. 26, subd. 1.

Respondent suggests that there was corroborative evidence but does not undertake to point it out. The prosecuting attorney stated to the jury in his argument: "I am not going to waste your time arguing that he is corroborated, because he isn't. There is no testimony in the case to that effect."

The record bears out this statement.

The court instructed the jury: "Where the crime is committed against the will of a complainant and without his consent, it is not necessary that the testimony of the complainant be corroborated."

[2] This instruction was too broad under the facts of this case. The jury should have been instructed in the language of sec. 26, subd. 8, Penal Code, and no such instruction was given.

The order denying the motion for new trial is reversed with directions to the trial court to grant the motion.

NOURSE, P. J., and GOODELL, J., concur.

---

98 Cal.App.2d 479

CREDIT BUREAU OF SAN DIEGO, Inc. v. CLARK et al.

Civ. 3981.

District Court of Appeal, Fourth District, California.

July 14, 1950.

Action by the Credit Bureau of San Diego, Inc., against Irvin T. Clark and another, to recover sums alleged to be due under a contract, wherein defendants applied for change of venue. From an order of the Superior Court of San Diego County, Robert B. Burch, J., denying motion for change of venue, the defendants appealed. The District Court of Appeal, Mussell, J., held that a direct conflict in the evidence as to where contract sued upon was made and executed presented a question for the trial court and that its finding would not be disturbed on appeal.

Affirmed.

1. Venue ⚷21

Defendant is normally entitled to have action tried in county of his residence, and for the cause to be triable elsewhere plaintiff must bring himself clearly within terms of statutory exception. Code Civ.Proc. § 395.

2. Venue ⚷21

Statute permitting defendant to have certain actions tried in the county of his residence is remedial in nature and should be liberally construed to the end that defendant may not be unjustly deprived of that right. Code Civ.Proc. § 395.

3. Venue ⚷7

Place where contract was in fact made is proper county for commencement of action thereon. Code Civ.Proc. § 395.

4. Appeal and error ⚷1024(3)

In action to recover sums alleged to be due under contract wherein defendant applied for change of venue to county of his residence, direct conflict in evidence as to where contract sued upon was made and executed presented question for trial court, and its finding thereon would not be disturbed on appeal. Code Civ.Proc. § 395.

◆

Leslie E. Hubbard and Frank L. Stearns, Los Angeles, for appellant.

Ruel Liggett and Roy M. Cleator, San Diego, for respondent.

MUSSELL, Justice.

Action on contract.

Plaintiff, as assignee, commenced the within action in the county of San Diego to recover sums alleged to be due from the defendant under a contract. The contract contains no recital as to the place where it was executed and contains no statement as to the place where the payments under it were to be made.

The defendant is a resident of Orange County and was served with process therein. He filed an answer and a notice of motion for change of venue, together with an affidavit of merits, and an affidavit stating that he was at all times a resident of Orange County, and that the contract sued upon was made, executed and delivered in the county of Los Angeles.

In opposition to the application for change of venue, plaintiff filed the affidavit of one of its assignors, stating, among other things, that on the 6th day of January, 1948, the contract herein sued upon was prepared and executed in writing at a certain office in San Diego and that all payments to be made thereunder were to be made to the said assignors at the said city.

The complaint contains an allegation "That the transaction and indebtedness sued upon herein and hereafter referred to was made and is payable in the county of San Diego, State of California". Defendant's contention is that the action should be tried in the county of his residence and that the court erred in failing to grant the motion for change of venue.

The determination of the question here involved involves a consideration of the provisions of section 395 of the Code of Civil Procedure, the applicable portion of which is as follows: "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, * * resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

[1, 2] As is contended by the defendant, the normal right of a defendant is to have the action tried in the county of his residence and for the cause to be triable elsewhere, plaintiff must bring himself clearly within the terms of such statutory exception, Bybee v. Fairchild, 75 Cal.App.2d 35, 37, 170 P.2d 54, and the statute permitting a defendant to have certain actions tried in the county where he resides is remedial in nature and should be liberally construed to the end that a defendant may not be unjustly deprived of that right. Lyons v. Brunswick-Balke Etc. Co., 20 Cal.2d 579, 582, 127 P.2d 924, 141 A.L.R. 1173. However, in the instant case, under the quoted provision, the place where the contract was "in fact entered into" is a proper county for the trial of the action and the county in which

the obligation is incurred is deemed to be the county in which it is to be performed, in the absence of a special contract in writing to the contrary.

[3] In Wilson v. Hoffman, 81 Cal.App. 2d 664, 666, 184 P.2d 951, and Armstrong v. Smith, 49 Cal.App.2d 528, 532, 122 P.2d 115, the rule is recognized that the place where the contract was in fact made is a proper county for the commencement of the action.

[4] The record shows that there was a direct conflict in the evidence as to where the contract sued upon was made and executed. This conflict presented a question for the trial court. It resolved that conflict in favor of the plaintiff and evidently believed the allegation of the complaint and affidavit of the witness Dunn rather than the statements contained in the affidavit of the defendant. Under such circumstances, the finding of the trial court on the conflicting issues of fact will not be disturbed on appeal. Mitchell v. Kim, 42 Cal.App. 111, 114, 183 P. 368; Lake Shore Cattle Co. v. Modoc Land & Livestock Co., 108 Cal. 261, 262, 41 P. 472; Gallo v. Boyle Mfg. Co., Inc., 35 Cal.App.2d 168, 169, 94 P.2d 1010; Harbinson v. Affeldt, 75 Cal.App.2d 499, 504, 171 P.2d 474; C. H. Parker Co., Inc., v. Exeter Refining Co., 26 Cal.App.2d 610, 611, 79 P.2d 1114.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

98 Cal.App.2d 447

JAYNES v. JAYNES.

Civ. 17361.

District Court of Appeal, Second District, Division 1, California.

July 14, 1950.

Rehearing Denied Aug. 1, 1950.

Hearing Denied Sept. 11, 1950.

Kathryn F. Jaynes brought action against Oliver B. Jaynes for damages for fraudulently inducing plaintiff to sell stock in family corporation at less than its true value. A judgment for defendant was entered by the Superior Court of Los Angeles County, Wilbur C. Curtis, J., and the plaintiff appealed. The District Court of Appeal, White, P. J., held that instruction from which jury could well have understood that despite existence of confidential relationship between the parties the plaintiff was under duty to investigate and could not recover if she had means of ascertaining true state of affairs of the corporation was prejudicially erroneous.

Judgment reversed and cause remanded.

1. Corporations 🔑316(3)

Under the "special facts doctrine", which imposes upon a corporate officer a limited fiduciary duty in transaction with a shareholder involving the transfer of stock, the confidential relationship arises as result of officer's possession of special knowledge gained in his capacity as a corporate fiduciary.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Special Facts Doctrine".

2. Corporations 🔑316(3)

A corporate officer, in buying or selling corporate stock to a shareholder, must inform him of those matters relating to the corporate business of which the officer has knowledge and which the shareholder has the right to know about, so that the latter may have the benefit of such information and judging the advantage of the deal.

3. Appeal and error 🔑930(1), 1031(6)

In determining whether a verdict is supported by the evidence, District Court of Appeal must assume that jury accepted the view most favorable to respondent, but, in considering erroneous instructions District Court of Appeal must assume that jury might have believed the evidence upon which the instruction favorable to losing party was predicated, and that if correct instruction had been given upon that subject the jury might have rendered verdict in favor of losing party.

4. Corporations 🔑316(3)

In action for damages for fraudulently inducing plaintiff to sell stock in family corporation at less than its true value brought by plaintiff against brother of her deceased husband, where there was evidence that defendant, by reason of his active management of business, had knowledge of the phenomenal increase in profits and there were "irregularities" in keeping of the books concealing true net profits of the corporation, instruction from which jury could have understood that despite existence of confidential relation between parties, plaintiff was under duty to investigate and could not recover if she had means of ascertaining true state of affairs was prejudicially erroneous.

5. Fraud ⟹65(1)

In action for damages for fraudulently inducing plaintiff to sell corporate stock at less than its true value, instruction that plaintiff was not excused from making investigation unless there existed not only superior knowledge on defendant's part but also a confidential relation was improper in that the correct rule was that either factor, superior knowledge or confidential relation, was sufficient.

6. Fraud ⟹23

A person cannot justifiably rely on mere statements of opinion, including legal conclusions drawn from a true state of facts unless the person expressing the opinion purports to have expert knowledge concerning the matter or occupies a position of confidence and trust.

7. Trial ⟹219

In action for damages for fraudulent inducing plaintiff to sell stock in family corporation at less than its true value brought by plaintiff against brother of her deceased husband, where question of existence of confidential relation between parties was present in the case, a definition of the term confidential relation should have been given.

◆

Gustafson & Rosenmund and Roy A. Gustafson, all of Oxnard, for appellant.

Wright & Garrett, Harold F. Collins, Walter L. M. Lorimer, David M. Harney, all of Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff appeals from an adverse judgment entered upon the verdict of a jury. An appeal from an order of nonsuit in favor of defendant Frankie Dale Jaynes has been abandoned. This appeal concerns only the first cause of action of plaintiff's complaint, wherein it was alleged that plaintiff, a 69-year-old woman inexperienced in business affairs, was induced by defendant, the brother of her deceased husband, to sell to defendant and his wife her shares in a family corporation which was engaged in the newspaper publishing business; that the inducement was by way of false representation as to who held control of the corporation and as to the value of the stock; that there was a confidential relationship between the parties and that plaintiff received only $22,000.00 for shares worth $55,000.00.

Appellant contends that the court erred in sustaining objections to certain testimony and in the giving and refusing of certain instructions. While recognizing that by the verdict all conflicts in the evidence were resolved against her, appellant urges that had proper instructions been given, it is likely that an opposite verdict would have been reached, and that therefore this court, if it finds error, is "required to examine the entire cause, including the evidence and decide whether * * * the errors have resulted in a miscarriage of justice." Hobart v. Hobart Estate Co., 26 Cal.2d 412, 447, 159 P.2d 958, 977.

With respect to the relationship of trust and confidence between plaintiff and her brother-in-law, it was alleged that defendant and plaintiff's husband had been associated in the newspaper business; that after the death of her husband in 1920 defendant continued to operate the business for the benefit of himself and plaintiff until 1927; that "on many occasions between the time of the death of plaintiff's husband and October 1, 1944, defendant represented that he was interested in watching after and protecting all of plaintiff's business interests," and that from 1920 to 1944, defendant was "in constant communication with plaintiff and advised plaintiff in all of her business affairs"; that by virtue of these relations plaintiff placed confidence and trust in defendant and relied upon him, and that this was known to defendant. It was further alleged that from 1928 to 1932 plaintiff and defendant were partners in the publication of a newspaper; that the business was incorporated in 1932 as "Northeast Los Angeles Publishing Co.," the stock being held as follows: "Defendant Oliver B. Jaynes, 1 share; defendant Frankie Dale Jaynes (wife of Oliver), 1 share; plaintiff, 348 shares (of which 175 shares were owned beneficially by plaintiff and 173 shares were held by plaintiff on an oral trust for defendants)." Further, it was alleged, that "at all times since the creation of said corporation defendants acted as general managers thereof and exercised full and complete control over its business and policies and at no time did plaintiff exercise any judgment or control with respect to the operation or conduct of said corporation. Plaintiff had no information respecting the operation of said corporation other than such as was furnished her by defendants."

The false representations alleged to have been made on or about August 1, 1944, were as follows:

"1. That the net worth of said Northeast Los Angeles Publishing Co. was not in excess of $37,000.00.

"2. That plaintiff was the owner of 174½ shares of said corporation and that defendants were the owners of 175½ shares of said corporation.

"3. That plaintiff's shares in said corporation were not worth in excess of $22,000.00.

"4. That if plaintiff did not sell her said shares to defendant Oliver B. Jaynes, defendants would sell their shares to a third party who would have controlling interest in said corporation.

"5. That if plaintiff did sell her shares to defendant Oliver B. Jaynes, defendants would, in the event of the sale of the newspaper 'Highland Park News-Herald' prior to paying to plaintiff the purchase price of her shares, pay to plaintiff one-half of the sales price obtained by defendants for said newspaper, less the amount theretofore paid by defendants to plaintiff for said shares."

The representations were alleged to be false, in that the net worth of the corporation was approximately $110,000.00; plaintiff was in fact legal and beneficial owner of 175 shares and the defendants of 175 shares; that plaintiff's shares were worth approximately $55,000.00; defendants could not transfer a controlling interest as they owned only one-half the shares; defendants had no intention of paying plaintiff any additional sum in the event of a sale.

The sale to defendant took place in September, 1944. In April, 1947, defendant sold the newspaper for $145,000.00. There was substantially conflicting evidence on the issues of the net worth of the business in 1944, as to whether the representations were made, and whether plaintiff relied thereon.

Appellant assigns error by the court in modifying instruction No. 28, requested by her. The instruction (with the language deleted by the court inclosed in parenthesis and the language added by the court shown in italics) is as follows:

"(Some issues in this case turn on whether there was a confidential or fiduciary relation between the plaintiff Kathryn F. Jaynes and the defendant Oliver B. Jaynes at the time of the sale and during the negotiations preceding the sale.

"A fiduciary relation in law is ordinarily synonymous with a confidential relation. Such a relation exists where a confidence is reposed by one person in the integrity of another and the other person accepts or assumes to accept that confidence.)

"*However,* in determining whether there is a confidential relation, you are entitled to consider the family connections of the parties, their past associations, their social relationship, their respective knowledge and information, their occupations, their respective experience in business affairs and their relative ages and health.

"Where the purchaser of *corporate* stock is an officer or director of (a) *the* corporation and has knowledge of special facts affecting the value of its stock, *which are not equally available to the stockholder,* he is in a confidential relation to the stockholder and is under a duty to disclose such facts before making a purchase of the stock."

[1, 2] We agree with appellant that the addition of the words "which are not equally available to the stockholder," was error. "Under the 'special facts' doctrine a corporate officer owes a limited fiduciary duty in transactions with a shareholder involving the transfer of stock. The confidential relationship arises as a result of the officer's possession of special knowledge gained in his capacity as a corporate fiduciary. An officer, in buying or selling to a shareholder, must inform him of those matters relating to the corporate business of which the officer has knowledge and which the shareholder has a right to know about, so that the latter may have the benefit of such information in judging the advantages of the deal." Hobart v. Hobart Estate Co., supra, 26 Cal. 2d at page 433, 159 P.2d at page 970.

[3] Under the particular circumstances of this case, we would be constrained to hold that the claimed erroneous language in the foregoing instruction did not constitute prejudicial error, since it could be assumed that the jury did not rely upon the erroneous language of the instruction. But when the foregoing instruction, as given, is scrutinized in conjunction with all the instructions given on the main issues of misrepresentation, concealment, confidential relationship, reliance and independent investigation, we are forced to conclude that the interests of justice require a reversal of the judgment. While in determining whether a verdict is supported by the evidence, we must assume that the jury accepted the view most favorable to respondent, nevertheless, in considering erroneous instructions, "we must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated, and that if the correct instruction had been given upon that subject the jury might have rendered a verdict in favor of the losing party." O'Meara v. Swortfiguer, 191 Cal. 12, 15, 214 P. 975, 976. As was said in Oettinger v. Stewart, 24 Cal.2d 133, 140, 148 P.2d 19, 23, 156 A.L.R. 1221, "In cases where it clearly appears that the jury did not rely upon the erroneous instructions, the judgment may be affirmed on the ground that the error is not prejudicial. This, however, is not such a case. * * *, and we should not speculate upon the basis of the verdict."

[4] It was claimed that defendant, by reason of his active management of the business, had knowledge of the phenomenal increase in profits in 1944 and that plaintiff did not. The evidence was in conflict. There was evidence that "irregularities" in the keeping of the books concealed the true net profits of the corporation. By the instruction as modified, the jury could well have understood that despite the existence of the confidential relation, plaintiff was under a duty to investigate and could not recover if she had the means of ascertaining the true state of affairs. As pointed out in appellant's brief, "In the ordinary situation where the only liability is for active false statement, there is no duty to investigate, that is, the mere existence of an opportunity to investigate, or of sources of information, will not preclude the plaintiff from relying upon the representations. * * * (Citations.) * * * If deliberate silence is also a ground for relief where a corporation officer has 'special facts', there is even greater reason for the absence of any duty on the plaintiff to investigate. The plaintiff is not even aware of what he or she *should* investigate when the defendant has not revealed the facts. Yet under the trial court's instruction the defendant's silence is excused if the facts are *available* to plaintiff." (Emphasis added.)

In Taylor v. Wright, 69 Cal.App.2d 371, 159 P.2d 980, 986, a case involving the purchase of stock by officers who did not disclose their identity, the contention was made that information as to the value of certain assets was available to the stockholder. The court there said: "Appellants also point out that the books of the company disclosed the information as to the ownership of the Shell Union stock, and that such books were located at the Oakland office. Any stockholder, * * * could have come to the office and ascertained the true facts for themselves. To state the point is to refute it. Such argument loses sight of the realities of the situation. A stockholder is not bound to anticipate fraud on the part of his trusted director. The legal right to look at the books, in view of the complexity of modern accounting practices, cannot preclude a stockholder from recovering from a fraudulent director."

The error in the foregoing instruction was magnified by the instructions following (Nos. 29 requested by the defendant, and 31 given by the court):

"A mere representation by the defendant, if any there was that the newspaper corporation was worth less than its actual value, will not warrant a recovery by plaintiff, if you find that the plaintiff had a full and complete opportunity to inform herself *or* that she or her agents had investigated the value of said property, *and* that no confidential relationship existed which would excuse the plaintiff's reliance on the representations of the defendant, unless the plaintiff was induced by truck, undue influence, or other misrepresentations of the defendants not to make such investigation."

"If it is shown that the defendant had a superior knowledge of the value of the property in question, *and* that such a confidential relationship existed between him and the plaintiff as would justify a reasonably prudent person in her position in relying upon his representations with respect thereto, then plaintiff is under no duty to make an independent investigation, and if she made none, she was justified in relying on such representations by the defendant.

[5, 6] The jury was told, in effect, by the last-mentioned instruction that plaintiff was not excused from making investigation unless there existed not only superior knowledge on the part of defendant, but also a confidential relation. The correct rule is that either factor, superior knowledge or confidential relation, is sufficient. The rule is stated in Seeger v. Odell, 18 Cal.2d 409, 415, 115 P.2d 977, 980, 136 A.L.R. 1291, as follows: "He may not justifiably rely upon mere statements of opinion, including legal conclusions drawn from a true state of facts, unless the person expressing the opinion purports to have expert knowledge concerning the matter *or* occupies a position of confidence and trust." (Emphasis added.)

So here, even had the jury concluded that the parties were dealing at arms' length, it could have believed that plaintiff was justified in relying upon representations of value, expressed as an opinion (not honestly entertained) by the man who was experienced in newspaper work, had been the active manager of the business for many years, and who had listed the property with a broker. Or on the other hand, it could have believed that although the defendant refrained from active misrepresentation, or that the plaintiff did not rely upon his views as to value, nevertheless the defendant, by remaining silent as to the special facts showing the increased prosperity of the corporation known to him by virtue of his position as the active director, breached his fiduciary duty to plaintiff, a stockholder unfamiliar with business affairs.

[7] Although recognizing that the principles of law applying in fraud cases vary according to whether or not there is a confidential relation, and that the question of the existence of a confidential relation was present in this case, nowhere did the court give the jury a definition of the term. In view of the fact that the existence or nonexistence of a confidential relation was an issue upon which the triers of fact were to find, such a definition should have been given, for there is no justification for the assumption that the jurors understood the meaning of such a term without definition.

Although appellant proffered a definition of the term, the instruction in which it was contained was modified by the trial court deleting the following: "A fiduciary relation in law is ordinarily synonymous with a confidential relation. Such a relation exists where confidence is reposed by one person in the integrity of another and the other person accepts or assumes to accept that confidence." Several times the court advised the jury as to what they might consider in determining whether a confidential relation existed, but nowhere do we find a definition of the term.

Coming now to a consideration of whether the aforesaid errors have resulted in a miscarriage of justice, a most difficult and perplexing task is oftentimes presented, but the present case was a close one on the issues hereinbefore discussed, and the evidence, or the inferences to be drawn, were sharply conflicting. This is particularly true on the issues of confidential relation, reliance and concealment. We are impressed that the erroneous instructions or failure to give certain requested instructions hereinbefore discussed, leave no escape from the conclusion that the errors were prejudicial.

Other contentions advanced as to rulings on the admissibility of evidence do not demand our consideration. Suffice it to say we find no error therein.

For the foregoing reasons, the judgment is reversed and the cause remanded for a new trial.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

---

98 Cal.App.2d 536

HOLMES v. HOLMES.

Civ. 17698.

District Court of Appeal, Second District, Division 2, California.

July 24, 1950.

Divorce action by Viola Pauline Holmes against Leslie J. Holmes, who filed a cross-action. The Superior Court, Los Angeles County, Charles P. Johnson, Judge of the Municipal Court of the City of Los Angeles, County of Los Angeles, presiding as Judge of the Superior Court under designation of the Chief Justice as Chairman of the Judicial Council, entered a judgment awarding the plaintiff an interlocutory decree and annulling the conveyance by the plaintiff to the defendant of an undivided one-half interest in plaintiff's chicken shack. The District Court of Appeal, Moore, P. J., held that a promise to pay $500 for conveyance of undivided one-half interest in chicken shack by promisor stating that he had such sum of money whereas promisor had no money and was incapable of performance and had no intention of paying such sum was fraudulent and was sufficient basis for annulling the conveyance.

Judgment affirmed.

1. Deeds 🔑70(8)

A promise to pay $500 for conveyance of undivided one-half interest in chicken shack by promisor stating that he had such sum of money whereas promisor had no money and was incapable of performance and had no intention of paying such sum was fraudulent and was sufficient basis for annulling conveyance. Civ.Code, § 1572, subd. 4.

2. Deeds 🔑211(3)

Evidence that defendant to whom plaintiff conveyed one-half interest in chicken shack thereafter rendered negligible services for which defendant required wages from plaintiff seeking annulment of conveyance was sufficient proof of defendant's false intention when defendant promised to pay $500 for half interest and to work in shack and to assist in management.

3. Fraud 🔑7

Living together as husband and wife created confidential relationship between plaintiff and defendant, so that defendant's breach of promise to pay plaintiff $500 for conveyance of undivided one-half interest in plaintiff's chicken shack constituted an actionable constructive fraud even if promise at time of utterance was not tainted with deceit.

4. Vendor and purchaser 🔑13

Where defendant promising to pay plaintiff $500 for conveyance of undivided one-half interest in plaintiff's chicken shack paid no consideration for conveyance, no contract arose, regardless of whether defendant made fraudulent statements as to existing facts or gave promises without intending to perform them. Civ.Code, § 1550.

5. Appeal and error 173(10)
Pleading 🔑374

The claim that plaintiff seeking annulment of conveyance to defendant was barred by laches from asserting accusation of fraud was affirmative defense which must be alleged and proved unless complaint effectually disclosed such defense, and defense would not be considered on appeal where defense was not pleaded by answer or demurrer.

◆

H. L. Richardson, Los Angeles, for appellant.

Earl C. Broady, Los Angeles, for respondent.

MOORE, Presiding Justice.

Alleging extreme cruelty by her husband, respondent prayed for divorce and for all the community property. Also, she alleged that she owns in her separate right a certain "chicken shack" which she had operated long prior to her marriage. In his answer and his cross-action appellant denies the cruelty and asserts ownership of an undivided half interest in the shack which he acquired by conveyance of respondent upon his payment of $500 one year prior to the marriage. In her answer to the cross-complaint respondent denied such claim of ownership and alleged that the conveyance of an interest in the chicken shack was procured without consideration and by appellant's fraud in that he falsely represented to respondent that he had $500 for investment, that he would pay that sum into her business, would work in the shack and assist respondent in the management and would marry her; but that he did not pay the $500 or any sum at all and did not contribute any service to the conduct of the business or assist respondent in the management thereof; that his statements were not true and his promises were false; that he did not intend at any time to pay any money or to contribute any services to the shack's business, but made his representations and promises with the intention of defrauding respondent of the half interest; that she believed and relied upon them and solely by reason thereof made the conveyance.

The court below found the facts as alleged by respondent, awarded her an interlocutory decree and annulled the conveyance on both grounds of fraud and of want of consideration.

[1-3] The evidence supports the finding. Notwithstanding his allegation appellant now claims that the real consideration for the conveyance of the half interest was his promise to marry respondent. No such claim was asserted at the trial. He never paid her the $500; his services for the shack were negligible and for such as he performed he required his wife to pay him wages while she toiled in excess of 18 hours daily. The court did not believe his narrative about having $500 and upon the testimony of respondent found that he never paid it and at no time intended to invest that sum in the shack. His false statement that he had the money and his fraudulent promise to pay it to respondent without intention of doing so were sufficient as a basis for annulling the conveyance. Civ. Code, sec. 1572, subd. 4. The fact that he had no money at the time of his promise, thereby rendering him incapable of performance, made such promise fraudulent. Langley v. Rodriguez, 122 Cal. 580, 582, 55 P. 406, 68 Am.St.Rep. 70. Also, his subsequent conduct as alleged and testified by respondent was sufficient proof of his false intention. Williams v. Hasshagen, 166 Cal. 386, 392, 137 P. 9; Holiday v. Tolosano, 39 Cal.App. 151, 153, 178 P. 170. But to add insult to injury, in imposing his fraudulent promise upon respondent, he violated her confidence. At the time of the promise and conveyance they were living together as husband and wife. This was sufficient to create a confidential relationship by virtue of which it follows that even though appellant's promise had not at the time of its utterance been tainted with deceit, his subsequent breach thereof constituted an actionable constructive fraud. Cox v. Schnerr, 172 Cal. 371, 378, 156 P. 509; Fieg v. Gjurich, 163 Cal. 740, 127 P. 49; 12 Cal. Jur., Fraud and Deceit, sec. 51.

[4] In addition to his fraud, appellant paid no consideration for the conveyance. He makes no pretense that he did so. He did not attack the finding of lack of consideration. Since a consideration is essential to the existence of a valid agreement,

Civ.Code, sec. 1550, no contract arose regardless of whether appellant made fraudulent statements as to existing facts or gave promises without intention of performing them.

[5] Appellant asserts now that respondent is barred by laches from asserting her accusation of fraud. Such claim was not made in the trial court. It is an affirmative defense and must be alleged and proved unless the complaint effectually discloses it. Phoenix Mutual Life Insurance Company v. Birkelund, 29 Cal.2d 352, 363, 175 P.2d 5. Since it was not pleaded by either answer or demurrer it deserves no consideration on appeal. Hill v. Barner, 8 Cal.App. 58, 69, 96 P. 111.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

---

98 Cal.App.2d 419

FICKEISEN v. CIVIL SERVICE COMMISSION OF SAN MATEO COUNTY et al.

Civ. 14280, 14292.

District Court of Appeal, First District, Division 2, California.

July 13, 1950.

Rehearing Denied Aug. 12, 1950.

Hearing Denied Sept. 7, 1950.

John W. Fickeisen filed separate actions in certiorari and in mandamus against the Civil Service Commission of the County of San Mateo and others, to review proceedings before respondent commission resulting in discharge of petitioner from his position as a permanent employee in the classified civil service of San Mateo County and to effect his reinstatement. Adverse judgments were entered by the Superior Court in and for the county of San Mateo, Andrew R. Schottky and Clark Clement, JJ., and the petitioner appealed. The District Court of Appeal, Nourse, P. J., held that evidence supported commission's order discharging petitioner pursuant to accusation charging him with misappropriation of county property.

Judgments affirmed.

1. Mandamus 🔑172
Officers 🔑72(2)

In certiorari and mandamus proceedings by permanent employee in county classified civil service who was discharged pursuant to accusation filed and heard by County Civil Service Commission to review proceedings before the Commission and to effect petitioner's reinstatement, it was incumbent upon petitioner to prepare and file in Superior Court a transcript of oral evidence heard by Commission if he wished to contend that evidence was insufficient, and his failure to do so precluded an attack on the evidence.

2. Mandamus 🔑168(4)
Officers 🔑72(2)

Evidence supported discharge of permanent employee in classified civil service of county assigned to Department of Public Health by County Civil Service Commission on charge that employee wrongfully misappropriated county property.

3. Certiorari 🔑70(8)
Mandamus 🔑187(9)

District Court of Appeal must disregard evidence which was contrary to that received in support of County Civil Service Commissioners' findings for discharge of permanent employee in the classified civil service of the county, and will resolve all doubts as to sufficiency of the evidence in favor of the findings.

4. Administrative law and procedure 🔑360
Officers 🔑72(1)

In proceedings before County Civil Service Commission pursuant to accusation charging permanent employee in the county classified civil service with misappropriation of county property, Commission was not required to conduct hearing in accordance with theories developed in field of criminal law.

5. Administrative law and procedure 🔑360
Officers 🔑72(1)

Strict rules of procedure do not apply in proceedings before County Civil Service Commission pursuant to accusation charging permanent employee in county classified civil service with misappropriation of county property.

6. Certiorari ⚿70(6)
Evidence ⚿83(4)
Mandamus ⚿168(2)

Where permanent employee in county classified civil service, who was discharged pursuant to accusation duly filed and heard by County Civil Service Commission charging him with misappropriation of county property, cited no authority holding that it was reversible error to employ special counsel to conduct the proceeding, District Court of Appeal would assume, in absence of any showing to contrary, that official duty had been regularly performed by Commission. Code Civ.Proc. § 1963, subd. 15.

7. Evidence ⚿31, 32, 48

District Court of Appeal may take judicial notice of a county charter but may not take judicial notice of a local ordinance or the rule or resolution of a local board, such as the county civil service commission.

On Petition for Rehearing.

8. Certiorari ⚿70(5)
Mandamus ⚿187(9)

Where District Court of Appeal, on appeal from adverse judgments in separate actions in certiorari and in mandamus to review proceedings before county civil service commission resulting in discharge of petitioner from his position as a permanent employee in the county classified civil service and to effect his reinstatement, accepted as true all plaintiff's references to and quotations from transcript of proceedings before the commission, plaintiff could not complain that District Court of Appeal should have read more of the transcript than that upon which he expressly relied. Rules on Appeal, rules 5(e), 10(b).

9. Certiorari ⚿70(5)
Mandamus ⚿187(9)

On appeal from adverse judgments in separate actions in certiorari and mandamus to review proceedings before county civil service commission resulting in discharge of petitioner from his position as permanent employee in county classified civil service and to effect his reinstatement, District Court of Appeal would not be permitted to examine the proceedings before the trial agency as a trial de novo, but rather its function was to determine whether there was sufficient substantial evidence to support trial court's findings based on the whole record.

◆

Carl William Anderson, Cyrus J. McMillan, Burlingame, for appellant.

Louis B. Dematteis, Dist. Atty., San Mateo, Paul A. McCarthy, Redwood City, for respondents.

NOURSE, Presiding Justice.

Petitioner was a permanent employee in the classified Civil Service of San Mateo County assigned to the department of Public Health. He was discharged pursuant to an accusation duly filed and heard by the county Civil Service Commission charging him with misappropriation of county property. On September 16, 1947, he filed two separate actions in the superior court to review the proceedings before the commission and to effect his reinstatement—one in certiorari and one in mandate. On the certiorari action the court entered a judgment directing the commission to amend its findings. This was done, but no further judgment was entered, and in due time petitioner appealed to this court, the appeal numbered 14,292. In a subsequent mandate proceeding, which was heard before another trial judge, the court, on January 3, 1949, entered judgment for respondents denying the writ. The appeal from that judgment is numbered 14,280. Both appeals are presented on the same briefs pursuant to stipulation.

A separate clerk's transcript was filed in case number 45,112 and numbered herein as appeal number 14,280. This shows that a petition for a writ of mandate was filed in the superior court February 13, 1948, which, it will be noted, is subsequent to the judgment in the certiorari matter which was entered January 6, 1948. This record shows that this second application for mandate was heard on June 11, 1948, "on the pleadings and proceedings herein" and judgment was entered January 3, 1949. (A reporter's transcript was filed herein showing that on September 30, 1948, some oral testimony was taken.)

[1] In the certiorari matter there was filed a return of the commission containing numerous exhibits received in evidence before the commission. We do not find any portion of the reporter's transcript covering the oral evidence heard by the commission. Since it was incumbent upon the petitioner—both in mandate and certiorari—to prepare and file in the superior court a transcript of such testimony if he wished to contend that the evidence was insufficient, his failure to do so precludes an attack on the evidence on this appeal. McPheeters v. Board of Medical Examiners, 74 Cal.App.2d 46, 168 P.2d 65. And see Dare v. Board of Medical Examiners, 21 Cal.2d 790, 794, 136 P.2d 304.

But notwithstanding this condition of the record both parties in their briefs refer to testimony taken before the commission with references to pages and lines of the commission transcript which we must accept as correct quotations or wholly disregard. Since the litigation is of several year's standing we may assume that both parties desire an early decision, and, for that reason alone, we will accept these statements as accurate.

[2, 3] So treating the question we find sufficient evidence in the quotations made supporting the finding of the trial court that the findings of the commission were supported by substantial evidence. One of those findings is that a "tray and other materials shown in said respondents' Exhibits A and B were unlawfully removed by appellant from Canyon Sanitarium to his home on King's Mountain on the 30th day of April, 1947, and were county property." The testimony of several witnesses is referred to, identifying the property found at appellant's home as county property which he removed from the county sanitarium. Appellant cites conflicting testimony mainly addressed to the identification and ownership of the property. But this merely creates a conflict. Under such circumstances we are bound to disregard the evidence which was contrary to that received in support of the findings of the board. Nunes v. Board of Civil Service Com'rs, 88 Cal.App.2d 632, 636, 199 P.2d 311, and will resolve all doubts as to the sufficiency of the evidence in favor of the finding. Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20. Two trials of the same issues—one before the examining board and one before the superior court are sufficient to satisfy the highly overburdened doctrine of due process. The parties are not entitled to a retrial of the issues of fact on appeal. This principle has been frequently announced and consistently followed as noted in the Moran case, supra.

[4] Secondly it is argued that the charge against appellant was a criminal charge and that accordingly he was entitled to all the presumptions available in a trial of a criminal case. The argument is unsound and has been rejected by competent authority. These proceedings, like those designed for the forfeiture of a professional license, are not controlled by the theories developed in the field of criminal law. Webster v. Board of Dental Examiners, 17 Cal.2d 534, 538, 110 P.2d 992; Gipner v. State Civil Service Comm., 13 Cal.App.2d 100, 106, 56 P.2d 535.

[5] It is argued that the commission erred in denying appellant's motion to dismiss the charges made at the conclusion of the evidence produced by the County Executive. The statement is made that: "The first four witnesses called by the County Executive and upon whom his case was rested failed in any degree to establish the truth of any part of the charge." The statement is not supported by any reference to the transcript. However, it is conceded that after the denial of the motion other evidence was offered by both parties; hence the attack now made is not different from the earlier attack upon the sufficiency of the evidence. The rule is well settled that in proceedings of this kind conducted by a body of laymen the strict rules of procedure do not apply. Webster v. Board of Dental Examiners, supra.

[6] Then it is argued that the commission acted arbitrarily in permitting private

counsel to appear and conduct the proceedings. The argument is based on the theory that, since the county charter requires the district attorney to represent all county officers, it was a breach of discretion to permit the special attorney for the County Executive to appear in the proceedings. It is stated that the district attorney, or a deputy, was present but took no part in the proceedings. The purpose of the attack is not apparent and it is not shown that appellant made any objection. It is stated in one of the briefs that the county charter authorizes the Civil Service Commission to make rules of procedure in cases of this kind. This is a widespread power which would include the right to provide special counsel on disciplinary hearings. Appellant has cited no authority holding that it is reversible error to employ special counsel and we must assume, in absence of any showing to the contrary, that the official duty has been regularly performed. (Code Civil Procedure, § 1963, sub. 15.)

[7] But on this record we are not permitted to consider any question touching the provisions of the ordinance or the rules of the commission. Neither party has furnished us with a citation of the provisions of the Charter of San Mateo County, the ordinance of the Board of Supervisors establishing a civil service system, nor the rules of such commission covering the trial and removal of a member of the civil service. We may take judicial notice of the county charter, City of Roseville, v. Tulley, 55 Cal.App.2d 601, 131 P.2d 395; Thompson v. City of Los Angeles, 82 Cal. App.2d 45, 185 P.2d 393, but we may not take judicial notice of a local ordinance. Stamper v. City of Los Angeles, 80 Cal. App.2d 242, 245, 181 P.2d 687. Conformably we may not take judicial notice of a rule or resolution of a local board such as the Civil Service Commission.

The opinion of another trial judge in appeal number 14292 is not determinative of any issue in this proceeding. If the trial judge in that case erred in sending the record back to the commission for an amendment of the findings, his error, if it was such, can in no way affect the proceedings in mandamus neither can his views on the evidence have any bearing upon the judgment in that case. If it were error a reversal of the certiorari matter would be of no avail as the mandamus judgment settles the very same issues and would become final before any new proceedings could be had in certiorari.

Judgments affirmed.

GOODELL, and DOOLING, JJ., concur.

On Petition for Rehearing.

NOURSE, Presiding Justice.

[8] In his petition for a rehearing the request is made that petitioner be relieved from his default in failing to request that the transcript of the proceedings before the Civil Service Commission be transmitted to this court as an exhibit under Rules 5(e) and 10(b), Rules on Appeal. Though a careful preparation of the appeal would have called for a transmission of this exhibit it is manifest that the failure to present it worked no prejudice to appellant. As we stated in the opinion, we accepted as true all appellant's references to and quotations from such transcript. We did this to save appellant unnecessary expense and delay and he cannot now complain that we should have read more of the transcript than that upon which he expressly relied.

[9] In a case of this kind the reviewing court is not permitted to examine the proceedings before the trial agency as a trial de novo. Our function is to determine whether there is sufficient substantial evidence supporting the findings of the trial court based on the whole record.

Petition denied.

98 Cal.App.2d 415

McGRATH et al. v. YOUNG et al.
Civ. 14278.

District Court of Appeal, First District,
Division 2, California.
July 13, 1950.

Mandamus proceeding by Pearl L. McGrath and Jack McGrath, a minor, by his guardian ad litem, Pearl L. McGrath, against Pauline Young and others, individually and as members of the Fire Pension Board of the City of Berkeley, to review an order of the Board denying a pension claimed for the death of petitioners' husband and father. The Superior Court, Alameda County, Ralph E. Hoyt, J., rendered a judgment for the defendants, and the petitioners appealed. The District Court of Appeal, Nourse, P. J., held that the evidence supported the judgment based on a finding that deceased did not lose his life as a direct result of the actual performance of his duty, and that his work as a fireman did not cause his fatal heart condition.

Judgment affirmed.

1. Mandamus ⚷187(9)

In mandamus proceeding to review order of Fire Pension Board denying claim for pension, function of appellate court was to determine if there was substantial evidence in the record, contradicted or uncontradicted, supporting findings of the trial court.

2. Mandamus ⚷168(4)

In mandamus proceeding to review order of Fire Pension Board denying pension claim arising out of death of petitioners' husband and father, evidence supported judgment based on finding that decedent did not lose his life as direct result of actual performance of his duty, and that his work as a fireman did not cause his fatal heart condition.

3. Workmen's compensation ⚷1130

Compromise settlement of widow's claim before State Industrial Accident Commission for death of municipal fireman was not res judicata in proceeding by widow and child before municipal Fire Pension Board to recover pension following death of fireman.

Reynald J. Bianchi, San Francisco, for appellants.

Fred C. Hutchinson, City Atty., Robert T. Anderson, Asst. City Atty., Berkeley, for respondents.

NOURSE, Presiding Justice.

Petitioners sued in mandamus to review the order of the Fire Pension Board denying them a pension claimed for the death of their husband and father. The proceedings in the superior court were had on a transcript of the evidence taken by the pension board and of that taken before the Industrial Accident Commission in a separate proceeding which was compromised and settled. No new evidence was offered in the superior court.

The pension board based its order on a finding that deceased "died as a result of a coronary occlusion" and that he "did not lose his life as a direct result of the actual performance of his duty." After reviewing the entire record of the proceedings before the board and the record before the Industrial Accident Commission, the trial court found that deceased "did not lose his life as a direct result of the actual performance of his duty and that his work as a fireman did not cause his fatal heart condition." On these findings judgment was entered denying the relief sought.

On this appeal the appellants cite at length the evidence favorable to them and ask us to evaluate the testimony taken before the pension board to determine that the weight of the evidence is against the judgment, and also to hold that the compromise settlement before the Industrial Accident Commission was an adjudication favorable to deceased. This is not the function of the appellate court. The Supreme Court has repeatedly held as in Re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, 690: "The rule as to our province is: 'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) (Crawford v. Southern Pacific Co., 1935, 3 Cal.2d 427, 429, 45 P.2d 183.) The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict. The critical word in the definition is '*substantial*'; it is a door which can lead as readily to abuse as to practical or enlightened justice. It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record. Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding."

[1] Hence, if there is "substantial" evidence in the record, "contradicted or uncontradicted" supporting the findings of the trial court above noted our function ends. The findings of the trial court rested upon an evaluation of the testimony of the medical witnesses called by both parties. The trial court (as did the pension board) chose to accept the testimony of those physicians called by the respondents. We should here note that the petitioners also filed with the State Industrial Accident Commission a petition for compensation and that the proceedings had before that commission were in evidence before the Berkeley Pension Board. One of the medical witnesses before the state commission testified: "I am of the opinion that this man died of an acute coronary occlusion which occurred on the morning of April 4, 1945. It was due to pre-existing coronary artery sclerosis. The precipitating cause is not at all clear. However, I am very definite in that it had nothing to do with the work he did on the morning of December 9, 1944." And again, "I feel that his death should not be considered of industrial origin. I see no connection with his work as a fireman. It was due to pre-existing degenerative changes in his vascular system. Overweight and smoking may both have played a contributory role."

Another medical witness testified before the pension board: "Death was due to an acute condition (thrombosis in the left coronary arteries) on the basis of sclerosis of the coronary arteries of long standing. It was not related either directly or indirectly to the event of December 9, 1944. The arteriosclerosis that precipitated the acute condition had such a tenuous relationship with previous hard work that this relationship must be considered to be non-existing."

[2] It would be a useless waste of time to cite or discuss the medical opinions of the witnesses called by the petitioners which is in conflict with this. The medical experts called by the respective parties expressed directly opposite opinions as to the cause of death and naturally they would not have been called as witnesses if they had not been willing to do so. It is sufficient to say that both the pension board and the superior court believed the testimony above noted and that is sufficient to support the judgment.

[3] Appellants suggest, but with no apparent confidence, that the compromise settlement of the widow's claim before the State Industrial Accident Commission is binding on respondents in this proceeding. The facts are that pursuant to a claim for compensation a hearing was had by a referee of the Industrial Accident Commission and no determination was made. The State Compensation Insurance Fund, as the carrier for compensation insurance of the City of Berkeley, entered into a compromise settlement with the widow under which she was paid $3,150 and the proceedings terminated. That such settlement was not res judicata and was not binding on the pension board would seem obvious. The precise question was answered negatively in Schmidt v. Pension Board, 63 Cal.App.

2d 439, 446, 147 P.2d 90, 94, where the court said: "The determination of the Industrial Accident Commission was not res judicata, was not binding on the Pension Board, and did not prevent a contrary determination by it. Drummond v. Drummond, 39 Cal.App.2d 418, 103 P.2d 217. If this claim of the appellant was meritorious it would result in the Industrial Accident Commission having the power to deal with and dispense funds in the care and management of the Pension Board of the Fire Department of the City of Bakersfield. It would in reality do away with the duties and powers of that board. We see no connection between the two proceedings."

We find no merit in the appeal.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

BRUCKS v. HOME FEDERAL SAVINGS & LOAN ASS'N et al.

Civ. 3973.

District Court of Appeal, Fourth District, California.

July 20, 1950.

Hearing Granted Sept. 13, 1950.*

Action by Kate W. Brucks against Home Federal Savings & Loan Association, a corporation, Adele W. Tapley, executrix of the estate of Jeanette W. Kinkade, and others, to enforce a trust and to quiet title to personalty. The Superior Court, San Diego County, Louis C. Drapeau, J., rendered an adverse judgment, and the plaintiff and the defendant Adele W. Tapley, executrix, appealed. The District Court of Appeal, Mussell, J., held that the judgment defining the rights of the plaintiff was binding upon her, but that the court could not direct payment of money to the decedent's son who was not a party to the action.

Judgment affirmed in part, and reversed in part.

1. Trusts 🔑34(1)

Where person deposits his own money in his name and that of another jointly with intention of enabling other party to draw money after his death valid trust is created in favor of other person as beneficiary.

2. Appeal and error 🔑1008(1)
Trusts 🔑34(1)

Where person deposits his own money in his name and that of another, whether trust is created is a problem of intent of depositor, and such intent is a question of fact for trier of facts.

3. Appeal and error 🔑996

If form of bank deposit creates but an inference, finding of trial court that depositor intended that trust be created cannot be attacked on appeal.

4. Trusts 🔑41

If form of bank deposit in which depositor deposits his own money in his name and that of another creates a presumption with respect to creation of a trust, presumption is rebuttable, and evidence is admissible to show true intent of depositor.

5. Appeal and error 🔑1008(1)

In action to enforce trust and determine ownership of money deposited in name of decedent in trust for another, finding that opening of account created a valid trust was binding on appellate court.

6. Appeal and error 🔑1008(1)

In action to enforce trust and to determine ownership of money deposited in name of depositor in trust for another, finding that letter written after deposit by depositor modified original trust and directed disposition of the funds was binding on appellate court.

7. Evidence 🔑461(1)

In action to enforce trust and to determine ownership of money in name of depositor in trust for another, acts, conduct and declaration of depositor at time subsequent to time deposit was made were admissible to show intention of depositor at time she made deposit.

---

* Subsequent opinion 228 P.2d 545.

8. Evidence ⚷461(1)

In action to enforce trust and to determine ownership of money deposited in name of depositor in trust for another, letter in handwriting of depositor, written after deposit was made, was admissible to show intention of depositor at time she made deposit.

9. Judgment ⚷243

Where action was brought by friend of deceased depositor to determine ownership of the deposit in trust for friend, and depositor's executrix was made party defendant, judgment determining that friend was owner of funds only as trustee for depositor's son who was not made a party was binding upon friend, but court could not direct payment of the money or any part thereof to son.

◆

Glendon L. Tremaine and Franklin L. Knox, Jr., Los Angeles, for plaintiff and appellant Kate W. Brucks.

McNulty & Squier, San Diego, for defendant and appellant Adele W. Tapley.

MUSSELL, Justice.

Action to enforce a trust and to quiet title to personal property.

This action was instituted by plaintiff to determine the ownership of a fund of money deposited in a savings and loan association.

Jeanette W. Kinkade, during her lifetime, invested funds with the Home Federal Savings & Loan Association in San Diego. At her instruction, the following notation was made on the accounting record of the association: "Kinkade, Jeanette W., in trust for Kate W. Brucks". A deposit of $1500 was made at the time the account was opened (July 8, 1947); an additional deposit of $2,242.47 was made on October 6, 1947, and certain withdrawals in small amounts were made thereafter. No change was made in the names in which this account stood and no subsequent instructions, relative to its disposition, were given to the loan association.

Kate W. Brucks was a second cousin of decedent and had been her very close friend for many years. Shortly after the account was opened, the decedent stated to the husband of plaintiff that she had put some money in the bank for Kate W. Brucks.

On January 24, 1948, the decedent wrote a letter, which was discovered in her effects shortly after her death, which letter is as follows:

"Jan. 24, 1948

Dear Kate—

I am sick and in case I should pass away, will you kindly look after my belongings?

My bank book is in your name & mine.

First thing draw out all the money & put it in your name.

If there is anything left after all expenses are paid will you kindly give the remainder to my son Frederic Kinkade. He needs it.

I expect you to take money for all your expenses caused by this.

Also if there is any pictures, bedding etc he would want please let him have them.

With much love
Nettie

My lace dress is in bottom of trunk also bank book.
I wish to be buried in Kensico Cemetery by my husband and Dear Gladys.
Nettie

Cedar Chest & small chair belong to me.
They are for you."

It is admitted that the letter was entirely written, dated and signed by the decedent and was not mailed to the addressee or delivered to her.

On February 5, 1948, the decedent executed a formal will, in which she revoked all prior wills; intentionally made no provision for her son, Frederick W. Kinkade, and bequeathed all of her estate, both real and personal, to Adele W. Tapley (defendant herein), appointing her as executrix.

Kate W. Brucks instituted this action against the executrix to determine the ownership of the money so deposited. The trial court determined that the plaintiff is the owner of the legal title to the funds so deposited, as trustee, and in trust for Frederick W. Kinkade, the son of the testatrix;

that the plaintiff has no right, title, claim or interest in or to said funds or any part thereof, except as trustee; and that the trust is now terminated. The trustee was ordered to pay over to Frederick W. Kinkade the residue of the said trust, subject to the payment of attorney's fees, taxes, if any, and costs incurred in the administration of the trust and of this case.

The plaintiff appeals from that portion of the judgment in which it was decreed that Frederick W. Kinkade was entitled to a beneficial interest in and to the subject matter of the action and that portion which ordered distribution to him of the funds in controversy.

The defendant executrix appeals from the whole of said judgment.

The principal questions before us for decision are whether a trust in favor of Kate W. Brucks in the deposited funds was created by the decedent and if so, was the trust revoked by her subsequent acts.

[1–4] The rule in California with reference to the creation of trusts of this kind is stated in Kuck v. Raftery, 117 Cal.App. 755, 757, 4 P.2d 552, to be that where a person deposits his own money in his name and that of another jointly, with the intention of enabling the other party to draw the money after his death, a valid trust is created in favor of the other person as beneficiary. In Kosloskye v. Cis, 70 Cal. App.2d 174, 160 P.2d 565, the California and other cases on this subject are discussed and the rule there stated is that the problem is one of intent of the depositor and that this is a question of fact for the trier of the facts. It was there stated, 70 Cal.App.2d at page 181, 160 P.2d 565, that if the form of the deposit creates but an inference the finding of the trial court thereon cannot be attacked successfully; that if the form of the deposit creates a presumption, such a presumption is a rebuttable one and evidence is admissible to show the true intent of the decedent.

[5, 6] In the instant case there is evidence that the decedent indicated to the husband of plaintiff that she had placed funds in the bank for the plaintiff, and in the letter of January 24, 1948, the decedent stated that her bank book was in her name and the name of the plaintiff. Plaintiff was directed to draw all of the money out and put it in her name and use it in a certain manner. The trial court found that the opening of the account herein created a valid trust. This finding cannot here be successfully attacked. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. The trial court found that the letter of January 24th modified the original trust and directed the disposition of the deposited funds. This finding is likewise binding upon us.

In the will of February 5th, the testatrix intentionally made no provision for her son, Frederick, and gave all of her property to her cousin, Adele W. Tapley. The provisions of the will by which the testatrix omitted to provide for her son is consistent with the inference that the testatrix knew that she had made provision for him by the modification of the trust in her letter of January 24th.

[7, 8] The argument is advanced that the letter was inadmissible to show the intention of the trustor at the time she made the deposits in question. However, we conclude that the acts, conduct and declaration of the decedent at a time subsequent to the deposit were admissible in evidence to show such intent. Whitlow v. Durst, 20 Cal.2d 523, 524, 127 P.2d 530; Williams v. Kidd, 170 Cal. 631, 648, 151 P. 1, Ann.Cas.1916E, 703; and Jean v. Jean, 207 Cal. 115, 121, 277 P. 313, and in the instant case the letter, admitted to be in the handwriting of the decedent, sufficiently indicates her intention.

[9] It is contended by plaintiff Brucks, and admitted by the defendant Tapley, that the trial court herein exceeded its jurisdiction in attempting to render a decision in favor of Frederick Kinkade, who was not a party to the action. The cases cited in support of the contention are Overell v. Overell, 18 Cal.App.2d 499, 64 P.2d 483; Samter v. Klopstock Realty Co., 31 Cal. App.2d 523, 88 P.2d 250; Hutchinson v. Cal. Trust Co., 43 Cal.App.2d 571, 111 P.2d 401; and Stockwell v. McAlvay, 10 Cal.2d 368, 74 P.2d 504. The rule as announced in these cases is that a judgment may not

be entered either against or in favor of one who is not a party to the action. However, in so far as the judgment defines the rights of the plaintiff Brucks, it is binding upon her, she being the party plaintiff. The judgment herein, in so far as its provisions that the plaintiff, Kate W. Brucks is the owner of the deposited funds, as trustee, and in trust for Frederick Kinkade, and that the plaintiff has no right, title, claim or interest in or to said funds or any part thereof except as trustee, are affirmed, and in so far as the said judgment directs the payment of the trust moneys or any part thereof to the said Frederick Kinkade, it is reversed.

Judgment affirmed in part, reversed in part. Each party to bear her own costs on appeal.

BARNARD, P. J., concurs.

---

98 Cal.App.2d 503

In re McCABE'S ESTATE.

BURWELL v. McCABE.

BURWELL v. McCABE et al.

Civ. 3989, 3988.

District Court of Appeal, Fourth District,
California.

July 20, 1950.

Rehearing Denied Aug. 8, 1950.

Hearing Denied Sept. 13, 1950.

Proceeding in the matter of the estate of Clarence Watson McCabe, deceased, by Virginia Rose McCabe Burwell, beneficiary, against Violet M. McCabe, trustee, for an accounting and equitable action by Virginia Rose McCabe Burwell against Violet M. McCabe and others to have trust funds traced, marshalled and impounded and for other relief. The matters were consolidated and tried together. The Superior Court of San Diego County, L. N. Turrentine, J., entered an order approving trustee's supplemental account and discharging the trustee and a judgment that plaintiff recover nothing by equitable action and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that the supplemental account was faulty in itself and that claimed expenditures charged against trust estate were not established by satisfactory evidence.

Order and judgment reversed.

1. Trusts 🔑179

A trustee must act in the highest good faith toward his beneficiary and may not take any advantage by the slightest concealment. Civ.Code, § *2228*.

2. Trusts 🔑219(1)

A trustee, who mingles trust property with his own, so as to appear to be its owner, is liable for the value of its use. Civ. Code, § *2236*.

3. Trusts 🔑219(2)

A trustee must invest money as fast as collected in sufficient amount, so as to afford reasonable interest thereon, and, if he omits to do so, trustee must pay simple interest on trust money not invested, if merely negligent, and compound interest if the omission is wilful. Civ.Code, §§ *2261*, *2262*.

4. Trusts 🔑289

A trustee must render to beneficiaries a full account of all his dealings with trust property and, in event of negligent failure to keep true accounts, all presumptions are against trustee upon a settlement.

5. Trusts 🔑325

A trustee has the burden of proving every item of his account by satisfactory evidence and any doubt arising from failure to keep proper records or from the nature of proof produced by trustee must be resolved against him.

6. Trusts 🔑325

Supplemental account of testamentary trustee, charging against corpus of trust more than $23,000 allegedly expended for board, clothes, laundry, etc., for beneficiary for 15 years by merely listing the cost of such necessities as estimated at so much per month or year without giving quantities or amounts as to specific items, was faulty in itself and the actual expenditure of such amounts, as totaled, was not established by satisfactory evidence.

7. Trusts ⚷325
Wills ⚷684(10)

Discretion given trustee by will to use such portions of principal for support and education of beneficiary as in absolute and uncontrolled discretion of trustee might be necessary did not justify action of trustee in commingling trust funds with her own and paying from such common fund expenses of maintaining herself and beneficiary without keeping any account of expenditures for benefit of beneficiary, nor did such discretion relieve trustee of a necessity of establishing charges against trust estate by satisfactory evidence. Civ.Code, §§ *2228, 2236, 2261, 2262.*

8. Trusts ⚷325

Fact that testamentary trustee had violated her duties as such by commingling trust funds with her own, omitting to invest them, and negligently failing to keep any records which would enable her to render a true account had a bearing, in absence of vouchers or receipts, on question of whether charges against trust estate for board, clothes, laundry, etc., for beneficiary for 15 years were established by satisfactory evidence. Civ.Code, §§ *2228, 2236, 2261, 2262.*

9. Trusts ⚷325

That claimed expenditures for board, clothes, laundry, etc., for beneficiary for 15 years, paid out of family fund consisting of commingled trust funds and private funds of beneficiary's mother, were made by mother as trustee in exercise of discretion under will creating trust to use such portion of principal as she deemed necessary for daughter's maintenance was not established by such satisfactory evidence as was necessary to entitle trustee to credit for such expenditures.

10. Trusts ⚷219(1)

Trustee, having commingled funds bequeathed to her in trust for benefit of minor daughter with her own funds, was chargeable with the value of the use of such trust funds. Civ.Code, § *2236.*

◆

Joseph E. Daly, Long Beach, for appellant.

McInnis & Hamilton, San Diego, for respondents.

BARNARD, Presiding Justice.

Mr. McCabe died on February 6, 1928. Under the terms of his will and a decree of distribution entered on April 5, 1929, Mrs. McCabe received some $330,000 and also received $50,000 in trust for their daughter Virginia, the trust to terminate when she reached the age of 21 years. Admittedly, Mrs. McCabe mingled these trust funds with her own, kept no record or account, and could produce no receipt or voucher of any kind. Virginia reached the age of 21 years on July 23, 1942.

On November 12, 1947, the "First and Final Account" of this trusteeship was filed by Mrs. McCabe after a citation had been issued. See, In re Estate of McCabe, 80 Cal.App.2d 823, 183 P.2d 72. In this account, she charged herself with $50,000 and claimed credits of $54,065.34 for expenditures over a period of fifteen years, from 1928 to 1942. Briefly stated, about $23,000 was charged as the expense at certain schools and of various trips; about $8500 as the beneficiary's share of maintaining the family home; and $22,500 as the "reasonable average cost (of board, clothes, laundry, etc.) for 15 years, 1928 to 1942" at $125 per month. An order approving that account was reversed, on appeal, as to this last item. In re Estate of McCabe, 87 Cal. App.2d 430, 197 P.2d 35.

On June 21, 1949, Mrs. McCabe filed a supplemental account listing monthly charges for food, clothes, laundry, etc. in the various years, with "total expeditures for Virginia for 15 years, 1928 to 1942—$23,739.45." An equitable action was also brought by Virginia seeking to have the trust funds traced, marshalled and impounded; asking for declaratory relief and a recovery of the amount due; and praying for such other relief as might be just. These matters were consolidated and heard together. The court found, with respect to the supplementary account, that the trustee had thus expended $23,739.45, or more than the $22,500 for which she was required to account; that in so doing she had exercised her discretion; and that although no accounts had been kept it was established by evidence satisfactory to the court that these amounts were actually and properly spent for the benefit of the beneficiary. An order was entered approving the account and discharging the trustee. With respect to the other action, the court found that the trustee had thus expended in excess of $50,000; that while she had mingled the trust funds with her own, she had now made a full and proper accounting; and that her account had been approved. A judgment was entered that the plaintiff recover nothing. The beneficiary has appealed from this judgment and also from the order settling the supplemental account.

[1-5] Some statutory rules as to the duties and obligations of trustees should not be overlooked. A trustee must act in the highest good faith toward his beneficiary and may not take any advantage by the slightest concealment, Civ.Code, Sec. 2228. A trustee who mingles the trust property with his own, so as to appear to be its owner, is liable for the value of its use, Civ.Code, Sec. 2236. A trustee must invest money, as fast as collected in sufficient amount, so as to afford reasonable interest thereon, Civ.Code, Sec. 2261. A trustee who omits to thus invest trust money must pay simple interest thereon, if merely negligent, and compound interest if the omission is wilful, Civ.Code, Sec. 2262. Trustees are also under an obligation to render to beneficiaries a full account of all their dealings with the trust property, and where there has been a negligent failure to keep true accounts all presumptions are against them upon a settlement. Purdy v. Johnson, 174 Cal. 521, 163 P. 893. Trustees are also under the duty to prove every item of their account by "satisfactory evidence"; the burden of proof is on them and not on the beneficiary; and any doubt arising from their failure to keep proper records, or from the nature of the proof they produce, must be resolved against them. Purdy v. Johnson, supra.

[6] Not only is this account faulty in itself but the evidence that these amounts, as totaled but not itemized, were actually spent is unsatisfactory. The supplemental account purports to set up general living expenses from 1928, to and including the first half of 1942. No quantities or amounts are given as to specific items, and the cost of board, clothes, laundry, etc. are merely listed at so much a month or a year, with totals for the respective years. A charge of $1655 (or $2287 if the first account is remembered) is made for the year 1928, and a large amount for the first three months of 1929. During that period the trust was not in existence, and a large family allowance was being made from the estate. Also, an analysis shows that many of the charges in this account are duplicates of others allowed in the first account.

The trustee's testimony contains many contradictions and clearly discloses that she was relying on general estimates and could not, and did not, remember much of anything about these expenses. She testified that at the time of the first hearing she had no memory at all as to the items making up this $22,500; that her new account was a computation she had made up since the prior hearing; that she arrived at the items of this account after talking with her maid and with people "that keep homes like I kept mine"; that she refreshed her memory and made a general estimate; that "I sat down and sort of figured it out what clothes cost and I more or less worked on a little budget", and that "all this figuring" has been done since the first trial; that she kept no record and had no checks or receipts for any of the figures given; that she made a general calculation; and that while she could not tell about the specific items, "I know I spent that money." In over 100 pages of her testimony she made no attempt to give the actual cost of any article except for one $100 item. Not only it is inconceivable that she could have made the required "full and true account" from memory, after all these years, but it clearly appears from her own testimony that she had, at the second hearing as at the first, no memory as to the items involved. Her prior guess of $125 a month was merely broken down into so much a month, under some half dozen headings, for each of the years. Her testimony, as we said on the prior appeal, "amounts to a mere guess or conjecture and falls far short of the degree of proof required."

Assuming that these amounts were actually paid for the support of the daughter, a question remains as to whether they were intended at the time as payments from the trust funds. Apparently, she treated the mingled fund as her own and took care of her daughter as an ordinary mother would. She did not testify that she had any such intention when the payments were made, and her evidence tends to indicate that any intention to thus charge the trust estate was an afterthought. Although they had a violent quarrel on the daughter's twenty-first birthday and the daughter then left home, she made no attempt to make an account, or to establish her claim to these credits, until forced to do so some years later. She also testified that her daughter wanted to become a nun when she was 18 years old; that "I told her then she would have to give up everything her Daddy left her"; and that she had the $50,000 at that time. When asked where it then was she replied: "Well, we just had the family fund. I told you I didn't segregate it, whether it was $50,000 or $40,000, I just had the family fund" and that she "had it then in the fund".

She now contends that she is entitled to credit for these expenses, and relief from further obligation, under the "discretion" given her by the trust provisions. The will, in setting up this trust, provides that the trustee shall hold and manage this $50,000, with the income thereof, for the use and benefit of this daughter; that the income, or such portion of it as may be necessary, shall be used for the proper support and education of the daughter until she is 18 years old; that until such time "such portion of the principal as in the absolute and uncontrolled discretion of said trustee may be necessary", may also be used for this purpose; that when the daughter reaches that age all of the accumulated income shall be paid to her; and that all net income shall then be paid to her until she attains the age of 21 years. The next paragraph provides that when the daughter reaches the age of 21 "all of the said trust estate and all increase and accumulations thereof then in existence shall be paid and delivered (to her) absolutely." A wish and recommendation is then expressed that the daughter be given a good education and that during the continuance of the trust "such amounts as may be deemed reasonable or proper in the absolute and uncontrolled discretion of" the trustee shall be used for the support and maintenance of this daughter "out of said trust money, whether principal or interest." The trustee was also authorized to invest and reinvest the trust fund, from time to time, in investments permissible for savings banks or trust companies.

[7] These trust provisions did not authorize the trustee to mingle the trust funds with her own, or to treat the trust as nonexistent. The recommendations therein should be considered with the specific directions. It clearly appears that the purpose was to make sure of proper support for the daughter, mainly from income but from the principal if it became necessary. Reasonably construed, the trust provisions required the trustee to invest the funds and to use the income so far as necessary for the support of the daughter, and also permitted her to use the principal for that purpose if it became necessary, giving her a broad discretion as to what conditions should constitute such a necessity. The discretion thus given to the trustee, while broad, is not sufficient to authorize or justify the manner in which this trust was handled, or to relieve her of the necessity of establishing her charges against the trust estate by evidence which is satisfactory under general rules.

Mrs. McCabe violated her duties as trustee, statutory and otherwise, by mingling these funds with her own, by omitting to invest them so as to provide an income, and by negligently failing to keep any records which would enable her to render a true account. Moreover, she testified that she never discussed the matter of this trust with her daughter who was to receive the income itself after she was 18. While this may not amount to concealment, it reflects on the use of the highest good faith since the daughter might well have objected to the high expenses, especially in later years, had she known they were coming out of her legacy.

[8, 9] All of these matters have a bearing on whether such charges are established by "satisfactory evidence", in the absence of any vouchers or records of any kind, and when all presumptions are against the trustee. It can hardly be said that a proper exercise of discretion appears, under the plain meaning of the trust provisions. There is no direct evidence that any such discretion was exercised or as to when it is supposed to have occurred. The very act of continuing to pay the expenses from the mingled fund, without keeping any record thereof, indicates that the trustee was treating it as a whole and as a "family fund", as she testified, rather than that she was exercising any discretion because she considered that conditions had made this necessary. The mere fact that these total expenses happen to equal the original trust fund is neither controlling nor of great weight. The discretion given her, while broad, was not sufficient for the purpose here claimed. Her right to these credits, upon this ground, was not established by such satisfactory evidence as the law requires.

[10] A further consideration is that she is chargeable with the value of the use of these trust funds which were thus mingled. Some considerable interest is involved, and this not only directly concerns the matter of necessity, and the use of any discretion, but materially affects the total amount for which she is accountable. While this matter was suggested in our prior opinion, 87 C.A.2d 430, 197 P.2d 35, it was not considered on the rehearing which was directed only to ascertaining whether she had actually spent, for the daughter's support during the years, an amount equalling the item which had been reversed. The controlling issues have never been squarely met or decided in the trial court.

In practical effect, this trustee has disregarded the trust and treated the mingled fund as her own, thus wiping out the entire trust estate and largely defeating the purpose and intent for which the trust was created. While on the former appeal we reluctantly affirmed a part of the court's order, although we questioned the evidence in that regard, we feel that no court should place the stamp of approval on the manner in which this trust was conducted or upon such an accounting as is here made. Not only is the highest good faith required of a trustee but he must be held to strict accountability, with all doubts resolved against him, to the end that he may not be permitted either to dissipate or waste the trust estate, or to profit from his own negligence or fault. Under well established rules, a trustee should not be discharged from all liability on such unsatisfactory evidence as here appears.

The order and judgment in the respective proceedings are reversed.

MUSSELL, J., concurs.

STEWART et al. v. McCOLLISTER.

Civ. 17069.

District Court of Appeal, Second District, Division 3, California.

July 21, 1950.

Hearing Granted Sept. 13, 1950.*

Suit by Cecile C. Stewart and another against W. O. McCollister to recover damages for personal injuries and injury to property sustained in an automobile collision. From a judgment of the Superior Court, Los Angeles County, Robert H. Scott, J., in favor of the defendant, the plaintiffs appealed. The District Court of Appeal, Second Appellate District, Shinn, P. J., held that, since the plaintiffs did not in their complaint or at any time assert that the defendant was a city employee engaged in performance of his duties at time of accident, they were not required to present a verified claim to the defendant or to the city.

Judgment reversed.

---

* Subsequent opinion 231 P.2d 48.

1. Automobiles ⚷**230**

Where plaintiffs suing for damages sustained in automobile collision did not allege or assert at any time that defendant was a city employee or engaged in performance of his duties as such at time of accident, plaintiffs were not required to file verified claim with defendant or city pursuant to statute requiring filing of such a claim in case of claim that injury resulted from negligence of public employee in course of his employment, notwithstanding that defendant alleged that he was acting in course of his employment with city at time of accident. Government Code, § 1981.

2. Officers ⚷**119**

The word "claimed" as used in statutory provision requiring filing of verified claim whenever it is claimed that injury resulted from negligence of public employee in course of his employment is used in its ordinary and popular sense and contemplates the assertion of a demand by the injured person. Government Code, § 1981.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Claimed".

3. Municipal corporations ⚷**741(1)**

Under statute relating to filing of tort claims against municipalities whenever it is "claimed" that injury has resulted from negligence of public employee in course of his employment or from defective condition of public property "alleged" to be due to negligence of employee, quoted words were intended to have the same meaning, and it is the allegation of facts in a complaint that gives rise to necessity for filing a claim. Government Code, §§ 1981, 2001 (b), 53051, 53052, 53054.

4. Municipal corporations ⚷**741(1)**

Under the various statutes relating to tort claims against municipalities and employees thereof, necessity for filing claim arises when facts asserted in a complaint filed in an action give rise to a cause of action against the city. Government Code, §§ 1981, 2001(b), 53051, 53052, 53054.

5. Municipal corporations ⚷**742(4)**

A complaint against an officer alleging that negligence causing injury occurred during course of service under public employment, but failing to allege presentation of a claim to the officer and to the city, is fatally defective and the defendant officer is entitled to judgment on demurrer. Government Code, § 1981.

* * *

William N. Parker, of Pasadena, for appellants.

Early, Maslach, Foran & Tyler and Robert E. Early, Los Angeles (John B. Connolly, Los Angeles, of counsel), for respondent.

SHINN, Presiding Justice.

Plaintiffs, Cecile C. Stewart and Elmer R. Stewart, brought suit against W. O. McCollister, seeking damages for personal injuries and injury to property suffered in an automobile collision resulting from the negligence of the defendant. McCollister answered, denying the material allegations of the complaint and later amended his answer, alleging as a separate defense that at the time of the accident he was employed by the City of Los Angeles as a building inspector and was acting within the scope and course of his employment, and alleging also that the plaintiffs had not presented any verified claim of damages to him or to the clerk of the City of Los Angeles. He was represented by his personal attorneys and not by the City Attorney. When the case came on for trial the special defense was tried first to the court. McCollister testified that at the time of the accident he was employed by the city and was engaged in the course of his service as a building inspector and was driving his own car. It was stipulated that no verified claim had been filed with McCollister or the city. The court, having found the foregoing facts, rendered judgment in favor of defendant, and plaintiffs appeal.

The sole question is whether the case comes under section 1981 of the Government Code, which reads as follows:

"Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment or as a result of the dangerous or defective condition of any public property, alleged to be due to the negligence or carelessness of any officer or employee, within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be. In the case of a State officer the claim shall be filed with the officer and the Governor." (Our references to "cities" include other public bodies and we use the word "officer" as including public employees.)

[1, 2] The section relates to claims of two classes, namely, those arising out of negligence of a public officer or employee during the course of his service, and those arising out of the dangerous or defective condition of public property alleged to be due to the negligence or carelessness of an officer or employee. Unless the claim asserted falls within one or the other of these classes, there is no requirement for the presentation of a verified claim. It is clear to us that the claim which constitutes plaintiffs' cause of action is not one within the letter or the purpose of the section. It is the nature of the claim or demand that determines whether the claimant has brought himself within the section. The introductory phrase of section 1981, "whenever it is claimed," contemplates that a demand will be asserted by the injured person *claiming* either negligence of a public officer during the course of his service, or *"alleging"* negligence of an officer related to the dangerous or defective condition of public property. It is unmistakable that the word "claimed" is used in its usual, natural, ordinary and popular sense and in the sense in which it would be understood by those for whom it was intended. 23 Cal.Jur., p. 749. The verb "claim" means, according to the books, "to assert as a fact, to ask or call for, to require, to demand." And as a noun it means "a demand of a right or supposed right; a calling on another for something due or supposed to be due." A right to damages is not claimed, nor is a claim of damages made, until the claimant has taken affirmative action looking to the enforcement of his supposed rights. As we shall see, the elements of a claim which would bring it within the section are entirely foreign to plaintiffs' cause of action against McCollister.

[3, 4] It is essential in the first class of cases described in the section that the officer *be accused of negligence during the course of his service,* just as it would be necessary in the second class of cases to assert that the dangerous or defective condition of the public property was due to the negligence of the officer. Accordingly, in the second class of cases the filing of a claim is required when the dangerous or defective condition is "alleged" to be due to the negligence of the officer. Such an allegation is necessary in order to state a cause of action against the officer for injury resulting from the dangerous or defective condition of public property. In either class of cases the allegation of facts constituting the cause of action establishes the nature of the claim. Whether the allegation be true or false is immaterial. The only difference in the wording that brings the two classes of cases under the claims statute is that the word "alleged" is used with relation to the dangerous or defective condition of the public property caused by the negligence of an officer and the word "claimed" is used in describing the cases of negligence of the officer during the course of his service. It is altogether clear that the words were intended to have the same meaning. The phrase "whenever it is claimed" with relation to one class of claim and the phrase "alleged to be due to" with relation to the other class of claim serve the same purpose, namely, to identify the nature of the cause of action upon which the injured person relies. The intention of the Legislature that the words should be given the same meaning is illustrated by the fact that in section 2001(b) of the Government Code "alleged" is used in the same sense as the word "claimed" is used in section 1981. Section 2001(b) reads: "(b) Whenever suit for damages is brought against any officer, including officers as defined in Article 2, of the State or of any school district, county or municipality on account of injuries to persons or property, *alleged* to have been received as a result of (1) the negligence or carelessness of such officer occurring during the course of his service or employment, or (2) the dangerous or defective condition of any public property, *alleged* to be due to the negligence or carelessness of such officer, it is the duty of the attorney for the State, district county, municipality, or other public or quasi-public corporation, as the case may be, to act as counsel in defense of such suit, unless lawful provision has been made for the employment of other counsel in connection therewith. The fees and expenses involved in a suit referred to in subdivision (b) are a lawful charge against the State, school district, county or municipality, as the case may be." [Enacted 1943.] (Emphasis added.) Thus the allegation of facts in the complaint which would bring the action within either subdivision (1) or (2) of section 2001(b) is sufficient to entitle the officer to a free defense, regardless of the truth of the allegation. The statute does not give him the right to a free defense unless he is accused by the injured party of having been acting in the course of public service, even though that fact may be alleged in the answer. And where the city alone is sued under the public liability law, Government Code, sec. 53051, based on Stats.1923, Ch. 328, p. 675, and "it is claimed" that the injuries resulted from the dangerous or defective condition of public property, a claim must be filed with the city, and the city attorney must defend the suit for injuries "allegedly received as a result of the dangerous or defective condition of public property." Government Code, secs. 53052, 53054. In all these situations the applicability of the claims statutes and the duty of the city attorney to defend the action, arise when facts are asserted in a complaint, filed in an action, which would give rise to a cause of action against the city. This is true although, as pointed out in Ansell v. City of San Diego, 35 Cal.2d 76, 216 P.2d 455, section 1981 does not apply to cities. It is clear upon study of these related code provisions that the issues which are determinative of the nature of the claim, and the applicability of the statute, are those which are tendered by the plaintiff.

It is recognized in all the cases that the origin of the claims statutes is the interest of the city in having notice of certain types of claims, in order that they may be investigated, and in some cases compromised or resisted. The presentation of claims as required by section 1981 is of interest for the reason that cities may insure their officers against liability for injuries "resulting from their negligence or carelessness during the course of their service or employment and for the injuries or damages resulting from the dangerous or defective condition of public property * * * due to their alleged negligence or carelessness" etc., Government Code, sec. 1956, and, as we have said, in such cases the officer has a right to be defended at the expense of the municipality. There was a brief period when it was required that a claim be filed with the officer and the city in any case charging negligence of an officer, even though it was not claimed that the negligence occurred during the course of his service or employment. Stats.1931, p. 2476, Act 5150, Deering's Gen.Laws, p. 2205. Act 5150 was amended in 1937 so as to give the claims statute this broad scope. The amendment was declared unconstitutional for insufficiency of its title in Jackman v. Patterson, 42 Cal.App.2d 255, 108 P.2d 682. It was obviously out of harmony with the related claims statutes, and when Act 5150, supra, was codified the Legislature limited the requirement for the presentation of claims to the cases in which an issue is presented as to whether the negligence of the officer occurred during the course of his service. This statutory revision supports the view that an indispensable element of the demand for which a verified claim must be presented is an allegation of the public employment of the officer and negligence during the course of his service.

[5] If the complaint against the officer alleges that the negligence occurred during the course of his service under public employment, and fails to allege the presentation of a claim to the officer and to the city, it is fatally defective, and the defendant officer is entitled to judgment on demurrer. Huffaker v. Decker, 77 Cal.App.2d 383, 175 P.2d 254; Veriddo v. Reynaud, 35 Cal.2d 263, 217 P.2d 647. In each of these cases, although the officer alone was sued, it was alleged in the complaint that the plaintiff had sustained injuries through the negligence of the officer occurring during the course of his service or employment. A demurrer was sustained without leave to amend, judgment was entered for the defendant, and affirmed on appeal. We do not see how any other conclusion could have been reached in those cases since the plaintiffs brought themselves within the letter of section 1981, and failed to allege that they had complied with its requirements. These recent cases make it clear that one who intends to sue, and to allege facts which would bring his case within section 1981, must lay the necessary foundation for such an action by presenting and filing a verified claim. We have no such case here. Plaintiffs Stewart did not allege in their complaint, nor have they asserted at any time, or in any manner, that McCollister was a city employee, and at the time of the accident engaged in the performance of his duties as such. Those facts were brought into the case by the defendant. The City of Los Angeles has no interest whatsoever in this lawsuit, or in the claim of damages upon which it is founded. To sustain the judgment upon the ground that plaintiffs failed to present their claims to McCollister and the city within 90 days after the occurrence of the accident would require not only that the provisions of section 1981 be distorted, but that they be distorted in a manner that would produce a wholly unjust and unreasonable result. The section would have to be made over by reading therein what has not been written. We would have to hold that it means something it does not say and that it does not mean what it says. Certainly the legislature has not provided that in any case of negligence against an individual, where it is alleged as a matter of defense, and established at the trial, that he was a public officer acting within the course of his service when the injury occurred, and that no claim was presented by plaintiff, the action must fail, even though the plaintiff has at no time claimed, or in any manner asserted, that the defendant was a public employee acting in the course of his service. Section 1981, as written, is reasonable and just. As construed by respondent it would be highly unreasonable. It would make it necessary in countless accident cases for the injured person to pursue an investigation to discover whether the wrongdoer was a public officer, acting within the course of his employment, and, if so, to lay a foundation for a suit against the public body, even though he did not intend to sue the employer. We can conceive of no good reason for imposing such a burden upon one who intends to disregard the possible liability of an employer, and to proceed only against the individual. We are unwilling to give to section 1981 an interpretation that would unreasonably discriminate between those who wish to sue public officers, ignoring the facts as to their employment and duties, and those who sue individuals who are not public officers. No basis whatever exists for such discrimination.

These claims statutes serve a good purpose, but at the same time have proven to be pitfalls into which many worthy claimants have stumbled to their dismay and defeat, as in the Huffaker and Veriddo cases. Frequent changes in the law have added to the confusion. The cited claims provisions relate only to cases in which the facts alleged by the claimant indicate liability of the city, whether the action is against the city, or the officer alone, or against both, for the dangerous or defective condition of city property, or for negligence of the officer in the course of his service. The present case does not fall in either category. Respondent's position finds no support in the wording of the section, and is manifestly opposed to its plain purpose.

The judgment is reversed.

WOOD and VALLÉE, JJ., concur.

98 Cal.App.2d 463

HYMAN v. HYMAN.

Civ. 17033.

District Court of Appeal, Second District, Division 3, California.

July 14, 1950.

Action by Myron E. Hyman against Edward Hyman to recover profits alleged due under an agreement between plaintiff, as manager, and defendant, as owner, of a business involving the manufacture of clothing and the purchase and sale of realty and personalty. The Superior Court, Los Angeles County, James Snell, J., rendered a judgment of nonsuit for the defendant, and the plaintiff appealed. The District Court of Appeal, Wood, J., held that jury questions were raised by the plaintiff's evidence.

Judgment of nonsuit and minute order granting motion for nonsuit reversed.

1. Appeal and error ⇨997(2)

On appeal from judgment of nonsuit in favor of defendant at close of plaintiff's case, question is whether plaintiff presented any substantial issue of fact for the jury.

2. Trial ⇨165

In ruling upon motion for nonsuit, evidence must be viewed in light most favorable to plaintiff.

3. Master and servant ⇨80(13)

In action by manager against owner of business, in which clothing was manufactured and realty and personalty were purchased and sold, to recover profits alleged due under contract granting manager right to 20 per cent of profits from operation of the business, whether word "operations" included transactions other than manufacturing operations was a question for the jury.

4. Master and servant ⇨70(3)

Where contract allowed manager of business 20 per cent of profits from operations and it could not be determined as a matter of law from contract itself whether word "operations" meant manufacturing only or included sale of merchandise, conduct of parties in performing agreement before controversy between them arose was an important factor to be considered in determining intention of the parties.

5. Master and servant ⇨80(13)

In action by manager against owner of business, in which clothing was manufactured and realty and personalty were purchased and sold, to recover profits alleged due under contract granting manager right to 20 per cent of profits from operations of the business, whether sale of apartment house and purchase of another business were operations, what amount, if any, was due manager as result, whether check sent to manager represented his share of profits or merely a gift, whether profit resulted from transfer of business assets to a newly formed corporation, and what amount, if any, was due manager by reason thereof were questions for a jury.

◆

Fink, Rolston, Levinthal & Kent, Los Angeles, and Nelson Rosen, Hollywood, for appellant.

Loeb & Loeb and Leon S. Alschuler, all of Los Angeles, for respondent.

WOOD, Justice.

Appeal from a judgment of nonsuit. In the complaint it was alleged that the defendant owned and operated a business known as Edward Hyman Company, and in said business he manufactured clothing and engaged in the purchase and sale of real and personal property; on January 2, 1942, plaintiff and defendant entered into a written agreement whereby defendant agreed to pay to plaintiff in consideration of plaintiff's services in said business 20 per cent of the net profits of said business; plaintiff performed every service to be performed upon his part; while said agreement was in effect and during the year 1946, and in addition to sums for which defendant had accounted to plaintiff, the defendant realized a profit in said business of $786,043.85; defendant refused to pay to plaintiff 20 per cent of said sum or any part thereof; and the sum of $157,208.77 is unpaid.

Defendant, in his answer, admitted that he owned and operated a business known as Edward Hyman Company in which he manufactured work clothes, uniforms, sportswear, and linen supplies; admitted that he and plaintiff entered into a written agreement as follows:

"Profit Sharing Agreement

"This Agreement, entered into January 2, 1942, by and between Edward Hyman Co., party of the first part, and Myron E. Hyman, party of the second part.

"It is hereby agreed as follows:

"1) That in consideration of the services to be rendered by Myron E. Hyman as manager of Edward Hyman Co., he shall receive 20% of the net profits and, in case of a loss, he shall absorb 20% of the loss from the operations of the Edward Hyman Co.

"2) The net profit or loss shall be determined at the end of each fiscal year after the completion of the audit. The books shall be closed July 31st of each year and the account of Myron E. Hyman shall be credited or debited with his share of profit or loss as disclosed by the audit.

"3) Cash drawn during the year by the party of the second part shall be considered an advance and shall be charged to his account.

"4) This agreement may be terminated by either party without giving any written notice in advance.

"Edw. Hyman
"Witness Myron Hyman
"Leo D. Epstein
"Witness
"Edward Carroll"

Defendant, in his answer, denied all the other allegations of the complaint and denied that he was indebted to plaintiff in any sum.

Trial was by jury. Neither the reporter's transcript nor the minutes of the court, as set forth in the clerk's transcript, shows that plaintiff had closed his case. There is a recital in the judgment that "plaintiff closed." No point is made on appeal as to whether plaintiff had closed his case prior to the order granting defendant's motion for a nonsuit, and it will be assumed that plaintiff had closed his case.

[1, 2] The question is whether plaintiff presented any substantial issue of fact for the determination of the jury. In ruling upon a motion for a nonsuit the evidence must be viewed in the light most favorable to plaintiff.

Plaintiff is a nephew of defendant. He was employed by defendant in 1934 and he continued in such employment until August 14, 1946. About 1937 plaintiff became the manager of defendant's branch factory in San Francisco, and he continued in that position until 1941. In 1941 defendant told plaintiff that if plaintiff would move to Los Angeles and become general manager of the entire business defendant would give him 20 per cent of the profits of the company provided plaintiff would share 20 per cent of the losses, and that from the profits plaintiff could purchase a 20 per cent interest in the business. Plaintiff accepted the proposal, and he moved to Los Angeles and became general manager of the company, which then had factories in Los Angeles, San Francisco, Portland, and Atlanta, Georgia. The attorney for defendant prepared the written agreement, hereinabove quoted, and the defendant presented it to plaintiff. Defendant told him that the document was for the records because the accountant for the company had recommended that they have some evidence in writing as to the percentage plaintiff was drawing. Plaintiff said "[T]his was not our arrangements," and asked defendant "[W]hat happened to the 20 per cent partnership interest I was to get, or the right to purchase it?" Plaintiff said that he wanted to make the purchase of the 20 per cent interest and he wanted "what the arrangements were in San Francisco." Defendant said "When you have the money you can purchase it," and "You are getting the 20 per cent now any way." In the latter part of 1944 plaintiff told defendant he was ready to purchase the 20 per cent interest. Defendant said that he would let him know in a couple of days what he was going to do about it. A few days later defendant said "I have been advised I cannot give out a partnership interest in the business. I don't want you to be able to sell me out. I don't want you to be able to control me. You have got everything I have got in this business except that I will share it 80 per cent and you will share it 20 per cent." Defendant also said at that time something "about incorporating at some future date" and that plaintiff then might have the 20 per cent interest.

The company manufactured washable service apparel such as uniforms for doctors, nurses, grocery men, and waitresses; and it also manufactured work clothing such as shirts, coveralls, and shop coats. In addition to said manufacturing business the company "traded in some securities" and "bought several pieces of real estate."

Articles of incorporation of the Edward Hyman Company, a corporation, were filed in May, 1946, and the company was authorized to issue 360,000 shares of stock. On June 1, 1946, the corporation made application to the corporation commissioner for a permit to issue 260,000 shares of stock to defendant in exchange for the assets, including the good will, of the business owned and operated by defendant under the fictitious firm name of Edward Hyman Company. The application was granted and on June 24, 1946, defendant executed a bill of sale which recited that he sold and conveyed to the corporation all the assets of the business conducted under the fictitious firm name of Edward Hyman Company, including the good will, trade marks, and trade names. After the said shares were issued to defendant the defendant asked plaintiff if he had the money for his 20 per cent of the stock (52,000 shares) at $5 per share, or $250,000. Plaintiff said that he did not have the money, and then he asked defendant where he got the $5 price. Defendant said that "is what we're selling the stock for." Plaintiff asked him if he intended "to make a profit off the good will on" plaintiff; and plaintiff also said, "What have I been doing all these years, and what about our original agreement?" Defendant said he would think that over and let plaintiff know "at what price we do come out at." Later defendant said he would not charge plaintiff for "the profit of the good will," but the price at which the company was sold to the corporation was the price plaintiff would have to pay for his stock. Application was thereafter made to the corporation commissioner for a permit to issue 52,000 shares to plaintiff at $2.31 per share.

About August 12, 1946, when plaintiff returned from a vacation he was asked to sign minutes of the corporation which authorized certain persons to sign checks for the withdrawal of money from one of the bank accounts, but the plaintiff, who was the manager of the company, was not included as one of those persons so authorized. Plaintiff asked defendant about such authorization, and defendant said he forgot to include plaintiff's name. Plaintiff then (about April 14, 1946) decided to resign and not to buy the stock.

The earnings and profits increased while plaintiff was manager. During the 6 months prior to January 31, 1942, there was a profit of $22,558.78. During the 12 months prior to July 31, 1943, there was a profit of $99,264. During the 10 months prior to May 31, 1946, there was a profit of $300,199.20.

The fiscal year of the company ended on July 31st. Plaintiffs admits that he has received his share of the profits for the fiscal years prior to July 31, 1945. Plaintiff does not contend that he has not been paid 20 per cent of the profits which resulted from the manufacturing operations of the company. His complaint is based upon transactions of the company, other than manufacturing operations, which occurred in the fiscal year ending July 31, 1946.

Before the company was incorporated, certain property known as the La Casitas Apartments was treated, on the books of the company, as an investment in the operation of the company. In the application for a permit to issue stock, the property was listed as an investment of $19,000, but the property was not thereafter transferred to the corporation. The property cost $11,840 originally. The company received the rents from the apartments, and plaintiff received 20 per cent of the rents collected. After plaintiff left the company the apartments were sold and defendant sent a check to plaintiff for $1,208.77 and told plaintiff that the check represented 20 per cent of the profits on the sale of the apartments. On the back of the check there was writing as follows: "In full payment of all obligations and indebtedness by Edward Hyman, Edward Hyman Company, Edward Hyman Company Corporation to December 12, 1946." Plaintiff did not present the check for payment. Defendant testified, in effect, that the check was a gift.

In May, 1945, the company purchased 7,125 shares of stock of the Galland Linen Supply Company for $26,250. In December, 1945, certain shares of the stock were sold at a profit, and plaintiff was paid 20 per cent of the profit. In January, 1946, other shares were sold at a profit, and plaintiff was paid 20 per cent thereof. The cost of the remainder of the stock was $24,776.25. In April, 1946, the remainder of that stock was withdrawn by defendant from the company, and at that time it was valued at $54,600.

On April 26, 1946, prior to incorporation of the company, the books of the company (as shown by a financial statement of that date) showed the net worth of the machinery, equipment, buildings and land of the company (at 1830 South Hill Street, Los Angeles) to be $597,392.74. That amount was $204,319.91 more than the cost of those assets as shown by the books. The said net worth, as shown by the books, did not include the value of the good will, trade marks, or trade names; nor did it include certain shares of stock of the Galland Linen Supply Company which had been carried on the books of the company. The financial statement, above referred to, was submitted to the corporation commissioner as a part of the application for a permit to issue stock.

Plaintiff contended at the trial that the transfer by defendant of the assets of the company (doing business under a fictitious name) to the corporation in consideration of the issuance of stock to the defendant was a sale, and that a profit resulted therefrom. There was evidence as to the appraised value and book value of those items prior to the transfer. In the application for a permit to issue stock the value of those items was stated, and that value was greatly in excess of the former appraised value and the book value. Defendant contended at the trial that a transfer of those assets was a "tax-free transfer" and that defendant did not realize a profit from the transaction. Plaintiff asserts that it is immaterial in this case as to what the federal or state government determines to be gains for purposes of fixing income tax; and that a determination for income tax purposes is not conclusive as to the rights and liabilities of the parties under their contract.

The machinery and equipment transferred by defendant to the corporation for stock issued to himself was not transferred at the original cost thereof but, according to testimony of an accountant, there was a profit from an accounting standpoint in the amount of $81,030.10, and that amount was entered on the books as "Appreciation of assets by appraisal, $81,030.10." Plaintiff had been charged 20 per cent of the depreciation on these items during the period from 1942 to 1946.

There was a conflict in the evidence as to whether the building and land (1830 South Hill Street, Los Angeles), where the main office was located, were transferred to the corporation. The cost of those assets was about $57,000. In the application for a permit to issue stock it was stated that those assets were of the value of $177,648.05. If those assets were transferred to the corporation, then plaintiff asserts that defendant realized a profit from the transfer. If those assets were not transferred to the corporation, plaintiff asserts that there is justifiable ground for plaintiff to claim 20 per cent on the gain reflected upon the books of the company by reason of the increase in value of the building and land. Plaintiff had been charged 20 per cent of the depreciation, the expenses, and the interest paid on a mortgage, in connection with those assets during the period from 1942 to 1946.

The good will of the company (operating under a fictitious name) was transferred by the defendant to the corporation. As above shown, the business increased greatly while plaintiff was manager. Plaintiff asserts that the value of the good will also increased greatly during that time; that the shares of stock issued to defendant by the corporation represented payment for the good will of the business in addition to the physical assets transferred to the corporation. The defendant testified that the good will of the business had value on the day he gave the bill of sale to the corporation. He asked plaintiff to pay $5 per share for the stock. He testified that in August and September, 1946, shares of stock (about 17,000 shares) were sold for $4.50 per share. When plaintiff objected to paying $5 per share for the stock and stated that defendant should not make "a profit off the good will on" plaintiff, the defendant said: "Well, I'll think about the good will involved, but those assets, I am entitled to a profit on those." Plaintiff argues that the jury could have found that the 260,000 shares of stock received by defendant were worth $4.50 per share or $1,170,000, and that the difference between that amount and the value of the physical assets, $597,392.74, constituted the value of the good will. He argues further that, although the value of the good will could not be determined with mathematical certainty, it was a question of fact for the jury as to the value of the good will when plaintiff becomes the manager and when the good will was transferred to the corporation; and that the increase in the value of the good will was a profit from "the operations of the Edward Hyman Co.," and that the jury would have been justified in finding that plaintiff was entitled to 20 per cent of the increase in value of the good will.

[3, 4] One question of fact for the determination of the jury was whether the word "operations" in the expression "from the operations of the Edward Hyman Co.," used in the contract, included transactions of the company other than manufacturing operations. The company, according to its books and the testimony of plaintiff, did engage in business other than manufacturing washable service apparel. It cannot be determined, as a matter of law, from the contract itself that the "operations" referred to were solely the manufacturing and sales of merchandise. The conduct of the parties in performing the agreement, before the controversy arose, is an important factor to be considered in determining the understanding and intention of the parties in the use of those words. As above shown, there was evidence that plaintiff did receive 20 per cent of the profits from transactions other than those of manufacturing and selling merchandise, and that he was charged 20 per cent of the loss depreciation and expenses in transactions other than the manufacturing operations. In Nelson v. Abraham, 29 Cal.2d 745, 177 P.2d 931, plaintiff and defendant entered into an oral agreement which provided that if plaintiff would conduct the branch office of defendant's ice business in San Fran-
v. Abraham, 29 Cal.2d 745, 177 P.2d 931,
cisco he would receive one-third of the net profits from the operation of the business but would not have an interest therein. After plaintiff therein had conducted the business for a while it was sold by defendant, without notice to plaintiff, at a profit of $5,000. Plaintiff therein alleged a copartnership and the existence of a net profit from the operation of the business and from the sale of assets, and sought an accounting. The trial court found that a copartnership did not exist and that plaintiff was not entitled to any part of the profits from the operation or sale of the business. The judgment was reversed. The court said 29 Cal.2d at page 749, 177 P.2d at page 933: "The question may not be dismissed summarily with the observation that, since the agreement gave

the plaintiff a share of the net profits from operation without an interest in the business, and since the books showed no net profit from operation, the plaintiff has furnished no basis for an accounting." It was also said therein, 29 Cal.2d at page 750, 177 P.2d at page 933: "Whether the agreement to share profits is merely to provide a measure of compensation for services * * * or whether it extends beyond and bestows ownership and interest in the proits themselves so as to constitute the undertaking a partnership or a joint venture, presents primarily questions of fact. * * * It has been said to be a 'mingled problem of law and fact.' * * * It is, however, unnecessary to place a precise legal designation on the relationship between the parties. * * * The oral agreement and the conduct of the parties thereunder, considering the nature of the undertaking and the surrounding circumstances, define their respective rights, liabilities and duties one to the other without the necessity for designating their relationship by a particular label." It was also said therein 29 Cal.2d at page 751, 177 P.2d at page 934: "It is conceivable that the relationship between parties may be, for one purpose, that of employer and employee, while for another that of partners or joint adventurers." It was also said therein 29 Cal.2d page 753, 177 P.2d at page 935: "[I]n any accounting under the agreement, the court may consider what the parties meant by 'profits from operation' of the San Francisco business. This is so for the reason that there existed between them an agreement to share those profits. * * * The plaintiff is entitled to his portion of the profits under the agreement established by the record. * * * Therefore, upon proper consideration of all relevant facts, there might appear justification for viewing the San Francisco venture as an 'operation,' and for concluding that any other sense of that word would render the parties' agreement meaningless."

[5] Other questions of fact in the present case for the determination of the jury were: (1) whether the La Casitas Apartments transaction was an operation of the company; (2) whether the check for $1,208.77, which defendant sent to plaintiff, represented 20 per cent of the profit from the sale of those apartments or whether it was a gift from defendant; (3) whether the Galland Linen Supply Company transaction was an operation of the company, and what amount, if any, was due to plaintiff from that transaction; (4) whether a profit resulted from the transfer of the assets to the corporation, and what amount, if any, was due to plaintiff by reason of the transfer. We do not hold, however, that there may not be other questions of fact for the court or a jury.

The judgment of nonsuit, and the minute order granting the motion for a nonsuit, are reversed.

SHINN, P. J., and VALLÉE, J., concur.

98 Cal.App.2d 488

CLARK et ux. v. TIDE WATER ASSOCIATED OIL CO., a Delaware Corporation.

Civ. 17518.

District Court of Appeal, Second District, Division 1, California.

July 17, 1950.

Rehearing Denied Aug. 8, 1950.

Merle H. Clark and wife sued the Tide Water Associated Oil Company, a Delaware Corporation, (Associated Division), for breach of a lease of a service station to defendant. From a judgment of the Superior Court of Los Angeles County, Percy Hight, J., on a jury's verdict for plaintiffs, defendant appealed. The District Court of Appeal, Drapeau, J., held that plaintiffs' failure to comply with a condition in the lease that they give lessee written notice of its default in performance of its covenants was fatal to plaintiffs' right to bring the action.

Judgment reversed.

1. Contracts ⚷176(1)

Construction of language of written contract is purely law question, in absence of other evidence.

2. Appeal and error ⚷1008(3)

A reviewing court is not bound by trial court's construction of language of written contract, in absence of other evidence, but must make final determination in accordance with applicable principles of law.

3. Contracts ⚷143, 152

Construction of written contract containing no ambiguity or uncertainty in its terms must be derived solely from language therein, and effect must be given to all parts of writing.

4. Landlord and tenant ⚷134(6)

Service station owners' failure to comply with condition in their written lease of station that they should give corporate lessee 20 days written notice of its default in performance of any of its covenants was fatal to such owners' right to sue for damages for lessee's breach of certain terms of lease.

W. F. Kiessig, Edmund D. Buckley, San Francisco, Harrison Guio, Los Angeles, and Charles O'Gara, San Francisco, for appellant.

Robert E. Krause and Allen R. Steele, Long Beach, for respondents.

DRAPEAU, Justice.

Plaintiffs own a large combination truck and passenger-car service station in Long Beach. They leased it to defendant corporation for a term of twenty years commencing on August 1, 1947. For about eighteen months prior thereto, plaintiff husband had successfully operated said station.

By the terms of the lease defendant agreed (1) to pay a monthly rental of 1¢ per gallon of gasoline, ½¢ per gallon of diesel, and ½¢ per gallon of butane sold by it at and from the station, the minimum rental to be not less than $170 per month (paragraph 3); (2) to operate the service station "in good faith and with reasonable diligence in conformity with the operating standards of lessee" (paragraph 3a); (3) to commence to install butane storage and dispensing facilities within 90 days after August 1, 1947 (paragraph 14).

Paragraph 4 of the lease provides that "If during the term hereof, or any extension thereof, Lessee shall default in the payment of rental or in the keeping or performing of any of the covenants or conditions herein contained to be kept or performed by Lessee, and if such default shall not be corrected within a period of twenty (20) days after receipt of written notice from Lessor, specifying said default, Lessor shall have the right at Lessor's election to terminate this lease or to re-enter the demised premises and remove all persons therefrom or to take any other action for the enforcement of any right or remedy available to Lessor by law or equity."

On May 27, 1948, plaintiffs commenced the instant action to recover damages for breach of the terms of the lease. The first cause of action alleged failure to operate the station in conformity with the operating standards of defendant, as required by paragraph 3a, resulting in damage to the extent of $4,850. The second cause of action alleged failure to commence installation of the butane facilities under paragraph 14, and prayed for damages in the amount of $4,850, or a total of $9,700, plus reasonable attorneys' fees.

The cause was tried with a jury, and during the trial defendant's motions for nonsuit and directed verdict were denied. A verdict was returned in favor of plaintiffs for $4,000 on the first cause of action; for $1,000 on the second cause of action, and the court fixed attorneys' fees at $500. Judgment was entered accordingly for a total of $5,500, from which defendant appeals.

It is here contended that the court's refusal to grant the motions for nonsuit and directed verdict was error justifying reversal of the judgment for the following reasons:

(1) Failure of respondents to comply with paragraph 4 of the lease by giving the 20 day notice of default which, it is urged, was a condition precedent to the right to sue.

(2) Respondents' assignment of all rentals to the Bank of America as security

for a promissory note made the bank a necessary party to the action.

(3) By their letter to appellant dated December 17, 1947, respondents waived their cause of action for failure to install the butane facilities.

It is also urged (4) that the trial court erred in admitting evidence of respondents' prior operation of the service station as a yardstick to determine the operating standards of appellant and the amount of damages sustained; (5) that assuming the respondents' theory of the measure of damages is correct, the verdict was grossly excessive and without support in the evidence; (6) that the trial court erred in the admission and exclusion of evidence and in its refusal to give certain instructions requested by appellant.

The record discloses that respondents did not allege or offer to prove that they gave the written notice of default required by paragraph 4 of the lease. In fact, their counsel, in his arguments against the motions for nonsuit and directed verdict, admitted that such notice was not given. In denying the motions, the trial court commented that said paragraph "has reference solely to the extraordinary remedy of terminating the lease * * * an action for damages * * * is not contemplated."

From a cursory reading, the disputed paragraph appears clear and unambiguous and rather sweeping in its terms: In the event of a default by lessee in payment of rental or in the performance of any of the covenants or conditions contained in the lease, and if such default be not corrected within 20 days after receipt by lessee of written notice specifying the default, lessor shall have the right to elect to terminate the lease or to re-enter the premises and remove all persons therefrom, or *"to take any other action for the enforcement of any right or remedy available to lessor by law or equity."* (Emphasis added.)

[1, 2] As was aptly stated in La Lumia v. Northern Cal. Packing Co., 75 Cal.App.2d 917, 922, 172 P.2d 94, 98: "The construction of the language of a contract, in the absence of other evidence, is purely a question of law. Under such circumstances a reviewing court is not bound by the construction thereof by the trial court, but must 'make the final determination in accordance with the applicable principles of law.' In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825, 830; 6 Cal.Jur. sec. 192, p. 326."

[3] See, also, Lane-Wells Co. v. Schlumberger Well Surveying Corp., 65 Cal.App.2d 180, 184, 150 P.2d 251, 253, where it is said: "The contract contains within its terms no ambiguity or uncertainty. Its construction therefore must be derived solely from the language within its borders and effect must be given to all parts of the writing. * * * Under that principle the reviewing court is not bound by the decision of the trial court made either without the aid of evidence or where there is no conflict in the evidence."

That written notice of default was within the contemplation of the parties is given further credence by paragraph 15 of the lease which recites in detail the mailing addresses to which any and all written notices should be sent.

While it is true that the lease was drawn by appellant, respondent husband was not exactly a novice. He was well informed and experienced in the business, having successfully operated the service station for some eighteen months prior to the execution of the instant lease.

[4] Having adopted the condition precedent embodied in paragraph 4, respondents' failure to comply therewith is fatal. As a result, appellant's motion for nonsuit should have been granted on the ground that respondents failed to state or prove their cause of action for breach of contract.

Because of the conclusion reached on the main point of this appeal, no useful purpose would be served by a discussion of the other issues raised by appellant, hereinabove recited.

For the reasons stated, the judgment is reversed.

WHITE, P. J., and DORAN, J., concur.

35 Cal.2d 607

BOMBERGER et ux. v. McKELVEY.

McKELVEY et al. v. BOMBERGER et al.

Sac. 5947.

Supreme Court of California, in Bank.
July 31, 1950.

Rehearing Denied Aug. 24, 1950.

Action by John W. Bomberger and wife against D. P. McKelvey to recover amount due under contract for demolition and removal of a building from realty purchased by defendant from plaintiffs and amount which defendant had agreed to pay plaintiffs' assignors from relinquishment of lease. D. P. McKelvey and another filed a counterclaim and cross-complaint against John W. Bomberger and others to recover damages for trespass and waste. The Superior Court, Stanislaus County, B. C. Hawkins, J., entered judgment in favor of plaintiffs and cross-defendants, and defendants and cross-complainants appealed. The Supreme Court, Gibson, C. J., held that the evidence sustained conclusion that the plaintiffs were entitled to fully perform agreement and did not commit trespass, despite notice by defendant not to enter upon premises or dismantle improvements, and that plaintiffs were entitled to amount agreed upon for demolition and removal of building and amount promised their assignors for relinquishment of lease.

Judgment affirmed.

Prior opinion 205 P.2d 709.

1. Judgment 🔑572(2)

Sustaining, with leave to amend, demurrer to complaint seeking a declaration of purchasers' right to building on premises purchased indicated that denial of preliminary injunction against demolition of building by vendors sought in connection with declaratory relief was not intended as a final adjudication of rights of parties and therefore was not res judicata of issues presented in action by vendors to recover amount which purchasers had agreed to pay for removal of building.

2. Judgment 🔑564(2)

A decision on application for a preliminary injunction does not amount to a decision on the ultimate rights in controversy, unless it appears that court intended a final adjudication of issues involved.

3. Contracts 🔑175(3)

Evidence warranted inference that vendors and purchaser had agreed that vendors were to demolish building on realty sold as soon as practicable after construction of a new building for the occupants and that vendors would be entitled to salvage the material after its removal.

4. Contracts 🔑168

Agreement for demolition and removal of building contained implied covenant that contractors would be given possession of premises for agreed purpose at a reasonable time to be chosen by them.

5. Contracts 🔑303(5), 313(2), 314

Forbidding contractors to enter upon premises was sufficient to excuse nonperformance of contract to demolish building thereon and constituted a breach or anticipatory breach of contract by owners. Civ. Code, § 1511.

6. Damages 🔑62(4)

Generally, either party to an executory contract has power to stop performance thereof by giving notice or direction to that effect, thereby subjecting itself to liability for damages, and upon receipt of such notice the other party cannot continue to perform and recover damages based on full performance.

7. Damages 🔑62(1)

Plaintiff must mitigate damages so far as he can without loss to himself.

8. Contracts 🔑321(1)

Where a contractor has started work under an executory contract and has reached a point where it would be impracticable to attempt to make a reasonable estimate of damages, or where to complete the work will diminish damages or at least not enhance them, the contractor may go forward and complete performance despite notice from other party to stop performance.

9. Damages 62(4)

The general rule that after receipt of notice from the other party to stop performance under an executory contract contractor cannot continue to perform and recover damages based on full performance is subject to the jurisdiction of equity to order specific performance of the contract, and where damages will not afford adequate compensation and specific performance will lie contractor may continue to perform in spite of notice to stop and thereafter recover on the basis of his continued performance.

10. Sales 🔑68

Adoption of the Uniform Sales Act, which authorizes specific performance, in the discretion of the court, of contracts to sell goods, exemplifies a tendency to liberalize the requirements for specific performance of contracts to sell or transfer personal property. Civ.Code, § 1788.

11. Specific performance 🔑74

Where contract for demolition of a building contemplated that contractors were to keep all salvaged material, owners were informed that contractors planned to use as much of such material as they could in constructing a new building and, in reliance on such contract, contractors had altered plans for new building to permit use of salvaged glass and skylights, which were scarce and subject to priority, trial court could properly conclude that damages for breach of contract by owners in stopping demolition of building and removal of salvage would be difficult to ascertain and inadequate and that contractors would therefore be entitled to specific performance of contract. Civ.Code, §§ 1729, subd. 3, 1788.

12. Licenses 🔑58(1)

A mere license to enter or use realty may be revoked at any time by licensor.

13. Licenses 🔑58(2)

A license to enter or use realty coupled with an interest is irrevocable and continues to exist for the period contemplated by the license.

14. Licenses 🔑58(2)

Where personalty is placed with permission upon the land of another, owner's right to enter upon such land and remove the personalty is a "license coupled with an interest" and is irrevocable.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "License Coupled with an Interest".

15. Licenses 🔑46, 58(2)

Buyer of personalty located on the land of seller has an irrevocable license to enter and remove the personalty within a reasonable time.

16. Licenses 🔑58(2)

Where the circumstances were such as to entitle contractors to specific performance of contract to demolish a building and remove salvage material therefrom, contractors' right to enter upon land to demolish the building and remove salvage material was a "license coupled with an interest" and was irrevocable, giving contractors a reasonable time to remove the building.

17. Contracts 🔑322(4)
Trespass 🔑46(1)

Evidence sustained conclusion that contractors, being entitled to specific performance of contract to demolish and remove a building because of their need for the materials to be salvaged therefrom, were entitled to fully perform the agreement and did not thereby commit trespass, despite notice from owners not to enter upon premises or demolish the building, and that contractors were not liable for damages for destruction of the building but were entitled to the amount due under contract upon completion of the demolition.

18. Landlord and tenant 🔑55(2)

Where vendors under contract with purchasers of realty had an irrevocable license enforceable by specific performance to enter and demolish building on the realty sold, tenants were not guilty of waste in permitting vendors to demolish the building.

19. Landlord and tenant 🔑109(2)

Where tenants placed lease in escrow, with instructions to deliver it to purchasers of realty upon payment of amount which purchasers had agreed to pay in consideration of voluntary relinquishment of lease, and vacated building as soon as new building was ready for their occupancy as contemplated by agreement, failure to formally surrender building to purchasers did not operate as a forfeiture of tenants' right to recover agreed payment for relinquishment of lease.

Taylor & Taylor, Edward T. Taylor and Edward T. Taylor, Jr., all of Modesto, for appellants.

Vernon F. Gant, Modesto, for respondents.

GIBSON, Chief Justice.

Plaintiffs brought this action against D. P. McKelvey to recover a sum of money promised for the demolition and removal of a building which stood on real property purchased by McKelvey from plaintiffs. Further, plaintiffs, as assignees of Mr. and Mrs. Fred L. Hill, sought to recover a sum of money which McKelvey promised to pay to the Hills in return for the latter's surrender of a lease of the premises. A counterclaim and cross-complaint was filed against plaintiffs and the Hills seeking damages for trespass and waste. R. G. McKelvey, who had become a co-owner of the property, joined in this pleading, and as a result thereof the trial court ordered that he be made a party defendant with D. P. McKelvey and that the Hills be made parties cross-defendant. Defendants have appealed from a judgment granting the relief requested in the complaint.

Early in 1946 defendants purchased twelve lots in the City of Modesto for the purpose of constructing a building and adjoining parking facilities for rental to a chain grocery store. Four of these lots, including lots 15 and 16, were acquired from plaintiffs for $60,000. At this time lots 15 and 16 were improved by a business structure occupied by the Hills under a lease, which plaintiffs assigned to defendants on March 16, 1946.

During negotiations for the sale of the lots the Hills agreed to surrender their lease upon payment of $4,000 by defendants, less $300 per month rent after March 1, 1946, and to vacate the premises "immediately upon the completion" of a new building to be built for the Hills by plaintiffs elsewhere in Modesto. A written agreement or "Deposit Receipt" entered into by plaintiffs and defendants on February 28, 1946, provided that the sale of the real property to defendants should be subject to the temporary occupancy of the old building on lots 15 and 16 by the Hills at a rental of $300 per month and that "The seller warrants such occupancy shall terminate and the improvements shall be removed not later than twenty days prior to the completion" of the contemplated chain store building. The instrument provided for payment of $70 for each day the old building remained standing after the agreed date unless the delay was caused by certain specified events, such as strikes, which prevented completion of the new building for the Hills. The deposit received also provided that plaintiffs "retained" certain dwellings on the remainder of the property and agreed to remove them within sixty days, but no such reservation of title was made with respect to the building on lots 15 and 16.

It was orally agreed that defendants would pay plaintiffs $3500 upon the demolition and removal of the old building on lots 15 and 16. During the various conversations relating to the transaction defendants stated that they did not want the old building or any part of it, and it appears that lots 15 and 16 were to be used as a parking lot by the chain store. Plaintiffs informed defendants that they intended to use whatever material they could from the old building in constructing the new one for the Hills.

The oral agreement was confirmed by a letter from defendants to plaintiffs on March 11, 1946, wherein defendants recited that plaintiffs were to "remove the existing improvements therefrom" and that in consideration for this defendants would pay them $3500. The letter further stated that if plaintiffs were prevented by strikes, government regulations, or the like, from completing the new building, the Hills could continue to occupy the old building and the time for its "removal" should be "extended to coincide with the completion of said new building." In reliance upon this letter and the agreement to tear down the old building, plaintiffs changed the plans for the new building "to fit the possible use of salvage" from the old building, namely, plate glass and skylights, and for this reason did not order those items, which were then scarce and could be obtained only after a delay of at least 90 to 120 days. In addition sheet metal for skylights was under priority by reason of governmental restrictions. There is testimony that the new building could not be completed without the glass and skylights from the old one.

Plaintiffs commenced construction of the new store for occupancy by the Hills, but due to governmental restrictions defendants were unable to get materials for the contemplated chain store and parking lot. Because of this delay defendants on August 2, 1946, notified plaintiffs that construction of the chain store building was not contemplated in the immediate future, that until further written notice plaintiffs were not to proceed with the demolition, and that notice would be given in ample time for plaintiffs to have the improvements "dismantled and removed." Plaintiffs answered by letter that they intended to proceed since the plate glass and skylights in the old building were needed for use in the construction of the new store. On September 10 defendants wrote to plaintiffs that they were not to dismantle the improvements on lots 15 and 16 nor to enter the premises except as customers of the Hills until such time as written permission was given by defendants, and that "for any known violations of these instructions redress at law will be had."

On September 27 defendants instituted a proceeding in which they sought a declaration of their rights to the building as owners of the premises and further requested that a preliminary injunction issue to restrain plaintiffs from dismantling the old building on lots 15 and 16. At the hearing on the application for the injunction it appeared that the new building for the Hills had then been completed except for the glass and the skylights. On October 18 the trial court denied the preliminary injunction and a few days later sustained a demurrer to the complaint with leave to amend.

Toward the end of October plaintiffs removed the plate glass and skylights from the old building and completed the new building for the Hills. About October 30 the Hills abandoned the old building, and plaintiffs thereupon entered defendants' premises and demolished and removed the building. On November 1 the Hills moved to the new store constructed for them by plaintiffs. In December the court sustained, with leave to amend, a demurrer to an amended complaint for declaratory relief, and no further action was taken in that proceeding.

Defendants refused to pay either the agreed price of $3500 due upon demolition of the old building or the unpaid balance of $2500 due to the Hills for surrender of the lease. The Hills assigned their claim to plaintiffs, who brought the present action to recover both amounts.

The trial court found and concluded that defendants had agreed to pay $3500 upon removal of the building and the salvage, that the agreement had not been renounced by defendants, that they were estopped from changing their position or maintaining an action against the cross-defendants or repudiating the contract, that plaintiffs had the legal right to demolish the building and to take the salvage, and that they had fully performed the agreement on their part. The court also concluded that the sum promised by defendants to the Hills became due and payable when the Hills moved into the new building constructed for them by plaintiffs. Judgment was entered for plaintiffs in the sum of $6000, which was the total amount sought in the complaint.

[1, 2] It should be stated at the outset that the order denying the preliminary injunction in connection with the proceeding for declaratory relief is not res judicata as to the issues herein presented. There is no inflexible rule as to the effect of the granting or denial of a preliminary injunction on subsequent litigation, but unless it appears that the court intended a final adjudication of the issue involved, a decision on an application for a preliminary injunction does not amount to a decision on the ultimate

rights in controversy. See Miller & Lux v. Madera Canal etc., Co., 155 Cal. 59, 62, 99 P. 502, 22 L.R.A., N.S., 391; 14 Cal.Jur. 184; 28 Am.Jur. 493. Here the court's action in sustaining the demurrer to the complaint with leave to amend indicates that its order denying the preliminary injunction was not intended as a final disposition of the rights of the parties.

[3] The deposit receipt did not fix a definite date for demolition of the old building or specify how the salvaged materials were to be disposed of but provided only that the building was to be "removed not later than twenty days prior to the completion" of the chain store building, subject to payment of $70 per day in the event of failure to perform on time. It is undisputed, however, that the building was to be left standing for occupancy by the Hills until a new building was constructed elsewhere for them. Further, there is testimony that defendants stated during the negotiations that they did not want any part of the old building and that plaintiffs were to get it off just as soon as possible, and plaintiffs told defendants that they were going to use whatever material they could from the old building in constructing the new one for the Hills. From this evidence the trial court could reasonably infer that the parties had agreed that plaintiffs were to wreck the old building as soon as practicable after construction of the new store for the Hills and that plaintiffs should be entitled to the salvaged material after it had been removed.

[4, 5] Under the contract as thus construed, there was an implied covenant that plaintiffs would be given possession of the premises for the agreed purpose at a reasonable time to be chosen by them. Gray v. Bekins, 186 Cal. 389, 395, 199 P. 767. Defendants' conduct in forbidding plaintiffs to enter, therefore, was sufficient not only to excuse their performance but also to constitute a breach or anticipatory breach of the contract. Civ.Code, § 1511; Crawford v. Pioneer Box & Lumber Co., 105 Cal.App. 760, 288 P. 694; Woodruff v. Adams, 134 Cal.App. 490, 25 P.2d 529; see 5 Williston on Contracts, Rev.Ed. 1937, § 1293A, p. 3686. The principal question for our determination, however, is whether plaintiffs could ignore the express notification from defendants not to enter the land and could proceed to demolish the building.

[6, 7] It is the general rule in California and in practically all other jurisdictions that either party to an executory contract has the power to stop performance of the contract by giving notice or direction to that effect, subjecting himself to liability for damages, and upon receipt of such notice the other party cannot continue to perform and recover damages based on full performance. Richardson v. Davis, 116 Cal.App. 388, 2 P.2d 860; Atkinson v. District Bond Co., 5 Cal.App.2d 738, 745, 43 P.2d 867; See Crawford v. Pioneer Box & Lumber Co., 105 Cal.App. 760, 765, 288 P. 694 et seq.; 5 Williston on Contracts, Rev.Ed. 1937, § 1298, pp. 3693-3695; 12 Am.Jur. 979-980. This is an application of the principle that a plaintiff must mitigate damages so far as he can without loss to himself. See 5 Williston on Contracts, Rev.Ed.1937, § 1298, p. 3694.

[8] The reason for this rule is twofold: Ordinarily a plaintiff is interested only in the profit he will make from his contract, and if he receives this he obtains the full benefit of his bargain; on the other hand, performance by the plaintiff might be useless to the defendant, although he would have to pay the entire contract price if the plaintiff were permitted to perform, and this would inflict damage on the defendant without benefit to the plaintiff. See 5 Williston on Contracts, Rev.Ed.1937, § 1298, p. 3694; Dowling v. Whites Lumber & Supply Co., 170 Miss. 267, 154 So. 703, 705. If these reasons are not present, the rule is not applied. For example, where the plaintiff is not interested solely in profit from the agreement but must proceed with the work in order to fulfill contract obligations to others, or where refraining from performance might involve closing a factory, damages may be inadequate and the plaintiff may have a right to continue performance. Southern Cotton-Oil Co. v. Heflin, 5 Cir., 99 F. 339; 5 Williston on Contracts, Rev. Ed.1937, § 1299, p. 3696. It has likewise

been held that where a contractor has started work and has reached a point where it would be impracticable to attempt to make a reasonable estimate of damages, or where to complete the work will diminish damages or at least not enhance them, the contractor may go forward and complete performance. Dowling v. Whites Lumber & Supply Co., 170 Miss. 267, 154 So. 703. In the Restatement of Contracts, Comment a on section 336, it is said that "It is not reasonable to expect the plaintiff to avoid harm if at the time for action it appears that the attempt may cause other serious harm. He need not enter into other risky contracts, incur unreasonable inconvenience or expense, disorganize his business, or put himself in a humiliating position or in one involving loss of honor and respect."

[9] The general rule is also subject to the jurisdiction of equity to order specific performance of the contract, and, apparently in recognition of this principle, it has been held that in cases where damages will not afford adequate compensation and where specific performance will lie, the plaintiff may continue to perform, in spite of a notice to stop, and thereafter recover on the basis of his continued performance. Marsh v. Blackman, N.Y.Supreme Court, 50 Barb. 329; Fine Art Pictures Corp. v. Karzin, Mo.App., 29 S.W.2d 170, 173; see Woodman v. Blue Grass Land Co., 125 Wis. 489, 494, 103 N.W. 236, 237, 104 N.W. 920; Badger State Lumber Co. v. G. W. Jones Lumber Co., 140 Wis. 73, 121 N.W. 933, 934; 17 C.J.S., Contracts, § 473, p. 979; 12 Am. Jur. 980; cf. La Salle Extension University v. Ogburn, 174 N.C. 427, 93 S.E. 986, 988, Ann.Cas.1918C, 887. In the Fine Art Pictures decision the court stated that this is one of the necessary exceptions to the rule. 29 S.W.2d at page 173.

In the present case the trial court granted relief similar to that which has been allowed under this exception to the general rule. The court determined that plaintiffs acted properly in performing the contract on their part and that, having performed, they were entitled to the full amount of $6,000 due under the agreement. In the light of the foregoing, we must consider whether the facts bring this case within the reasons underlying the general rule or the reasons for the exception, and we must determine whether there is sufficient evidence to show that plaintiffs would have been entitled to specific performance and that damages would have been inadequate.

Unlike the situations presented in Richardson v. Davis, 116 Cal.App. 388, 2 P.2d 860, and Crawford v. Pioneer Box & Lumber Co., 105 Cal.App. 760, 288 P. 694, relied upon by defendants, the agreement involved here did not provide simply for the payment of money in return for the performance of services. As we have seen, it was contemplated that plaintiffs were to keep all salvaged material. During the negotiations for the agreement they informed defendants that they planned to use as much of this material as they could in constructing the new building for the Hills, and, in reliance on the contract, they altered the plans for the new building to permit use of the glass and skylights from the old one. These materials were then scarce, and sheet metal for the skylights was under priority. There was testimony that it would take from 90 to 120 days to obtain new glass and skylights, and some other glass required for the new building did not arrive until about five months after it was ordered. Except for the glass and skylights the new building was completed sometime in October, and the lack of these materials left it exposed to the weather and apparently unsuitable for occupation by the Hills. Thus it is obvious that an essential element of the rule giving one party the power to stop performance by giving notice not to perform is lacking here since plaintiffs were not interested solely in the profit to be derived from tearing down the old building and selling the salvage, but they had an additional interest in obtaining actual performance of the agreement so that they could secure scarce materials and complete the new building.

[10] The fact that the agreement involved property which was scarce and under priority is of particular importance in the present case. There are analogous decisions in other jurisdictions holding that a

purchaser does not have an adequate remedy at law and may obtain specific performance of a contract to sell materials if he needs them in his business and cannot obtain them or their equivalent within the local marketing area. Oreland Equipment Co. v. Copco Steel & Engineering Corp., 310 Mich. 6, 16 N.W.2d 646; Eastern Rolling Mill Co. v. Michlovitz, 157 Md. 51, 145 A. 378, 383-384 [steel scrap, not procurable in the area]; Conemaugh Gas Co. v. Jackson Farm Gas Co., 186 Pa. 443, 40 A. 1000, 1001, 65 Am.St.Rep. 865; Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, 27 N.E. 1005, 1007, 12 L.R.A. 563, 26 Am.St.Rep. 214; see Campbell Soup Co. v. Wentz, 3 Cir., 172 F.2d 80, 82-83; 152 A.L.R. 4, 26-29. Some of these cases were decided in states which, like California, have adopted the Uniform Sales Act provision authorizing specific performance, in the discretion of the court, of contracts to sell goods. See, e. g., Civ.Code § 1788. Although the Uniform Sales Act may not be directly applicable here, since part of the consideration was the transfer of realty, Civ.Code, § 1729, subd. 3, the cases are nevertheless in point insofar as they hold that damages do not afford an adequate remedy in such a situation. Moreover, the adoption of the Uniform Sales Act exemplifies a tendency to liberalize the requirements for specific performance of contracts to sell or transfer personal property. See 3 Williston on Sales, Rev.Ed.1948, § 601; cf. Sanford v. Boston Edison Co., 316 Mass. 631, 56 N.E.2d 1, 3, 156 A.L.R. 644, stating that there is a "growing tendency" to allow specific performance where damages are not the equivalent of the performance.

[11] Under these circumstances the trial court could properly conclude that inability to obtain the salvage from the old building would seriously interfere with completion of the new building, that equivalent materials could not then be secured by plaintiffs, and that in an action for breach of contract damages would be difficult to ascertain and would be inadequate.

Defendants argue that plaintiffs were not entitled to proceed with performance because they could have covered up the holes in the new building with boards to protect it from the weather until new glass and skylights could be obtained and, further, that the glass and skylights from the old building, even if required, could have been removed without tearing down the entire structure. Boarding up the new building, however, would have rendered it unusable for an indefinite period. Also, removal of part of the old building without demolition of the remainder was not authorized by the agreement, and there is nothing in the record to indicate that defendants had suggested or would have consented to such a step, even though they knew that the need for the glass and skylights was the principal reason for plaintiffs' insistence upon full performance of the contract. All of these factors were, of course, to be considered by the trial court in passing upon the propriety of plaintiffs' conduct, and we cannot say as a matter of law that plaintiffs were required to adopt one of the solutions now mentioned by defendants.

Defendants introduced testimony that the value of the old building, if allowed to remain on the property for continued use, was $26,250, and they contend that demolition of such a valuable structure was not justified by plaintiffs' need for the salvage, which, it is asserted, could have been replaced for $540. Regardless of the weight to be given this testimony, however, the trial court could properly consider the facts that defendants had purchased the property for construction of a chain grocery store, that they had made a lease to the chain store operators by which they agreed to deliver possession of lots 15 and 16 for use as a parking lot with all improvements removed, and that for this reason the building had little if any value for continued use on the property. On the other hand the value of the salvage to plaintiffs was enhanced by their need of materials for the new building.

The next question is whether plaintiffs' right to complete performance of the agreement could be defeated by the fact that plaintiffs were required to enter defendants' realty in order to remove the building and had been notified not to enter or to dismantle the improvements. Defendants contend that the entry and removal of the building contrary to the notice constituted trespass and malicious destruction of property, entitling them to damages under their cross-complaint. As we have seen, the agreement gave plaintiffs an implied contractual right or license to enter defendants' realty for the purpose of removing the building, and the problem is whether, under all the circumstances, the license was irrevocable or whether defendants had a power to revoke it.

[12–15] A mere license to enter or use premises may be revoked at any time by the licensor. See County of Alameda v. Ross, 32 Cal.App.2d 135, 143, 89 P.2d 460; 16 Cal.Jur. 285; 33 Am.Jur. 404. Various factors, however, may render a license irrevocable, and it is generally recognized that a license coupled with an interest is not revocable but continues to exist for the period contemplated by the license. One example of the license coupled with an interest is the right of an owner of personal property to remove it when it has been placed with permission upon the land of another. See 3 Tiffany, Real Property, 3d Ed., 1939, § 835; 53 C.J.S., Licenses, § 92, p. 819. Similarly, where there has been a sale of personal property located on the land of the vendor, the purchaser has an irrevocable license to enter and remove the property within a reasonable time. See Rogers v. Cox, 96 Ind. 157, 49 Am.Rep. 152 (sale of a frame building); Holt v. City of Montgomery, 212 Ala. 235, 102 So. 49, 51; Sterling v. Warden, 51 N.H. 217, 227, 12 Am.Rep. 80; Rest., Torts, § 181; 3 Tiffany, Real Property, 3d Ed., 1939, § 835; 53 C.J.S., Licenses, § 92, p. 819.

[16] Under these authorities it is clear that plaintiffs would have had an irrevocable license to remove the building within the period contemplated by the agreement if title to the building had passed to them before defendants had given notice not to enter. Although the agreement apparently contemplated that title to the salvage would not pass until the building was severed from the land, the situation is closely analogous to one in which title had been transferred, because, as we have seen, plaintiffs had a right to specific performance of the agreement and thereby to acquire legal title, and unlike the ordinary case of an executory contract to sell chattels located on the property of the vendor, defendants could not prevent completion of the contract by repudiating it and subjecting themselves to damages. See Holt v. City of Montgomery, 212 Ala. 235, 102 So. 49, 51, where the court stated that the license was irrevocable, although title apparently had not passed. The same reasoning which justifies the conclusion that defendants could not repudiate the contract because plaintiffs had a right to specific performance supports the conclusion that they could not revoke the implied license to enter, exercise of which was essential to plaintiffs' completion of the agreement. It follows that plaintiffs' license to enter defendants' realty was coupled with an interest and was irrevocable, giving them a reasonable time to remove the old building.

There is also authority that a revocable license may become irrevocable on the basis of estoppel where the licensee has performed work or expended money in reliance thereon. Miller and Lux v. Kern County, etc., Co., 154 Cal. 785, 99 P. 179; Stoner v. Zucker, 148 Cal. 516, 83 P. 808, 113 Am. St.Rep. 301, 7 Ann.Cas. 704; see 2 Thompson on Real Property, Perm.Ed., § 720; 33 Am.Jur. 408. In the present case plaintiffs, in reliance upon the agreement, changed the plans for the new building and constructed it in such a manner as to permit use of the glass and skylights from the old building, and the trial court found that defendants were estopped from repudiating the agreement. However, since plaintiffs had an irrevocable license, it is unnecessary to consider the contentions of the parties relating to estoppel.

[17] In view of the foregoing we conclude that the facts found by the trial court, supported by the evidence, are sufficient to justify the determination that plaintiffs acted within their rights in fully performing the agreement, that they did not commit trespass, and that they were not liable for damages for destruction of the old building. Defendants, on the other hand, became lia-

ble to pay plaintiffs the sum due under the contract upon completion of the demolition.

Defendants contend that the Hills abandoned the premises and failed to surrender them in good condition to defendants as required by the lease, that the Hills were guilty of permissive waste in allowing plaintiffs to demolish the building, and that for these reasons the Hills are liable for the value of the building. As a defense to plaintiffs' claims as assignees of the Hills, defendants contend that the asserted abandonment and waste resulted in a forfeiture of the right to recover the money which defendants promised to pay the Hills in return for voluntary relinquishment of the lease.

[18, 19] There is no merit to these contentions. It is undisputed that the Hills agreed to surrender their lease upon payment of $4000 by defendants, less $300 per month after March 1, 1946, and to vacate the old building immediately upon completion of the new one by plaintiffs. Defendants promised to pay this amount when the lease was surrendered. The Hills placed the lease in escrow with instructions to deliver it to defendants upon receipt of the agreed amount, and they vacated the old building as soon as the new one was ready. They did not surrender the building to defendants but "just moved out," and they did not lock the door because plaintiffs had previously removed the glass and "there was no door to lock." There is nothing in the record which would compel the trial court to find that there was anything wrongful in the acts of the Hills or that plaintiffs would not have removed the building even if the Hills had gone through the formality of surrendering it to defendants. As we have seen, plaintiffs had an irrevocable license to enter and a right to tear down the building, enforceable by specific performance, and it cannot be said that the Hills are guilty of waste because of plaintiffs' rightful actions in demolishing the building or that the absence of a formal surrender to defendants operated as a forfeiture of the right to recover the agreed payment. Accordingly, the trial court correctly determined that the Hills were not liable to defendants and that the sum promised by defendants became due when the Hills vacated the premises.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

Rehearing denied, TRAYNOR, J., dissenting.

35 Cal.2d 621

MONARCO v. LO GRECO et al.

(two cases).

L. A. 21024, 21025.

Supreme Court of California, in Bank.

Aug. 1, 1950.

Carmen Monarco brought actions against Carmela Castiglia and others for partition and accounting, and the named defendant filed a cross-complaint asking that plaintiff be declared a constructive trustee of property plaintiff received as result of breach of oral agreement by deceased to keep property in joint tenancy and to leave property by will to her son if a son would take part in a family venture. Carmela Castiglia died and Christie Lo Greco and Nick Norcia, as executors of the will of Carmela Castiglia, deceased, were substituted in her place. The Superior Court of Los Angeles County, Albert F. Ross, J., gave a judgment for the defendants, and the cross-complainant and plaintiff appealed. The Supreme Court, Traynor, J., held that plaintiff was estopped to assert the statute of frauds, and that Carmela Castiglia was a proper party to maintain the cross-complaint and to assert that plaintiff was estopped to assert the statute of frauds.

Judgments affirmed.

Prior opinion, 211 P.2d 361.

1. Frauds, statute of 🔑144

The doctrine of estoppel to assert the statute of frauds will be applied to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances, where fraud inheres in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other to change his position seriously in reliance on the contract, or where fraud inheres in unjust enrichment that would result if a party who has received the benefits of another's performance were allowed to rely on the statute. Civ.Code, § 1624; Code Civ.Proc. § 1973.

2. Frauds, statute of ⚷144

Where husband and wife entered into oral agreement with husband's step-son and wife's son that if he would remain with them and work diligently in a family venture, they would leave all of their property to him except for small devises to his brother and sister, and husband and wife placed all of their property in joint tenancy and executed wills in accordance with oral agreement, and husband's step-son labored 20 years in accordance with oral agreement, but husband shortly before his death terminated joint tenancies and executed a new will leaving all of his property to his grandson, grandson in his actions for partition was estopped to assert statutes of frauds. Civ.Code, § 1624; Code Civ.Proc. § 1973.

3. Frauds, statute of ⚷144

Doctrine of estoppel to plead a statute of frauds is not limited to instances where there have been representations with respect to the requirements of the statute indicating that a writing is not necessary or will be executed or that the statute will not be relied on as a defense. Civ.Code, § 1624; Code Civ.Proc. § 1973.

4. Trusts ⚷359(3)

Neither the remedy of an action at law for damages for breach of contract nor quasi-contractual remedy for value of services rendered is adequate for breach of a contract to leave property by will in exchange for services of a peculiar nature involving the assumption or continuation of a close family relationship, and a suit to establish a constructive trust is not precluded on ground that such other remedies are adequate.

5. Trusts ⚷359(3)

Where husband and wife entered into oral agreement with husband's stepson and wife's son that if he would remain with them and work diligently in a family venture they would leave all of their property to him except for small devises to his brother and sister, and husband and wife placed all of their property in joint tenancy and executed wills in accordance with oral agreement, and husband's stepson labored 20 years in accordance with oral agreement, but husband shortly before his death terminated joint tenancies and executed a new will leaving all of his property to his grandson, and probate court distributed property to grandson, and wife by cross-complaint sought to have grandson declared a constructive trustee, rule that neither remedy of action at law for damages for breach of contract nor quasi-contractual remedy for value of services rendered is adequate for breach of contract to leave property by will, was applicable.

6. Frauds, statute of ⚷144
Trusts ⚷347

Where husband and wife entered into oral agreement with husband's stepson and wife's son that if he would remain with them and work diligently in a family venture they would leave all of their property to him except for small devises to his brother and sister, and husband and wife placed all of their property in joint tenancy and executed wills in accordance with oral agreement, and husband's stepson labored 20 years in accordance with oral agreement but husband shortly before his death terminated joint tenancies and executed a new will leaving all of his property to his grandson, and grandson to whom property was distributed by probate court brought actions for partition and accounting, wife was a proper party to maintain a cross-complaint to have grandson declared a constructive trustee, and to assert doctrine that grandson was estopped to assert statute of frauds. Civ.Code, § 1624; Code Civ. Proc. § 1973.

◆

Allen M. Williams, Montrose, for appellant.

Oliver O. Clark and Jack R. Mills, Los Angeles, for respondents.

TRAYNOR, Justice.

Natale and Carmela Castiglia were married in 1919 in Colorado. Carmela had three children, John, Rosie and Christie, by a previous marriage. Rosie was married to Nick Norcia. Natale had one grandchild, plaintiff Carmen Monarco, the son of a deceased daughter by a previous marriage. Natale and Carmela moved to California where they invested their assets, amounting to approximately $4,000, in a half interest in agricultural property. Rosie and Nick Norcia acquired the other half interest. Christie, then in his early teens, moved with the family to California. Plaintiff remained in Colorado. In 1926, Christie, then 18 years old, decided to leave the home of his mother and step-father and seek an independent living. Natale and Carmela, however, wanted him to stay with them and participate in the family venture. They made an oral proposal to Christie that if he stayed home and worked they would keep their property in joint tenancy so that it would pass to the survivor who would leave it to Christie by will except for small devises to John and Rosie. In performance of this agreement Christie remained home and worked diligently in the family venture. He gave up any opportunity for further education or any chance to accumulate property of his own. He received only his room and board and spending money. When he married and suggested the possibility of securing some present interest to support his wife, Natale told him that his wife should move in with the family and that Christie need not worry, for he would receive all the property when Natale and Carmela died. Natale and Carmela placed all of their property in joint tenancy and in 1941 both executed wills leaving all their property to Christie with the exception of small devises to Rosie and John and $500 to plaintiff. Although these wills did not refer to the agreement, their terms were agreed upon by Christie, Natale and Carmela. The venture was successful, so that at the time of Natale's death his and Carmela's interest was worth approximately $100,000. Shortly before his death Natale became dissatisfied with the agreement and determined to leave his half of the joint property to his grandson, the plaintiff. Without informing Christie or Carmela he arranged the necessary conveyances to terminate the joint tenancies and executed a will leaving all of his property to plaintiff. This will was probated and the court entered its decree distributing the property to plaintiff. After the decree of distribution became final, plaintiff brought these actions[1] for partition of the properties and an accounting. By cross-complaint Carmela asked that plaintiff be declared a constructive trustee of the property he received as a result of Natale's breach of his agreement to keep the property in joint tenancy. On the basis of the foregoing facts the trial court gave judgment for defendants and cross-complainant, and plaintiff has appealed.

[1] The controlling question is whether plaintiff is estopped from relying upon the statute of frauds (Civil Code § 1624; Code Civ.Proc. § 1973) to defeat the enforcement of the oral contract. The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract, Wilk v. Vencill, 30 Cal.2d 104, 108, 180 P.2d 351; Vierra v. Pereira, 12 Cal.2d 629, 630-632, 86 P.2d 816; Wilson v. Bailey, 8 Cal.2d 416, 422, 65 P.2d 770; Seymour v. Oelrichs, 156 Cal. 782, 796, 108 P. 88, 134 Am. St.Rep. 154; Kaye v. Melzer, 87 Cal.App. 2d 299, 306, 197 P.2d 50; Frey v. Corbin, 84 Cal.App.2d 536, 540-541, 191 P.2d 21; Le Blond v. Wolfe, 83 Cal.App.2d 282, 286, 188 P.2d 278; Beverly Hills Nat. Bank v. Seres, 76 Cal.App.2d 255, 262, 172 P.2d 894; Sessions v. Southern Cal. Edison Co., 47 Cal.App.2d 611, 619-620, 118 P.2d 935;

---

1. One action involves the property in which Nick and Rosie Norcia hold a half interest. The other involves property that had been owned by Natale and Carmela only. Since the trial Carmela has died and her executors have been substituted as parties in her stead.

Rutland, Edwards & Co. v. Cooke, 44 Cal.App.2d 258, 263, 112 P.2d 287; Tuck v. Gudnason, 11 Cal.App.2d 626, 631, 54 P.2d 88; Holstrom v. Mullen, 84 Cal.App. 1, 4-5, 257 P. 545; Rockhill v. Parker, 22 Cal.App. 367, 372, 134 P. 720, or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely upon the statute. Foster v. Maginnis, 89 Cal. 264, 267, 26 P. 828; Feeney v. Clapp, 126 Cal.App. 729, 733-734, 15 P.2d 178; Brenneman v. Lane, 87 Cal.App. 414, 417-418, 262 P. 400; Heffernan v. Davis, 24 Cal.App. 295, 301, 140 P. 716; see also, Aho v. Kusnert, 12 Cal.2d 687, 690, 87 P.2d 358. In many cases both elements are present. Thus not only may one party have so seriously changed his position in reliance upon, or in performance of, the contract that he would suffer an unconscionable injury if it were not enforced, but the other may have reaped the benefits of the contract so that he would be unjustly enriched if he could escape its obligations. Notten v. Mensing, 3 Cal.2d 469, 476-477, 45 P.2d 198; Tonini v. Ericcsen, 218 Cal. 43, 51-52, 21 P.2d 566; Sandfoss v. Jones, 35 Cal. 481, 488-489; Ryan v. Welte, 87 Cal.App.2d 897, 903, 198 P.2d 357; Tobola v. Wholey, 75 Cal.App.2d 351, 357, 170 P.2d 952; Van Fossen v. Yager, 65 Cal.App.2d 591, 597, 151 P.2d 14; Honsberger v. Durfee, 55 Cal.App.2d 68, 72-73, 130 P.2d 189; Pellerito v. Dragna, 41 Cal.App.2d 85, 89-90, 105 P.2d 1011; Grant v. Long, 33 Cal.App.2d 725, 739, 742, 92 P.2d 940; Rundell v. McDonald, 62 Cal.App. 721, 724-725, 217 P. 1082; Flint v. Giguiere, 50 Cal.App. 314, 320, 195 P. 85.

[2] In this case both elements are present. In reliance on Natale's repeated assurances that he would receive the property when Natale and Carmela died, Christie gave up any opportunity to accumulate property of his own and devoted his life to making the family venture a success. That he would be seriously prejudiced by a refusal to enforce the contract is made clear by a comparison of his position with that of Rosie and Nick Norcia. Because the Norcia's were able to make a small investment when the family venture was started, their interest, now worth approximately $100,000, has been protected. Christie, on the other hand, forbore from demanding any present interest in the venture in exchange for his labors on the assurance that Natale's and Carmela's interest would pass to him on their death. Had he invested money instead of labor in the venture on the same oral understanding, a resulting trust would have arisen in his favor. Byers v. Doheny, 105 Cal.App. 484, 493-495, 287 P. 988; see, Restatement, Trusts, § 454, comment j. illus. 12. His twenty years of labor should have equal effect. On the other hand, Natale reaped the benefits of the contract. He and his devisees would be unjustly enriched if the statute of frauds could be invoked to relieve him from performance of his own obligations thereunder.

[3] It is contended, however, that an estoppel to plead the statute of frauds can only arise when there have been representations with respect to the requirements of the statute indicating that a writing is not necessary or will be executed or that the statute will not be relied upon as a defense. This element was present in the leading case of Seymour v. Oelrichs, 156 Cal. 782, 108 P. 88, 134 Am.St.Rep. 154, and it is not surprising therefore that it has been listed as a requirement of an estoppel in later cases that have held on their facts that there was or was not an estoppel. See, e. g., Zellner v. Wassman, 184 Cal. 80, 87, 193 P. 84; Smith v. Bliss, 44 Cal.App.2d 171, 175, 112 P.2d 30; Standing v. Morosco, 43 Cal.App. 244, 246, 184 P. 954. Those cases, however, that have refused to find an estoppel have been cases where the court found either that no unconscionable injury would result from refusing to enforce the oral contract, Zellner v. Wassman, 184 Cal. 80, 87, 193 P. 84; Smith v. Bliss, 44 Cal.App.2d 171, 178, 112 P.2d 30; Little v. Union Oil Co., 73 Cal.App. 612, 621-622, 238 P. 1066; Standing v. Morosco, 43 Cal.App. 244, 247, 248, 184 P. 954, or that the remedy of quantum meruit for services rendered was adequate. Murdock v. Swanson, 85 Cal.App.2d 380, 385, 193 P.2d 81; De Mattos v. McGovern 25 Cal.App.2d 429, 432, 77 P.2d 522; cf., Mor-

rison v. Land, 169 Cal. 580, 586, 147 P. 259. In those cases, however, where either an unconscionable injury or unjust enrichment would result from refusal to enforce the contract, the doctrine of estoppel has been applied whether or not plaintiff relied upon representations going to the requirements of the statute itself. Wilson v. Bailey, 8 Cal.2d 416, 65 P.2d 770; Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198; Sandfoss v. Jones, 35 Cal. 481; Ryan v. Welte, 87 Cal.App.2d 897, 198 P.2d 357; Frey v. Corbin, 84 Cal.App.2d 536, 191 P.2d 21; Le Blond v. Wolfe, 83 Cal.App.2d 282, 188 P.2d 278; Tobola v. Wholey, 75 Cal.App.2d 351, 170 P.2d 952; Van Fossen v. Yager, 65 Cal.App.2d 591, 151 P.2d 14; Honsberger v. Durfee, 55 Cal.App.2d 68, 130 P.2d 189; Sessions v. Southern Cal. Edison Co., 47 Cal.App.2d 611, 118 P.2d 935; Rutland, Edwards & Co. v. Cooke, 44 Cal.App.2d 258, 112 P.2d 287; Pellerito v. Dragna, 41 Cal.App.2d 85, 105 P.2d 1011; Tuck v. Gudnason, 11 Cal.App.2d 626, 54 P.2d 88; Feeney v. Clapp, 126 Cal.App. 729, 15 P.2d 178; Holstrom v. Mullen, 84 Cal.App. 1, 257 P. 545; Price v. Smith Mfg. Co., 53 Cal.App. 303, 200 P. 53; Flint v. Giguiere, 50 Cal.App 314, 195 P. 85. Likewise in the case of partly performed oral contracts for the sale of land specific enforcement will be decreed whether or not there have been representations going to the requirements of the statute, because its denial would result in a fraud on the plaintiff who has gone into possession or made improvements in reliance on the contract. Pearsall v. Henry, 153 Cal. 314, 318, 95 P. 154, 159; Foster v. Maginnis, 89 Cal. 264, 267, 26 P. 828; Rundell v. McDonald, 62 Cal.App. 721, 724, 217 P. 1082; Stewart v. Smith, 6 Cal.App. 152, 160, 91 P. 667; see, 3 Pomeroy, Equity Jurisprudence (5th ed.) § 921, p. 618; 4 Pomeroy, Equity Jurisprudence (5th ed.) § 1409, p. 1056; anno., 75 A.L.R. 650; anno., 101 A.L.R. 923, 935; anno., 117 A.L.R. 939. In reality it is not the representation that the contract will be put in writing or that the statute will not be invoked, but the promise that the contract will be performed that a party relies upon when he changes his position because of it. Moreover, a party who has accepted the benefits of an oral contract will be unjustly enriched if the contract is not enforced whether his representations related to the requirements of the statute or were limited to affirmations that the contract would be performed.

[4, 5] It is settled that neither the remedy of an action at law for damages for breach of contract nor the quasi-contractual remedy for the value of services rendered is adequate for the breach of a contract to leave property by will in exchange for services of a peculiar nature involving the assumption or continuation of a close family relationship. Jones v. Clark, 19 Cal.2d 156, 160, 119 P.2d 731; Wolfsen v. Smyer, 178 Cal. 775, 782-783, 175 P. 10; Baumann v. Kusian, 164 Cal. 582, 587-588, 129 P. 986, 44 L.R.A.,N.S., 756; McCabe v. Healy, 138 Cal. 81, 88-89, 70 P. 1008; Owens v. McNally, 113 Cal. 444, 450, 452, 45 P. 710, 33 L.R.A. 369. The facts of this case clearly bring it within the foregoing rule.

[6] It is contended, however, that since Christie is not a party to this action, his change of position in reliance on Natale's promises will not support Carmela's efforts to secure the benefits of the contract due to her. In this respect, plaintiff contends that defendants did not plead a contract for Christie's benefit but only one whereby Carmela was entitled to ownership as the surviving joint tenant. When the action was commenced, however, Carmela was the person entitled to the property under the terms of the contract. It was therefore appropriate that she should be the one to seek its enforcement. To the extent that Natale's promise to keep the property in joint tenancy with Carmela was supported by the consideration of Christie's services, Carmela was a third party beneficiary of the agreement between Christie and Natale. She was entitled to rely upon the elements of estoppel provided by Christie's change of position in reliance on the contract and Natale's acceptance of the benefits. "[I]t is the change of position of the *contracting parties,* and not the beneficiaries of the contract, that forms the estoppel to rely upon the statute of frauds." Ryan v. Welte,

87 Cal.App.2d 897, 903, 198 P.2d 357, 361. In this respect the present case is governed by Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198. In the Notten case a childless couple made an oral agreement that each would leave all his property to the other on the condition that the survivor would leave it equally to the heirs of both. The husband died first leaving a will in accordance with the agreement. The wife accepted the benefits thereby accruing to her. In breach of her agreement, however, she left all her property to her own heirs. In an action by the husband's heirs to impress a constructive trust on the amount due them under the agreement it was held that the wife's heirs were estopped to plead the statute of frauds. The basis of the estoppel was not anything done by the husband's heirs, but the husband's change in position in dying without providing for his own heirs, a change in position made irrevocable by the wife's acceptance of the benefits of the agreement. Likewise, Christie in reliance on the contract contributed his services for over twenty years to make the family venture a success, and Natale accepted the benefits thereof. Plaintiff is thus estopped because of these facts just as were the wife's heirs in the Notten case.

The judgments are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

---

98 Cal.App.2d 500

Ex parte BACKSTRON.

Cr. 4513.

District Court of Appeal, Second District, Division 1, California.

July 19, 1950.

Proceedings in the matter of the application of Eugene Backstron, also known as Nathan Scott, for a writ of habeas corpus to secure petitioner's release from custody after arrest on a warrant for extradition. The District Court of Appeal, Doran, J., held that the scope of the inquiry in the proceeding was limited to a determination of the sufficiency of the extradition papers and of the identity of the prisoner, and that the court could not hear and determine constitutional validity of phases of penal action by the demanding state in respect to the fugitive or his offense.

Petition denied.

1. Habeas corpus 🔑92(2)

The scope of inquiry in a habeas corpus proceeding to secure release from custody after arrest on a warrant for extradition is limited to a determination of the sufficiency of the papers and of the identity of the prisoner.

2. Habeas corpus 🔑92(2)

In habeas corpus proceeding to test validity of arrest and detention of fugitive by authorities of asylum state for extradition purposes, court of asylum state may determine whether a crime had been charged in demanding state, whether fugitive in custody is person so charged and whether fugitive was in demanding state at time alleged crime was committed.

3. Habeas corpus 🔑92(2)

A court, either state or federal, in asylum state, cannot hear and determine constitutional validity of phases of penal action by demanding state in respect of fugitive, held under extradition warrant, or his offense.

4. Habeas corpus 🔑92(2)

In habeas corpus proceeding to secure petitioner's release from custody after arrest on a warrant for extradition, scope of inquiry would be limited to determination of sufficiency of papers and of identity of prisoner, and alleged violation in demanding state of prisoner's constitutional rights guaranteed to him by federal Constitution would not be determined. U.S.C.A.Const. Amend. 14.

Herbert W. Simmons, Jr., Edward C. Maddox, Los Angeles, Sanford I. Carter, Beverly Hills, Wirin, Rissman & Okrand, Los Angeles, for petitioners.

W. E. Simpson, District Attorney, Jere J. Sullivan, Deputy District Attorney, Los Angeles, for respondent.

A. L. Wirin and Fred Okrand, Wilbur F. Littlefield, all of Los Angeles, for American Civil Liberties Union, amicus curiae.

DORAN, Justice.

The petition alleges that petitioner is "unlawfully restrained of his liberty * * * by virtue of a warrant for extradition * * * pursuant to a demand * * * by the Governor of the State of Mississippi."

In substance it is alleged that the conviction in Mississippi was unlawful and in violation of the Fourteenth Amendment in that "petitioner was sentenced by said court by use of a forced confession"; that petitioner was denied counsel; that the judgment, "imposed upon the petitioner cruel and inhuman punishment" in connection with which many details were alleged; that "for this court to render a judgment that will allow the agents of the State of Mississippi to take the petitioner into custody would violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, and the United Nations Charter, 59 Stat. 1031, in that this would constitute state action of the State of California and would directly cause his return to the State of Mississippi to effectuate a sentence of cruel and inhuman punishment * * * for he, a Negro, has challenged the state of Mississippi, its brutality which is permeated by hatred of the Negro, and its open, vicious and deadly programs of terrorism against the Negro citizen" and that "The action of the Governor of the State of California in issuing the warrant of extradition, and officers of the Sheriff's Department of Los Angeles, under said warrant, are contrary to the prohibitions of the Fourteenth Amendment to the Constitution of the United States, in that they are actions of the State in aid of a violation of constitutional rights guaranteed to him, the petitioner, by the due process clause of the federal constitution."

Petitioner's argument, in support of the above contention, relates generally in substance to "the segregated penal system of the State of Mississippi" and the contended legal effect thereof in that the violations of due process, such as a lack of counsel, forced confession, lack of fair trial, sentence to cruel and inhuman punishment, and discrimination "are properly included within the scope of habeas corpus."

[1] It is well settled that the scope of inquiry in such a proceeding is limited to a determination of the sufficiency of the papers and of the identity of the prisoner. See 25 Am.Jur., p. 192, sec. 67; 22 Am.Jur., p. 254, sec. 15; 39 C.J.S., Habeas Corpus, § 39, pp. 549–550, also p. 562, sec. 39(1).

[2] A recent case decided by the United States Court of Appeals for the District of Columbia involved the same issues presented in the within petition and declared that, "*Habeas corpus* is the proper process for testing the validity of the arrest and detention by the authorities of the asylum state for extradition purposes. But a petition for a writ for that purpose tests only that detention; it does not test the validity of the original or the contemplated incarceration in the demanding state. The Supreme Court has established the scope of the extradition inquiry and the issues which are presented by it. The state cases and other federal court cases upon the subject are myriad. In essence the rule is that the court may determine whether a crime has been charged in the demanding state, whether the fugitive in custody is the person so charged, and whether the fugitive was in the demanding state at the time the alleged crime was committed.

[3] "The question before us is whether a court (either state or federal) in the asylum state can hear and determine the constitutional validity of phases of the penal action by the demanding state in respect to the fugitive or his offense. We think that it cannot do so. Authorities, sound theory of government, and the practical aspects of the problem all require that conclusion.

"The problem is not merely one of *forum non conveniens*. It involves the interrelationship of governments, both among the states and between the states and the Federal Government. The quoted provision of the Constitution is in the nature of a treaty stipulation between the states, and compliance is a matter of agreed executive comity." (Citing cases.) The opinion continues, "The basic premise of appellant's position is that he could not get fair treatments in the courts of Georgia, either state or federal. Every argument in support of power in the District of Columbia court to consider and determine whether appellant should be released because of anticipated ill-treatment by executive officers of Georgia comes in the final analysis to the essential proposition that appellant's rights would not be protected by the courts of Georgia. Those courts are there. They are charged with the duty of protecting this prisoner and any other in custody in that state. If they perform that duty, appellant would be as adequately protected by their order as he would be by an order of the court here; he would have no basis for applying to the court here.

"We are asked to assume that appellant would not be protected by the courts in Georgia. We not only decline to make the assumption but we repudiate the suggestion that we make it. We will not impugn either the capacity or the integrity of the state courts of Georgia or of any other state. And even if we were to assume, upon the basis of this fugitive's allegations, that the state courts are impervious to his assertions, we would make no such assumption concerning the federal courts having jurisdiction in that state. Those courts of the United States are as capable and faithful as are the courts of this or any other jurisdiction. If that Court of Appeals errs, *certiorari* to the Supreme Court will lie.

"If we will not assume the non-availability of courts in Georgia, we are asked to permit petitioner to present evidence upon that non-availability and then to determine the question. There is an established procedure for the correction of error or dereliction on the part of every court in the country, and where constitutional rights are involved the Supreme Court of the United States stands watchman over every court, state or federal. It would be an act of unwarranted arrogance for us to ascribe to ourselves virtue superior to that of other courts and so to assert power to hear and determine the faithfulness to duty of a sister court occupying a place like ours in the federal system. We have not the slightest semblance of authority over such courts. We might differ with them in opinion, but to us the availability of the Georgia federal courts to protect appellant is not 'merely a presumption'." Johnson v. Matthews, D.C. Cir., 182 F.2d 677. The authorities all support the foregoing which is the controlling law in the within proceeding.

[4] The petition is denied. And it is ordered that after fifteen days have elapsed from and after the filing of this opinion, the Sheriff of Los Angeles County, to whose custody the petitioner is remanded, shall deliver him into the custody of the state agent or agents of the State of Mississippi.

WHITE, P. J., and DRAPEAU, J., concur.

---

98 Cal.App.2d 699

CRANE v. LIVINGSTON.

Civ. 17552.

District Court of Appeal, Second District,
Division 1, California.
July 31, 1950.

Evelyn J. Crane brought an action against Richard David Livingston for expenditures made in caring for defendant's child. The Superior Court of Los Angeles County, William B. McKesson, J., sustained a demurrer to plaintiff's fourth amended complaint without leave to amend and entered judgment of dismissal, and plaintiff appealed. The District Court of Appeal, Doran, J., held that no cause of action had been stated.

Affirmed.

1. Parent and child 🔑3(3)

Where first count of complaint alleged that defendant was indebted for money paid, laid out and expended by plaintiff for the use and benefit of defendant for the reasonable value of necessaries supplied to the minor child of defendant, second count alleged defendant's fatherhood, the death of the child's mother, and the furnishing of necessities of life of the reasonable value of $8,123.48, and third count made similar allegations and sought recovery of the same amount "which was paid for the use and benefit of defendant," complaint did not state a cause of action for amount expended by child's relative in caring for child.

2. Parent and child ⚷3(1)

Child's relative could not recover from child's father for furnishing support up to child's majority, where father never expressly or impliedly agreed to compensate relative. Civ.Code, § 208.

3. Pleading ⚷238(4)

Where plaintiff in amended complaint pleaded mere conclusions of law in the form of common counts to avoid the effect of allegations of fact contained in original complaint, which court had held insufficient to state a cause of action, trial court properly examined and considered original complaint, since facts once alleged cannot be withdrawn from consideration by merely filing an amended pleading omitting them without explanation.

4. Appeal and error ⚷102

An order of the court sustaining defendant's demurrer to plaintiff's complaint without leave to amend is not appealable.

5. Appeal and error ⚷422

Where plaintiff's notice of appeal specified that appeal was from order of court sustaining defendant's demurrer to plaintiff's fourth amended complaint without leave to amend, rather than from judgment of dismissal which followed such order, but plaintiff's notice to clerk on appeal correctly referred to plaintiff's appeal from the judgment upon the order sustaining defendant's demurrer, the appeal would be considered.

◆

Claude L. Welch, Los Angeles, for appellant.

Wallace, Cashin & Arrington, Harold J. Cashin, all of Los Angeles, for respondent.

DORAN, Justice.

A demurrer was sustained to plaintiff's Fourth Amended Complaint without leave to amend, and a judgment of dismissal entered. It is appellant's contention that this complaint which set up three causes of action on the common counts, namely, indebitatus assumpsit, quantum valebat, and for money paid, satisfied the requirements for pleading the common counts; hence, that the demurrer should not have been sustained.

The original complaint alleges that Helen Livingston, divorced wife of respondent, died on September 9, 1949, leaving two minor children, "who were in her exclusive control and custody by virtue of a (divorce) decree entered in the State of New York, * * * and that plaintiff herein is a sister of said Helen Livingston." Said complaint alleges that at the request of Helen Livingston who was then ill, "plaintiff herein took custody of said children and cared for them", and supported the two children until each became of age,—Ruth Livingston, the daughter, becoming of age October 1, 1940, and the son Richard attaining majority on June 10, 1947. Plaintiff asked judgment against the father in the sum of $12,009.35.

A demurrer having been sustained, an amended complaint was filed to which likewise a demurrer was sustained. A second amended complaint dropped the original charge for support of the daughter and sought to recover $8,123.48 for the son's maintenance. This was also held demurrable as was a third amended complaint. Thereafter plaintiff came into court with a fourth amended complaint for the same amount, framed in the terminology of the common counts. To this a demurrer was sustained without leave to amend.

The first count of the Fourth Amended Complaint alleges that defendant "was indebted * * * for money paid, laid out and expended by plaintiff for the use and benefit of defendant for the reasonable value of necessaries supplied to the minor child of defendant." The second count alleges defendant's fatherhood, the death of the child's mother, and the furnishing of "necessities of life of the reasonable value of $8,123.48." The third count makes similar allegations and seeks recovery of the same amount "which was paid for the use and benefit of defendant."

It is argued in appellant's brief that a cause of action exists and has been properly stated by way of the common counts for the reason that "A promise of a father to pay the reasonable value of necessaries supplied to his child is implied", since there is "a duty of a father to support his minor child"; that when the father does not provide the support and allows another to do so, such other person may compel the father to repay the amount expended for the child's support.

The respondent answers the above contentions by calling attention to the fact that nothing has been alleged in any of the five complaints filed other than voluntary payments made by a relative of the child with no agreement for compensation by respondent father; that "There is no promise implied to pay a relative for support of a child." As authority therefor, respondent quotes Section 208 of the Civil Code which provides that "A parent is not bound to compensate the other parent, *or a relative,* for the voluntary support of his child, without an agreement for compensation, * * *." (Italics added.) Among other cases is cited Blair v. Williams, 86 Cal.App. 676, 680, 261 P. 539, 541, affirming the nonresponsibility "of the father for the support of his children after the entry of an order granting the custody * * * to the mother, either with or without a provision for their maintenance." The Blair case involved an action by a nurse to recover for services rendered in caring for defendant's child.

No discussion of the above-mentioned code section, clearly applicable to the present controversy, is found in appellant's briefs. The appellant relies wholly upon the general obligation of a father "to support his child", and observes that "It would be monstrous if a father could avoid his primary liability merely because the person who keeps his child from becoming a public charge happens to be a relative." No cases analogous to the present situation, affirming appellant's position, have been presented.

[1] Under Section 208 of the Civil Code, hereinbefore mentioned, and the cases cited, the trial court was correct in holding that no cause of action had been stated. A father's general obligation to support a child is not the question here involved; as to that obligation the law is, as appellant observes, well settled. However, the party seeking to enforce the present claim is neither the child, the child's mother, nor the State. The plaintiff, a relative of the child, stands in no different situation than any other plaintiff advocating an alleged claim against a defendant.

[2] In order to maintain a position entitling plaintiff to proceed with the case it was necessary to set forth a cause of action on either an express or an implied contract. No express contract to repay the plaintiff for the money alleged to have been paid out, or to become responsible for the support furnished, is set forth. To imply such a contract as plaintiff relies upon would amount to a negation of the express provisions of Section 208 of the Civil Code.

[3] The fourth amended complaint, couched in the phraseology of the common counts, presents no improvement over the previous complaints. As is said in Neal v. Bank of America, 93 Cal.App.2d 678, 209 P.2d 825, 827, "Resort to pleading mere conclusions of law in the form of common counts was evidently had to avoid the effect of the verified allegations of fact contained in the original complaint, which the court had held insufficient to state a cause of action, * * *. Facts once alleged, however, cannot be withdrawn from consideration by merely filing an amended pleading omitting them without explanation. * * * Accordingly * * * the court was fully justified in examining and considering the original complaint. * * * So considered, the 'amended' complaint was no better than the original complaint." Moreover, it is evident that any further efforts at amendment would be fruitless.

[4, 5] The respondent's brief calls attention to the fact that appellant's notice of appeal specifies that the appeal is "from the Order of the Court made on June 2, 1940, sustaining Defendant's Demurrer to Plaintiff's Fourth Amended Complaint without leave to amend", which is not appealable, rather than from the judgment of dismissal which followed such order. However the "Notice to Clerk on Appeal" correctly refers to "plaintiff's appeal from the judgment upon the order * * * sustaining defendant's demurrer", and the appeal may be so considered.

The judgment of dismissal is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

98 Cal.App.2d 678

BRATTAIN et al. v. PACIFIC ELECTRIC RY. CO.
Civ. 17398.

District Court of Appeal, Second District, Division 3, California.
July 28, 1950.

Harry B. Brattain and Bess L. Brattain sued Pacific Electric Railway Company, a corporation, for damages allegedly caused by negligence of defendant in operating a street car. The Superior Court of Los Angeles County, Samuel R. Blake, J., granted defendant's motion for a new trial after verdict and judgment for plaintiffs, and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that evidence was sufficient to support verdict for defendant.

Order affirmed.

1. Appeal and error ⇨1015(1)

Order of trial court granting a new trial will be reversed on appeal only when it can be said as a matter of law that there is no substantial evidence to support a contrary judgment.

2. New trial ⇨68

In action against street car company for damages trial judge properly granted defendant a new trial after verdict and judgment for plaintiff where there was evidence that motorists other than defendant, who were driving in adjacent highway lane, had seen street car approaching and had stopped to permit street car to cross highway but that defendant drove past such motorists and collided with street car, and there was evidence from which it could reasonably be concluded that defendant did not use ordinary care to avoid collision, and that had defendant used ordinary care he would have observed wigwag signals in operation, heard warning signal of street car, seen street car, and been aware of its approach.

Charles E. Beardsley, Jackson A. Jordan, Los Angeles, for appellants.

C. W. Cornell, O. O. Collins, John R. Allport, Clyde C. Beery, all of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiffs, husband and wife, from an order granting defendant's motion for a new trial in an action for damages for personal injuries and injury to property allegedly caused by the negligence of defendant in operating one of its interurban cars. Defendant denied negligence and affirmatively alleged that plaintiffs were contributively negligent. The trial was by jury; verdict and judgment were for plaintiffs.

The court granted the motion upon the grounds: 1. Insufficiency of the evidence. 2. Misconduct of the jury (one juror having visited and viewed the scene of the accident during the trial) by which defendant was prevented from having a fair trial. 3. The verdict was against law.

The accident, a collision between plaintiffs' automobile and defendant's street car, occurred on November 24, 1945, on Sepulveda Boulevard where it crosses defendant's right of way north of Exposition Boulevard. Sepulveda is a four-lane highway, with a gravel shoulder on each side, and at the point of the accident extends in a northerly-southerly direction. Defendant's right of way is approximately one hundred feet in width on which is located one set of railroad tracks. Between Pico and Exposition, both of which run in an easterly-westerly direction, Sepulveda curves slightly, but where it crosses defendant's right of way it runs a straight course for a distance of about 156 feet north of the track. On the west side of Sepulveda just north of the track there was a wigwag signal atop a striped pole, and a similar signal on the east side just south of the railroad track. The photographs introduced in evidence show there was nothing on the east side of Sepulveda to obstruct the view of the approach of defendant's westbound street cars. The weather was clear. It was just getting dark. It appears without conflict that immediately preceding and at the time of the collision the wigwags were ringing, the lights of defendant's street car were on, the motorman blew a series of whistles and clanged his bell as he approached and crossed Sepulveda.

Plaintiffs, with their two sons, were traveling south on Sepulveda, in the lane of traffic immediately adjacent to the center line of the street, at a speed of between 25 and 30 miles an hour. Defendant's street car was westbound, going about 15 to 20 miles an hour. It had crossed the easterly half of Sepulveda when the accident occurred.

[1] The rules which govern a reviewing court in the determination of an appeal from an order granting a new trial are so well known they need not be repeated. The Supreme Court has recently said that the order of the trial court will be reversed only when it can be said as a matter of law that there is no substantial evidence to support a contrary judgment. Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689.

Plaintiff Harry B. Brattain was the only witness to testify for plaintiffs concerning the accident. His wife had no recollection of what occurred. He testified: As he proceeded southerly he observed no signs on the west side of Sepulveda Boulevard—no markings on the highway, no wigwag signals, no signs on overhead cables, or any other signs or markings warning of the existence or approach of a railroad crossing. He did not see the railroad track before the collision as it was flush with the street. The lights of on-coming cars were in his eyes and obstructed his left view. There were no automobiles immediately ahead of him in his lane but there were cars ahead of him in the lane to his right. He did not, and could not, observe the wigwag signal to the west of him over the tops of these automobiles. The first thing which called his attention to the track or to defendant's street car was a blast of a horn or a whistle immediately to his left. He instinctively applied his brakes, swerved the car to his right, and was struck by the street car on the left front of his car. He visited the scene the day after the accident. At that time he saw both wigwag signals. The one at the southeast corner was covered with weeds which extended to within a foot or two of the top; the signal was barely over the car tops, and on the southeast corner of Exposition Boulevard behind this wigwag was a building in which were electric neon signs. He further testified that he was a stranger to this particular area and had never traveled over this intersection.

On cross-examination Mr. Brattain testified the first time he heard a warning signal was almost at the moment of impact.

"Q. Then do you know whether any warning signal had been sounded prior to that time? A. I do not.

"Q. Do you know whether or not the headlight of the train was lighted? A. No, sir.

"Q. Do you know whether or not the interior lights of the train were on? A. I did not see them at the time.

"Q. Do you know whether or not any automatic warning signals, either visual or that you can hear were sounded? A. I did not see or hear any.

"Q. Did you look or is it just that you don't know? A. I did not look prior to the accident because, as I have stated, I had no idea in the world that there was anything in the nature of a car crossing there. * *

"Q. * * * I will make a statement first, Mr. Brattain, and then I will ask you if it is not true that you made that statement to the police at the time we were talking about. Here is the statement: 'I was driving and conversing with my wife and two sons at the time. Traffic was very heavy and I guess I was rather confused. I did not notice the railway wigwag. The street car loomed up in front of me and I jammed on my brakes and tried to swerve to avoid collision, but believe I smashed into the side of the street car.' My question is, is it not a fact that you made that statement to the police officer immediately after the collision? A. I could not say positively that I made that statement in those words, but it is possible that I may have made some such statement.

"Q. What about the facts? Were you conversing with your wife and two sons immediately before the accident? A. There was always just a little general conversation going on; I have no occasion to remember anything in particular about conversations."

The police officer who investigated the accident approximately ten minutes after it happened testified that Harry Brattain told him the traffic was quite heavy at the time; that he was talking to his wife and two sons as he was driving along and he must have been confused because he did not see the wigwag signal, and all of a sudden the street car loomed in front of him and he collided with it.

Harvey Johnson, who was traveling in the lane to plaintiffs' right, testified he saw the lighted street car approaching when he was about 150 feet north of the track. He pulled over to the gravel shoulder and stopped his car. An automobile in front of him also stopped. Plaintiffs' car, however, "just went right straight ahead and ran into the street car." Ralph Cummings, who was also traveling in the lane to the right of plaintiff, testified he stopped his car approximately ten to fifteen feet north of the track and as the street car came across Sepulveda, plaintiffs' car, which was "traveling in the middle lane * * * came alongside of me and smashed into it."

[2] The foregoing evidence was sufficient to support a verdict for defendant on the ground that negligence was not shown as a matter of law. Also it was reasonable to conclude that Brattain did not use ordinary care to avoid the collision; that had he exercised ordinary care he would have observed the wigwag signals in operation, heard the warning signal of the street car, seen the street car, and been aware of its approach. We cannot say, as a matter of law, that there was no substantial evidence to support a verdict for defendant.

We do not find any merit in appellants' contention that the trial judge misconceived the evidence and for that reason abused his discretion in granting the motion. In passing on the motion the judge filed a 16 page memorandum. Appellants' contention stems from the fact that in the memorandum he summarized the testimony of Harry Brattain and in doing so began by saying that Brattain testified: "There are railroad crossing signs with white boards. I saw some crossing signs at the scene of the accident today." Appellants argue that it is apparent the trial judge believed Brattain was referring to white cross-arm railroad signs at the railroad crossing where the accident occurred at the time of the accident when in fact it is undisputed there were none, and that he based his order on such misconception. Assuming, without deciding, that the memorandum may be considered in determining the question before us, it is clear from reading it as a whole that the judge did not grant the motion because of a misconception of the evidence but because he believed the evidence was insufficient to sustain the verdict. He stated in the memorandum that "Mr. Brattain never saw the train and does not know how the accident happened" and that "after mature study" he was satisfied the verdict was wrong, against the weight of the evidence, and should be set aside.

The foregoing renders unnecessary a discussion of whether the conduct of the one juror was prejudicial.

Order affirmed.

SHINN, P. J., and WOOD, J., concur.

FIELD et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 17639.

District Court of Appeal, Second District, Division 1, California.

July 31, 1950.

Rehearing Granted Aug. 26, 1950.*

Maria De La Cinta Povedano Field and others, sued Bank of America National Trust & Savings Association, a National Banking Association, to recover personal property held by defendant as trustee under a declaration of trust. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., rendered a judgment adverse to plaintiffs and plaintiffs appealed. The District Court of Appeal, Drapeau, J., held that the named plaintiff was guilty of laches.

Judgment affirmed.

1. Husband and wife 🔑254

Where premiums on policy insuring life of husband, during part of life of policy were paid with community funds, a percentage of the proceeds of policy constituted community property.

2. Trust 🔑372(3)

Evidence sustained finding that consent of a wife who could not at the time read English, to waiver of her community interest in policies insuring life of her husband, which waiver was signed by her when policies were placed in trust for benefit of wife and children of husband and wife, was given with knowledge and consent of wife and not by reason of misrepresentation or improper conduct of husband, and that wife was guilty of laches in accepting benefits of trust without question from her husband's death until filing her complaint to recover stocks and bonds bought from proceeds of policies, which complaint was filed approximately 18 years after death of husband and approximately 17 years after wife became conversant with English.

◆

Kenny & Morris, and Joseph W. Aidlin, all of Los Angeles, for appellants.

Preston & Files, Eugene D. Williams and Ralph E. Lewis, all of Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiffs, the widow, children and grandchildren of Walter J. Field, seek to recover certain personal property having an approximate value of $42,000, held by defendant as trustee under a declaration of trust.

When the declaration of trust was executed in January of 1928, trustor Walter J. Field placed in trust four insurance policies on his own life, two of which were issued in 1887 and 1894, respectively, and the other two in 1900. The trust provided that after the death of trustor, the net income from the corpus should be paid to the widow and seven named children in equal shares, and upon the death of the survivor of the widow and such children, the net estate should be divided equally among the then living grandchildren. The trust also contained spendthrift provisions prohibiting the transfer of any interest therein by the beneficiaries, and a clause that if any provision of said trust was judicially declared invalid, the remaining provisions should be effective nevertheless.

At the time the declaration of trust was executed, the wife of the trustor, plaintiff Maria de la Cinta Povedano Field, by a writing attached thereto declared that she had read and was fully acquainted with the contents of the trust, and in consideration of the benefits conferred upon her thereby, consented to, approved, ratified and confirmed the same, expressly waiving all of her community interest in the insurance policies.

After the trustor's death in 1931, his estate was probated, said plaintiff Maria being the sole distributee by virtue of assignments to her from the seven children. The insurance policies were collected and the proceeds invested by defendant trustee in stocks and bonds.

The complaint alleges that plaintiff Maria was born in Spain in 1878; that she and decedent trustor were married in Costa Rica in 1902 and moved to California in 1920 bringing the insurance policies with them; that the premiums thereon were paid out of joint earnings and accumulations of the parties; that her husband and other members of her family conversed with

---

* Subsequent opinion 223 P.2d 514.

Maria in Spanish; that she did not learn to read or understand the English language until 1932. Also, at the time she signed the waiver, no explanation was given her of its legal effect, her husband stating "that her signature was a mere technical formality" in the transfer of property entirely owned by him, and "that she had no right in or control of the life insurance policies"; that on December 24, 1948, the seven children assigned to her any interests they had in the trust estate. The prayer is for a transfer to Maria of the bonds and certificates of stock held in trust, or their value, the sum of $42,000.

Plaintiffs appeal from the judgment in favor of defendant.

The questions involved herein are recited in appellants' opening brief as follows:

"May a widow, with the consent of all of the other living heirs at law, recover community property from the trustee of purported trust where the trust was void *ab initio* because created by waiver of her community interest, signed by her at her husband's request, at a time when:

"(a) She was unable to read English (the language in which the waiver was written),

"(b) She relied upon the advice of her husband, and

"(c) She was not informed by him or any other person as to the waiver's legal effect?"

In effect, the point here urged is that the conveyance in trust amounts to a gift of community personal property without the consent of the wife. Sec. 172, Civil Code.

Appellant Maria testified that at the time the waiver was executed her husband "had me sign, he said 'It is the right thing' and I made it. He always say, 'You should sign,' I did. That is all. He didn't explain anything in Spanish."

With respect to other documents "he always said to me, this paper I like, and you sign, but I never know what kind of paper it was." Also that he never discussed the life insurance policies with her; community property law or her community interest.

It was stipulated that from the date of their arrival in California on July 17, 1920, to the date of trustor's death, the premiums on the insurance policies were paid out of community property.

On cross-examination, Maria testified that she agreed without question to everything her husband did in reference to the business of the family. "Anything he asked that I sign, I did it." When "he fixed up this trust at the Bank * * * I went there * * * he didn't tell me anything." In answer to the question: "Then your testimony is, so far as this trust is concerned, Mr. Field didn't talk with you about it at all?" Mrs. Field replied: "Absolutely."

[1] Since the premiums from 1920 to 1931 were paid with community funds, there is no doubt that a certain percentage of the proceeds of the policies constituted community property. McDougald v. First Fed. Trust Co., 186 Cal. 243, 244, 199 P. 11. That this was clearly understood by the trustor is evidenced by the fact that he had Mrs. Field expressly waive any rights she had to community property. Fraud on the part of trustor has not been alleged or proved in this action.

While it was established that trustor made no explanation to Mrs. Field as to the legal effect of her waiver, there is nothing in the record tending to prove that she did not understand what she was doing when she signed the document in question.

And assuming that she did not understand the import of her act in 1928, no excuse has been offered for failing to assert her alleged right after she became conversant with the English language in 1932. To the contrary, she continued to accept the benefits of the trust without question from her husband's death in 1931 until the instant complaint was filed on February 18, 1949.

[2] Upon the issues presented, the trial court concluded (1) that the written and acknowledged consent of Mrs. Field to the declaration of trust was given with her full knowledge and consent and not by reason of any misrepresentation or other improper conduct on the part of her husband; and

(2) that she was guilty of laches and therefore was barred and estopped to maintain the instant action. Such conclusions are based upon the court's findings which in turn are amply supported by the evidence.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

---

98 Cal.App.2d 683

FICK v. NILSON.

Civ. 3970.

District Court of Appeal, Fourth District, California.

July 28, 1950.

Charles W. Fick sued Edwin Nilson for treble damages for act of defendant in cutting down trees, the roots and branches of which damaged defendant's land, and for an injunction prohibiting defendant from molesting trees then growing or thereafter planted in strip of land adjacent to defendant's land, and defendant filed a cross-complaint. The Superior Court of Imperial County, V. N. Thompson, J., entered judgment for treble damages, enjoined defendant from molesting such trees except as to roots or limbs extending over or into defendant's land, and enjoined plaintiff from permitting any such encroachment on defendant's land, and defendant appealed from part of judgment which was in favor of plaintiff. The District Court of Appeal, Barnard, P. J., held that evidence did not justify an award of treble damages.

Judgment affirmed as modified.

1. Adjoining landowners 🔑5
Nuisance 🔑3(1)
Trespass 🔑10

An adjoining landowner who is injured by limbs and roots of trees on another's land may cut off offending parts, or may sue for damages and to abate nuisance, but may not enter the other's land and cut down trees.

2. Trespass 🔑26

Where defendant was injured by limbs and roots of trees on adjoining land allegedly owned by plaintiff, and defendant entered adjoining land and cut down trees, plaintiff could recover damages notwithstanding plaintiff refused to do anything to prevent the continuous damage to defendant's land and plaintiff could have been compelled by law to have prevented damage to defendant's land.

3. Appeal and error 1071(6)

In action for damages for act of defendant in entering upon adjoining land and cutting down trees, failure of trial court to expressly find upon issue as to whether roots and branches of trees damaged defendant's land, which damage defendant alleged conferred upon defendant right to compel plaintiff to abate trees, was not prejudicial to defendant in view of fact that defendant's right to abatement was recognized and that there was an implied finding since court found that plaintiff had no right to permit such an encroachment, and enjoined plaintiff from so doing.

4. Trespass 🔑61

To warrant treble damages for act of defendant in entering upon land allegedly owned by plaintiff and cutting down trees, the roots and branches of which damaged defendant's adjoining land, plaintiff was required to establish that wrongful act was willful and malicious.

5. Damages 🔑91(1)

An award of punitive damages may not be based upon mere speculation, but rather such penalty depends upon a definite showing of willingness to vex, harass, annoy, or injure.

6. Trespass 🔑46(3)

In action for damages for act of defendant in entering upon land allegedly owned by plaintiff and cutting down trees thereon located, the roots and branches of which damaged defendant's adjoining land, evidence did not justify an award of treble damages. Civ. Code, § 3346; Code Civ. Proc. § 733.

Horton & Knox, El Centro, for appellant.

James E. Marable, El Centro, for respondent.

BARNARD, Presiding Justice.

This is an action for damages and for injunctive relief. The plaintiff and defendant owned adjoining lands. There was a row of "Athel" trees immediately south of defendant's south line, growing on a strip over which plaintiff's predecessor had deeded a right of way for drainage purposes to the Imperial Irrigation District. The drainage ditch ran between this row of trees and the plaintiff's citrus grove. It appears, without conflict, that the roots and branches of these trees had for many years caused serious damage to defendant's property. The evidence is conflicting as to whether the value of these trees to the plaintiff, as a windbreak, was greater or less than their detriment to his land. With the permission of plaintiff's predecessor defendant cut these trees down several times, this tree being hard to kill and having a rapid regrowth. The last of these cuttings occurred shortly after the plaintiff acquired his property. The plaintiff then had his attorney write the defendant a letter. Two years later, while the defendant was again cutting these trees and removing the stumps, this action was brought.

The complaint sought treble damages, under section 3346 of the Civil Code and Section 733 of the Code of Civil Procedure, and an injunction prohibiting the defendant from molesting any trees then growing or thereafter planted on this strip. By answer and cross-complaint, the defendant alleged the impossibility of growing such trees in this place without continuous damage to his land, and sought to have the plaintiff enjoined from permitting such growth in any manner which would allow the roots or branches to interfere with his property. The court found that the defendant has no right to cut or molest such trees; that the plaintiff had been damaged in the amount of $500 by the destruction of this windbreak; and that the defendant had acted maliciously and wantonly, thus becoming liable for treble damages. It was further found, with respect to trees now growing or hereafter planted along this line, that the plaintiff has no right to permit any roots or branches to encroach upon defendant's land. Judgment was entered for $1500 as treble damages, enjoining the defendant from molesting such trees except as to any roots or limbs extending over or into his land, and also enjoining the plaintiff from permitting any such encroachment on defendant's land. The defendant has appealed from that part of the judgment which is in favor of the plaintiff.

Appellant's main contention is that the evidence does not justify the allowance of any damages to the respondent. It is argued that it clearly appears that these trees resulted in continuous damage to appellant's land; that the respondent refused to do anything to prevent this damage, and could have been compelled by law to do so; and that the appellant should not be penalized for doing what the respondent could have been compelled to do at his own expense.

[1, 2] While we sympathize with appellant's general viewpoint, he was not justified in taking the law into his own hands even to accomplish what the respondent should have done. It is well established that an adjoining landowner who is injured by limbs and roots of trees on another's property may cut off the offending parts, or may sue for damages and to abate the nuisance, but may not enter the other's land and cut down the trees. Grandona v. Lovdal, 70 Cal. 161, 11 P. 623; Crance v. Hems, 17 Cal. App.2d 450, 62 P.2d 395; Stevens v. Moon, 54 Cal.App. 737, 202 P. 961. It would seem to follow that where such a landowner, without pursuing either of these remedies, commits a trespass and destroys the other's property he is liable for any resulting damage.

[3] It is next contended that the court erred in failing to expressly find upon an issue raised, as to whether or not these roots and branches had damaged the appellant's property. It is argued that if such injury existed the appellant had the right to compel the respondent to abate the trees. His right to an abatement of the nuisance was recognized, and no prejudice appears. An implied finding sufficiently appears since the

court found that the respondent had no right to permit such an encroachment, and enjoined him from so doing.

[4, 5] Appellant's final contention, that the evidence is insufficient to justify treble damages, must be sustained. As respondent concedes, to warrant treble damages in such a case it must be established that the wrongful act was one which was willful and malicious. Stewart v. Sefton, 108 Cal. 197, 41 P. 293; Butler v. Zeiss, 63 Cal.App. 73, 218 P. 54; Wolfsen v. Hathaway, 32 Cal.2d 632, 198 P.2d 1, 12. In the latter case, it is said: "An award of punitive damages may not be based upon mere speculation, but rather such penalty depends upon a definite showing of a 'willingness to vex, harass, annoy, or injure * * *. And this is necessarily so, for the law, having made full compensation for the *act,* can thereafter be concerned solely with the *motive* of the act. The wrongful act has been redressed by full compensation. The improper motive which actuated it may be punished by an award of exemplary damages.'"

[6] The uncontradicted evidence shows that the appellant had been considerably damaged over a period of years; that the respondent would do nothing; that with the former owner's permission appellant had cut the trees several times and found this was not enough; that he believed that this damage could be prevented only by completely removing the trees; that he tried, when objection was finally made, to find out whether the respondent owned the strip on which the trees stood; that he was told at the county recorder's office that they were unable to find any record showing such ownership; and that he was advised by his attorney that the respondent had no such title. Even at the trial, the evidence of such ownership was so confusing the judge reserved his decision thereon. It clearly appears that the appellant was trying to protect his own property in a way he believed to be both rightful and not harmful, and there is no evidence tending to indicate that he acted with any malice or with any intention to injure the respondent or any one else. While he mistook his remedy and is liable for actual damages, the evidence is not sufficient to support an award for treble damages. Fetterly v. Salyer, 96 Cal.App.2d 240, 215 P.2d 64.

The judgment is modified by reducing it to $500, the actual damages, and as so modified is affirmed. Each party to pay his own costs on appeal.

MUSSELL, J., concurs.

---

98 Cal.App.2d 524

In re CLARY'S ESTATE.

ANRECHT et al. v. BROWN.

Civ. 17515.

District Court of Appeal, Second District,
Division 2, California.
July 24, 1950.

Rehearing Denied Aug. 8, 1950.

Proceeding in the matter of the Estate of Mattie Clary, deceased, wherein Eulyne Anrecht, Drury D. Dixon, and Ben H. Brown, Public Administrator all applied for letters of administration. From a judgment of the Superior Court, Los Angeles County, Edwin L. Jefferson, J., granting letters testamentary to Drury D. Dixon, the Public Administrator appealed. The Distirct Court of Appeal, Moore, P. J., held that Drury D. Dixon, son of testatrix and sole devisee was not entitled to letters testamentary, in absence of appointment in will, but was entitled to letters of administration with will annexed.

Judgment modified and affirmed.

1. Executors and administrators 🔑14

Whether a writing purporting to be a last will has with sufficient clarity designated a specific person to act as executor must be determined by familiar rules for interpretation of such documents. Probate Code, § 402.

2. Wills 🔑439

A holographic will must be perused for purpose of determining intention of testator.

3. Wills 🔑441, 456, 470

In order to ascertain intention of testator, holographic will must be read in view of circumstances under which it was written, the words must be given their ordinary grammatical sense and all parts of the writing must be considered in relation to one another.

4. Executors and administrators 🔑14

The appointment of an executor, "according to tenor" of will, in absence of specific designation, is not regarded with favor.

5. Executors and administrators 🔑14

Under statute permitting appointment of an executor, "according to tenor" of will, in absence of specific designation, although decision of any case must be based upon its own facts, unless the court can conclude from words of testator that he intended that his devisee take charge of estate, collect its assets, pay its debts and perform the usual functions of an executor, it is error to appoint such devisee. Probate Code, § 402.

6. Executors and administrators 🔑14

Under statute permitting appointment of executor, "according to tenor" of will, in absence of specific designation, a holographic will which merely gave home and contents to son to do with as he pleased, and in postscript recited that testatrix would like son to do something nice for named person, could not be construed as intending that son be appointed executor. Probate Code, § 402.

7. Executors and administrators 🔑21(1)

Son who was named as sole devisee in holographic will was not estopped from withdrawing his nomination of a niece of testatrix as administrator with the will annexed, and demanding his own appointment.

8. Executors and administrators 🔑21(1)

Where son who was named as sole beneficiary in holographic will originally nominated niece of testatrix as administrator with the will annexed, but five days later filed his own petition for letters of administration with the will annexed or testamentary, and still later the public administrator filed petition for letters of administration with will annexed, the trial court's selection of son to administer estate was the exercise of a vested discretion, but the letters granted should have been letters of administration with the will annexed, rather than letters testamentary. Probate Code, § 402.

9. Executors and administrators 🔑21(2)

Where trial court had properly picked son of testatrix to administer estate but under circumstances public administrator had properly filed petition for appointment, estate would be required to reimburse public administrator in amount of $250 for expenditures incurred in filing of petition and taking appeal.

10. Executors and administrators 🔑21(2)

Where the right of the son of testatrix to letters of administration was questioned for lack of finding that he was a resident of California, but question of whether son had become a resident before he applied for letters was an issue at hearing and court found that he had submitted himself to the jurisdiction of the court and had a residence in California and would personally conduct settlement of the estate, son was entitled to letters of administration with will annexed. Probate Code, § 422.

◆

Harold W. Kennedy, County Counsel, and Baldo M. Kristovich, Deputy County Counsel, Los Angeles, for appellant.

Vern E. Garten, Long Beach, for respondents.

MOORE, Presiding Justice.

The public administrator appeals from a judgment (1) denying him letters of administration with will annexed and (2) granting letters testamentary to Drury D. Dixon, the son of decedent.

Testatrix left a holographic will in words and figures as follows:

"120 W. Claude St.
Compton, Calif.
Jan. 25, 1947

I, Mattie Clary, makes this statement concerning the disposition of my home and

contents. Located at 120-W. Claude at Compton, Calif. I give my home and its contents to my son Drury D. Dixon to do with as he pleases. This is my gift to him and his family—his address is at present
1540 N W 8th St
Miami Fla.

this is later
P S. I would like for him to do something nice for Mrs. Ashmore who has been so good to me.

Mattie Clary.
Gods blessings."

On July 13, 1949, respondent Anrecht, a niece of testatrix, filed her petition alleging the decease of Mrs. Clary on July 2 and asked for letters of administration with will annexed. Attached to it was her nomination by respondent Drury D. Dixon and his request as sole heir for her appointment. But five days later respondent Dixon filed his petition "for letters of administration with-the-Will Annexed & or Testamentary." On July 20 appellant filed a petition for letters of administration with will annexed. Upon a hearing on all three petitions August 15, 1949, the court granted the petition of respondent Dixon and denied those of Miss Anrecht and the public administrator.

Notwithstanding the fact that her son was not specifically named by her as executor, the court granted his petition for letters testamentary on the theory that it is authorized by section 402[1], Probate Code. That section is: "When it appears by the terms of a will, that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor."

[1-3] Appellant contends that the court erred in making the appointment of respondent inasmuch as the will does not disclose by its terms that it was the intention of decedent to commit the execution thereof to him. Whether a writing purporting to be the last will of a decedent has with sufficient clarity designated a specific person to act as executor of his will must be determined by familiar rules for the interpretation of such documents. A holographic will must be perused for the purpose of determining the intention of the testator. In order to ascertain such intention, the document must be read in view of the circumstances under which it was written, the words must be given their ordinary grammatical sense and all parts of the writing must be considered in relation to one another. Estate of Peabody, 154 Cal. 173, 175, 97 P. 184.

[4, 5] The appointment of an executor "according to tenor" is not regarded with favor. While the decision of any case must be based upon its own facts, unless the court can conclude from the words of the testator that the latter intended for his devisee to take charge of the estate, collect its assets, pay its debts and perform the usual functions of an executor, it is error to appoint such devisee. Estate of Berg, 3 Coffey's Probate Dec. 259. The foregoing rule is firmly established by the decisions of California and other jurisdictions. However in order to derive a satisfactory solution of the problem presented a review of the pertinent decisions has been made and the result follows. In the Estate of Ringot, 124 Cal. 45, 56 P. 781, the will wanted Mr. Taylor "to have full charge of my Estate to receive all moneys and pay all Bills for the terms of Seven years And to be paid a liberal sum each and every year". Such language conferred full power as executor upon Mr. Taylor and his appointment was affirmed. A similar nomination and affirmance occurred in the Estate of Henderson, 196 Cal. 623, 238 P. 938, 944, where it was held that although testator's intention that "a certain person shall be named as executor to carry out the terms of his will is not expressed therein with directness, but is reasonably deducible from the language thereof, it is the duty of the court * * * to respect that intention and so appoint such person * * *." In Estate of Parker, 202 Cal. 138, 259 P. 431, 432, the testator directed one McFarland to put him "away

---

[1] Section 1371, Civil Code, prior to 1931.

Decent Not Expensive * * * Eny Bills I wished you would Pay them Thare is 500 In Bonds * * *." From such language the court concluded that it was the testator's intention for McFarland to be appointed. In reversing the order appointing the public administrator the court said, "It is sufficient if the will uses expressions pointing at the essential functions of an executor, functions which exist in consistent combination." In Estate of Spencer, 203 Cal. 424, 264 P. 765, 766, the testatrix left a will bequeathing her property to her daughter, her son and her mother, concluding with the following words. "I desire my two friends Wallace W. Wemott and Robert R. Curry to act without bond as custodians of property for both children and guardians for Lois Roberta Spencer." On appeal the order appointing Messrs. Wemott and Curry executors was affirmed. The court held that section 1371, Civil Code, was applicable in that it was the intention of the testator to have the two gentlemen qualify as executors.

In the Estate of Berg, 3 Coffey's Probate Decisions, 259, the testatrix in addressing her letter to Mrs. Lyng said, "if there is any money left me when I die I wish that you shall have it, also my watch and my clothes. I have no relatives here and this my wish must not be changed. If you should need somebody to assist you in this matter ask Mr. Bacon. Mr. Bacon will help you because Mr. and Mrs. Bacon were always good to me." Mrs. Lyng renounced the right to administer the estate and requested the appointment of Mr. Bacon. His petition was rejected and the public administrator was appointed by Judge Coffey. In his opinion upon such appointment observing that the rule of section 1371 of the Civil Code is a well settled principle of both code and common law the learned judge said, "it is equally well settled that courts do not look with favor upon the appointment of an executor according to tenor, but will rather appoint an administrator with the will annexed who will administer the estate under the guidance of the court and make distribution of the property of the decedent in conformity with the terms of the will * * * before a person who is not directly named as executor can receive an appointment according to the tenor not only must the identity of the person be certain, but the court must be able to conclude from the language of the will itself, that there is a testamentary intent that the party named should take charge of the estate, collect the assets and liquidate the indebtedness, and perform the duties and possess the powers usual to executorship." Turning his attention to the language of Mrs. Berg's will, Judge Coffey observed, "there is nothing contained in the will from which the court can reason that it was the intention of the testatrix to appoint her friend Dr. Bacon; he is not requested by either direct words or by inference to take charge of the property of the deceased, to pay her debts, collect moneys due to her, distribute her property, pay her legacies or to do anything whatever regarding her estate; he is not requested directly or indirectly to do or perform any act which usually falls to the lot of an executor."

The language of Judge Coffey is supported by two decisions, to wit, In re Hills Estate, 102 Mo.App. 617, 77 S.W. 110; and State ex rel. Simmons v. Watson, 2 Spears, S.C., 97. In Hills Estate the will provided: "I desire Mr. P. H. Bierman to direct anything that may be done about my St. Louis affairs in connection with this will." [102 Mo. App. 617, 77 S.W. 111] In State ex rel. Simmons v. Watson the testator's wish was: "It is my desire that this should be carried into effect by my brother-in-law, Samuel Mayrant." In both cases the petitions of the parties named were denied. In the Watson case the South Carolina court said that to be an executor authority must arise from the will and unless there be a clear intent to constitute the person claiming to be so regarded the executor, he never ought to be so appointed according to the tenor.

[6] The logic of the foregoing decisions is incontrovertible. In each case the intention of the testator is clearly manifested by unambiguous words directing a specified party to do and perform one or more of the essential functions of an executor. No such language is to be found in decedent's

words. The utmost that can be said of them is that she conveyed a fee simple estate to her son, subject to administration.

[7-9] Appellant contends that respondent Dixon is estopped from withdrawing his nomination of Eulyne Anrecht and from demanding his own appointment. Many decisions are cited in support of such contention. Estate of Lowe, 178 Cal. 111, 172 P. 583; Estate of True, 120 Cal. 352, 52 P. 815; Estate of Bedell, 97 Cal. 339, 32 P. 323; Estate of Silvar, 5 Cal. Unrep. Cas. 494, 46 P. 296; Estate of Kirtlan, 16 Cal. 161. In each of the controversies involved, the plea of estoppel was made by the nominee of a designated executor who later came forth to reassert his abandoned right. By reason of the facts the plea of estoppel was justified. However, in Estate of Lowe, supra, the court said 178 Cal. at page 112, 172 P. at page 584, "The rule established by our decisions is that where it is sought to retract such a waiver, it is for the trial court, in the exercise of a sound discretion, to determine whether greater weight should be given to the original surrender, or to the subsequent assertion of the right." There is no valid reason why under the circumstances of the case at bar the trial court should not justly and equitably have concluded that respondent's petition should be granted. He had evidently nominated his cousin as a convenience to himself and probably with an arrangement for her to serve without expense to the estate whose assets are limited and whose administration by appellant can serve no public good. When the issue arose as to whether respondent Dixon should be appointed rather than a stranger to the blood, the trial court named the son and in so deciding, it exercised a vested discretion. However, it erred in granting letters testamentary to respondent inasmuch as the will contains no request for him to act in such capacity. Since appellant was led to intervene by reason of respondent's act in nominating Eulyne Anrecht the ends of justice will be more nearly served by requiring the estate to reimburse the public administrator to the extent of his actual outlay. The sum of $250 is a reasonable charge to be made against the estate to compensate appellant for expenditures incurred in the filing of its petition and in taking this appeal.

[10] Appellant questions respondent's right to letters of administration by reason of a lack of finding that he is a resident of California. Prior to the death of testatrix, Respondent Dixon had been a resident of Florida. Whether he had become a resident of California before he applied for letters became an issue at the hearing. Pursuant to the proof the court found that Mr. Dixon "has come into the State of California * * * within a reasonable time after the decease of Mattie Clary, and * * * has submitted himself to the jurisdiction of the court * * * has a home and a residence in the City of Long Beach, and will personally conduct the settlement of the estate." In view of such finding and conclusion respondent was as the son of deceased entitled to letters of administration with will annexed. Probate Code, sec. 422.

It is therefore ordered that the judgment be modified as follows: Strike all parts thereof commencing with and following the word "Wherefore" and substitute in lieu thereof the following.

By reason of the law and the foregoing findings, it is ordered, adjudged and decreed,

That the last will and testament of Mattie Clary, deceased, be and the same is admitted to probate; that the petitions of Eulyne Anrecht and Ben H. Brown, Public Administrator of Los Angeles County, be and the same are denied; that letters of administration with will annexed be issued to Drury D. Dixon upon his giving a good and sufficient surety bond in the sum of $2,000 conditioned as required by law; that Ben H. Brown, Public Administrator of Los Angeles County, is hereby awarded a lien against the assets of said estate in the sum of $250.

As thus modified the judgment is affirmed.

McCOMB and WILSON, JJ., concur.

98 Cal.App.2d 719

GAVIN et ux. v. BLUMENTHAL.
Civ. 14215.

District Court of Appeal, First District,
Division 1, California.
Aug. 1, 1950.

Action by Joseph P. Gavin and another against Harry Blumenthal to recover money paid under mistake of fact or law on theory that respondent gave nothing and plaintiffs received nothing when they paid the money and received their release under an old lease from respondent. Judgment for defendant in the Superior Court in and for the City and County of San Francisco, Samuel F. Finley, J., and the plaintiff appealed. The District Court of Appeal, Wood, J., held that the evidence sustained the judgment for defendant.

Judgment affirmed.

1. Money received ⚷18(3)

In action for money had and received for the use of plaintiff on the theory that it was paid under a mistake of fact or law based on theory that when plaintiffs paid the money and received their release under an old lease such lease had been cancelled by operation of law so that respondent gave nothing and the plaintiffs received nothing, evidence sustained judgment for defendant.

2. Appeal and error ⚷1011(1)

Any conflicts in the testimony were to be weighed and determined by the trial court who viewed the witnesses and heard the testimony.

Albert Picard, San Francisco, for appellants.

Morris Oppenheim, San Francisco, for respondent.

WOOD, Justice.

This is an appeal by the plaintiffs from a judgment for the defendant in an action tried by the court without a jury upon a complaint for $4,000 had and received to and for the use and benefit of the plaintiffs.

Appellants' theory is that the money was paid under mistake of fact or of law. They make no claim of any error of law occurring at the trial. The only question is whether or not the evidence supports the judgment.

It appears from the evidence that in February, 1948, appellants held an apartment house under lease from respondent at a rental of $700 per month with a term that had three and one-half years yet to run. Desiring to sell, they engaged the services of a real estate broker, a Mr. Taylor, who found purchasers, referred to as the Littles, who agreed to pay $21,000 for the leasehold interest, the furniture and furnishings, and the good will of the business, "subject to a satisfactory lease for purchasers" and bill of sale by sellers. A new lease was negotiated between the Littles and respondent at a rental of $800 a month for a term of five years with an option in their favor for a five-year renewal, coupled with a power in the lessor to cancel the lease upon payment to the Littles of the sum of $21,000, the amount of their investment. Respondent executed and delivered to appellants a release of their obligations under the old lease, and they returned that lease to him with their relinquishment of their rights in and to it endorsed upon it.

For his part in the transaction, respondent demanded and received the sum of $5,000, of which $1,000 was paid by Mr. Taylor or the firm with which he was associated, out of the realtor's commission, and $4,000 by Mr. Taylor upon the direction of appellants, out of the proceeds of the sale of their interest to the Littles. In respect thereto, respondent executed and delivered two receipts. One, dated February 19, 1948, recited the receipt of $1,000 from Love Investment Co., the firm with which Mr. Taylor was associated, "as consideration for entering into a lease" of the premises with James and Bessie Little. The other, dated February 27, 1948, recited the receipt of $4,000 and that in consideration therefor respondent released appellants from all obligations under their lease with him, and from any and all claims respondent had or might have against them.

Appellants claim that the transaction concerning the new lease with the Littles was consummated February 19, the date which the $1,000 receipt bears; that the old lease was thereupon cancelled by operation of law and all obligations of appellants under it terminated; hence, that when on February 27 they paid the $4,000 and received their release, respondent gave nothing and they received nothing; that on the 27th they were unaware of the new lease, desired respondent's consent to a transfer of the old lease, did not ask for a release of their obligations under the old lease, and thus paid the money under mistake.

There is evidence which amply supports the view that this claim of appellants is without foundation.

Respondent testified that he did not agree to transfer the old lease; that at the same time that he released appellants from the old he executed the new lease; that he dealt through his attorney, Mr. Oppenheim, instructing the latter to release appellants from their lease, give a new ten-year lease to the Littles, and receive $5,000 for it; that the new lease was for a term of ten years at a different rental with a provision that if he wanted to cancel it within that period he would have to pay $21,000; and that he received $5,000.

Mr. Oppenheim testified that he had a telephone conversation with appellant Joseph Gavin in which the latter said he had O. K.'d a prospective buyer who was willing to pay $21,000 but was not satisfied to take the place for a mere three and a half years, and wanted a five-year lease with an option for five years more; that Gavin would like to see the new people get a new lease, and that he wanted to be released from the old lease; that after consulting respondent, Oppenheim informed Gavin that respondent would release Gavin from his lease and would give a lease to these people upon the terms described, and that for that respondent wanted $5,000; that Gavin then said he did not like to pay that, but would talk to Mr. Taylor and Oppenheim would hear from Taylor; that later Mr. Taylor said he had taken the matter up with the appellants and was ready to close the deal; that Taylor came to the office and Oppenheim typed the release.

It appears without conflict that Taylor and Oppenheim then met the appellants at the latters' apartment, where the release was delivered to appellants and the latter delivered to Oppenheim the relinquishment of their rights under the old lease. Mr. Gavin testified that upon that occasion Mr. Taylor gave Mr. Oppenheim $4,000 at Gavin's direction and Gavin received in return the release of the old lease; that Gavin accepted that paper and made no objection to accepting it; that he knew the $4,000 was demanded for the release; it was not his understanding that it was for the purpose of getting respondent to permit the assignment of appellants' interest under the old lease; that he understood the release and that the $4,000 was paid pursuant to it. Mrs. Gavin testified that she was present at the time the release was signed, and that Mr. Taylor was authorized to pay $4,000; that Mr. Taylor came in with the money to pay Mr. Oppenheim the $1,000 and also the $4,000 he demanded; that Mr. Oppenheim said the Gavins would have to pay $4,000 more before he would return to appellants the release of lease.

Mr. Oppenheim testified that he was paid $5,000 all at one time; that that was all under the same agreement. Mr. Taylor testified that the release was delivered to Gavin in Gavin's apartment at the time that Gavin turned over his old lease to Oppenheim; that Oppenheim signed the release, as agent of respondent, in Taylor's presence; that the Gavins signed the relinquishment of the old lease in the apartment the day they were there; that Taylor paid Oppenheim $5,000, waiving $1,000 of the commission and paying $4,000 on behalf of Gavin at Gavin's instructions, and received from Oppenheim a receipt for $1,000.

It is true that the appellants testified that they understood through a Mr. Bomgardner, a realty broker, that respondent would consent to a transfer of the old lease for $1,000; and that Mr. Gavin denied that he ever told Mr. Oppenheim he wanted a release. It is also true that respondent denied having made any such representation in relation to this transaction; the old lease was not transferred; and it would appear from appellants' own testimony that they knew what they were doing when they relinquished their rights, and accepted delivery of the release of their obligations, under the old lease, and instructed their agent to pay the $4,000.

[1,2] No purpose would be served by further extending this summary. The evidence amply supports the judgment. Any conflicts were, of course, weighed and determined by the trial court who viewed the witnesses and heard the testimony.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

---

98 Cal.App.2d 703

PEOPLE v. SANDERS.

Cr. 4406.

District Court of Appeal, Second District, Division 1, California.

July 31, 1950.

William Henry Sanders was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., of robbery, of violating section 288a of the Penal Code, and of rape, and he appealed. The District Court of Appeal, White, P. J., held that submission of case on transcript of the testimony taken at the preliminary examination, such submission being with personal consent of the defendant and that of his attorney and district attorney, did not deny due process of law.

Affirmed.

1. Constitutional law 🔑268

Where submission of case on transcript of testimony taken at preliminary examination was with personal consent of defendant and that of his attorney and district attorney, defendant was not denied due process of law.

2. Criminal law 🔑1159(2)

Identification of perpetrator of crime is essentially question for determination by triers of fact, and their verdict will not be set aside unless appellate court can say as matter of law that there was no substantial evidence to support conviction.

3. Criminal law 🔑739(2), 741(2)

Identification of accused and defense of alibi were for trier of the facts.

4. Criminal law 🔑1137(2)

Where defendant failed to call witness who might have testified in support of his defense of alibi and failure to subpoena the witness was attributable to defendant alone, defendant could not complain on appeal that such witness was not called.

5. Criminal law 🔑240

Function of committing magistrate was to determine whether there was sufficient evidence to hold defendant to answer.

6. Criminal law 🔑1035(3)

Ordinarily, claim of misconduct by trial judge will not be considered on appeal unless party making the claim by appropriate objection or assignment, gave court below an opportunity to correct the alleged error.

7. Criminal law 🔑230

Committing magistrate did not show itself partisan by indicating to district attorney that proof of copulation was required, and action of magistrate could be regarded as merely an attempt to clarify the record. Pen.Code, § 288a.

◆

William Henry Sanders, in propria persona.

Fred N. Howser, Attorney General, Norman H. Sokolow, Deputy Attorney General, for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused in Counts I and II of the crime of robbery; in Counts III and IV of the offense of kidnaping for the purpose of robbery; Count V charged a violation of section 288a of the Penal Code; and Count VI charged defendant with the crime of rape. It was also alleged that prior to the commission of the offenses charged, defendant was on or about September 7, 1948, convicted of a violation of section 503 of the Vehicle Code, a felony.

When the cause was called for trial, defendant personally, his counsel and the district attorney, stipulated that the case of the prosecution might be submitted on the transcript of the testimony adduced at the preliminary examination, with the added stipulation that all exhibits offered at said preliminary examination could be offered in evidence at the trial, and that both the prosecution and defendant could call any additional witnesses they desired. Defendant admitted the prior conviction pleaded in the information.

Following trial by the court defendant was found guilty of the offenses charged in Counts I, II, V, VI, and not guilty as to Counts III and IV. The court found the offenses charged in Counts I and II to be robbery of the first degree.

From the judgments of conviction defendant prosecutes this appeal.

Regarding the factual background which gave rise to this prosecution, the record reflects that about 2:00 o'clock on the morning of January 23, 1949, defendant came into a hotel in the city of Los Angeles, at which James Brown, 75 years of age was acting as night clerk. Defendant used the telephone and then obtained change from the clerk for use in the cigarette machine. He explained to Brown that he was telephoning in regard to his automobile which had broken down. He sat down in the lobby awhile and Brown sat at his desk, reading a book. Subsequently Brown was approached by defendant who had a gun in his hand. He ordered the clerk to get on the floor and thereupon took $1.50 from Brown's person. With a key he had removed from Brown's clothing, he opened the hotel money drawer and took $20 therefrom.

At this time Mrs. Toby Barton, a tenant, came into the hotel. At gun point defendant compelled Brown and Mrs. Barton to go into the boiler room in the rear, some 10 feet away. There defendant compelled Brown to lie on his back and ordered Mrs. Barton to disrobe, with which directions she complied. He then ordered Brown to kiss Mrs. Barton's privates, which he did. Defendant himself also kissed Mrs. Barton's privates, copulating his mouth with her sexual organ, as well as compelling her to do the same with him. Defendant then compelled Mrs. Barton to have sexual intercourse with him. During all of this time defendant kept the gun in his hand. When they first entered the boiler room, defendant with the aid of the weapon he was carrying, took Mrs. Barton's purse which contained $27. The foregoing testimony of Mr. Brown and Mrs. Barton was contained in the transcript of the testimony taken at the preliminary examination. These witnesses also testified at the preliminary examination that they recognized certain exhibits including a green felt hat, a brown suede pair of shoes and a green tweed overcoat that defendant was wearing at the time of the alleged offenses. They also testified that it was their belief that a weapon introduced into evidence was similar to the one used by defendant.

At the trial defendant took the witness stand in his own defense, denied committing any of the crimes charged against him and stated that at the time in question he was in the home of a Mrs. Anderson in another part of the city. He denied seeing the hotel clerk prior to the preliminary hearing and denied seeing Mrs. Barton prior to the "showup" at the San Francisco City Jail about February 10, in which locale he was apprehended. He admitted that the clothing introduced into evidence was his and that some years prior he had seen the gun. He testified that on the night in question he was wearing a gabardine raincoat and no hat. Another witness for the prosecution testified that the defendant had come to live at his place early in January and remained there a short time, and that he would come in at odd hours of the night. The witness testified that the gun introduced into evidence "looks like" a gun belonging to the witness and which he had on the shelf in his closet at the time police officers obtained a gun therefrom.

[1] In support of his contention that he was denied due process of law, appellant urges that the case against him was submitted on the transcript of the testimony taken at the preliminary examination. He concedes that such procedure was taken with his personal consent and that of his attorney and the district attorney.

Appellant relies upon the case of People v. Wallin, Cal.App.2d, 208 P.2d 400, reversing a judgment of conviction where the case in the trial court was submitted on the transcript of the preliminary examination. However, in the cited case, a hearing was granted by the Supreme Court and the judgment of conviction was by that tribunal affirmed. People v. Wallin, 34 Cal. 2d 777, 215 P.2d 1, 3. The Supreme Court held that the right of an accused to be confronted by witnesses at his trial, "whether reserved in the Constitution or in statutes, may be waived." That where, as here, the attorney for the accused cross-examined the prosecution's witnesses at the preliminary hearing in the defendant's presence, and thereafter, the latter waived his right of confrontation during his trial by stipulation that the people's case be submitted upon the transcript of the preliminary hearing, he "has not been deprived of his rights under the United States Constitution."

[2, 3] In urging the next ground for a reversal, appellant concedes that if the testimony of the prosecution witnesses at the preliminary hearing, in the case at bar, "presented a true picture of the offenses charged, there was sufficient evidence to sustain the judgments of conviction." However, he contends that the trial court failed to consider "the difficulty encountered by white people in distinguishing one Negro from another * * *". Appellant points out that he is colored and that the two white prosecution witnesses "excited, badly frightened and in fear of their lives—would have experienced great difficulty in differentiating between one Negro and another." Defendant refers to the direct conflict in the testimony between the prosecution witnesses and himself in that he testified he was at the home of a Mrs. Anderson at the time of the commission of the offenses.

This contention of appellant was fully considered and determined against him in People v. Alexander, 92 Cal.App.2d 230, 234, 206 P.2d 657, 659, wherein this court said:

"On the question of identification of the perpetrator of the crime, it has been repeatedly held by the courts of this state that such a question is essentially one for determination by the triers of fact, and that their verdict or decision will not be set aside unless the appellate court can say as a matter of law that there was no substantial evidence to support the conviction. People v. Ash, 88 Cal.App.2d 819, 825, 199 P.2d 711; People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814; People v. Hightower, 40 Cal.App.2d 102, 106, 107, 104 P.2d 378. Unless it can be said that the evidence of identity was so weak as to constitute practically no evidence at all, an appellate court is not entitled to set aside a jury's finding of guilt. People v. Braun, 14 Cal.2d 1, 5, 92 P.2d 402. In the instant case appellant has not met the burden imposed upon her to show that the identification evidence is inherently unbelievable. The claimed inconsistencies and uncertainties in the testimony of the prosecuting witness were matters which should have been directed to the attention of the jury, and cannot be urged upon appeal. People v. Skaggs, 80 Cal.App.2d 83, 97, 181 P.2d 390; Code Civ.Proc. sec. 1847.

"What we have just said is equally applicable to the testimony in support of appellant's defense of alibi. The jury was authorized to stamp this testimony as false."

Appellant urges us to give consideration to the fact that Mrs. Anderson, at whose home he testified he was at the time the offenses in question were committed, was not called as a witness. In this regard he states in his brief that he "admits his error in permitting his misguided sense of chivalry or judgment or whatever it may be termed in failing to call said Mrs. Anderson, a willing witness, to the stand. Appellant can only state to this Honorable Court that he felt that since he was in fact an innocent man, he could not in his wildest moment conceive actually of being found guilty, and thus advised Mrs. Anderson against submitting herself to the disgrace of testifying in his behalf."

[4] Appellant was at all times represented by counsel, both at the preliminary examination and at his trial. After hearing the testimony against him at the preliminary examination he must have realized the extreme seriousness of the charges made against him. At his trial, the process of the court was available to him to produce witnesses in his behalf. No claim is made that appellant was denied the right to produce the witness in question or that he requested his attorney or the court to secure the presence of the witness. In fact, he concedes that the failure to subpoena the witness was attributable to himself alone. Therefore, he cannot now be heard to complain.

[5] Finally, appellant urges that "the court showed itself partisan to the People's cause in its concern for proof of the corpus delicti." This complaint is occasioned by what transpired at the preliminary hearing, and (pursuant to the foregoing stipulation) was read into the record at the trial, when the court indicated to the district attorney that more proof than "a kissing of the private parts" must be produced; that "the courts have held that you have to prove a copulation." We find no merit in this claim of appellant. It was the function of the committing magistrate to determine whether there was sufficient evidence to hold appellant to answer. A reading of the record at once indicates that the court was clearly attempting to clarify the testimony. As was said in Estate of DuPont, 60 Cal.App.2d 276, 290, 140 P.2d 866, 873, "* * * a judge is not a mere umpire presiding over a contest of wits between professional opponents, but a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts between the parties who have sought the protection of our courts. Within reasonable limits, it is not only the right but the duty of a trial judge to clearly bring out the facts so that the important functions of his office may be fairly and justly performed. People v. Mendez, 193 Cal. 39, 45, 46, 223 P. 65; People v. Butterfield, 40 Cal.App.2d 725, 731, 105 P.2d 628; People v. Salas, 17 Cal.App.2d 75, 79, 61 P.2d 771; Gerson v. Kelsey, 4 Cal.App.2d 158, 163, 40 P.2d 543, 43 P.2d 266; People v. Ottey, 5 Cal.2d 714, 721, 56 P.2d 193. For the same reason the trial judge is not to be unduly or unreasonably hampered in his control and conduct of the trial. Commercial Union Assur. Co. v. Pacific Gas & Electric Co., 220 Cal. 515, 525, 31 P.2d 793."

[6, 7] We are satisfied from a reading of the entire record of the proceedings had at the preliminary examination that the magistrate did not exceed the proper bounds either in seeking to elicit the full facts or in attempting to clarify the record. Furthermore, no objection was interposed to the magistrate's conduct. Aside from the well recognized rule that ordinarily a claim of misconduct on the part of a trial judge will not be considered on appeal unless the claiming party by appropriate objection or assignment, gave the court below an opportunity to correct the alleged error, we are satisfied that appellant suffered no prejudice at his trial because of the aforesaid actions of the committing magistrate.

For the foregoing reasons, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

98 Cal.App.2d 741

INDUSTRIAL INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 17902.

District Court of Appeal, Second District, Division 1, California.

Aug. 1, 1950.

Rehearing Denied Aug. 21, 1950.

Hearing Denied Sept. 25, 1950.

Proceeding by the Industrial Indemnity Company, opposed by Mary Yearout, Rhoda Yearout and William Howard Yearout, minors, by their guardian ad litem and trustee, Mary Yearout, to review an award of death benefits by the Industrial Commission of the State of California. The District Court of Appeal, Drapeau, J., held that the grandchildren of deceased employee, who were residing in home of deceased employee and wife at time of death of deceased employee, were "dependents" within Workmen's Compensation Law.

Petition for writ denied.

1. Workmen's compensation ⚷51

The workmen's compensation law is to be liberally construed to the end that the beneficent provisions thereof be extended to employees and their dependents. Labor Code, § 3202.

2. Workmen's compensation ⚷484

Grandchildren, who were issue of first marriage of deceased employee's son, which terminated by divorce, and who were placed with deceased employee and wife after having been made wards of the Welfare Department of Hawaii, were "dependents" within Workmen's Compensation Law. Labor Code, §§ 3202, 3207, 3501–3503, 4702.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Dependents".

◆

Herlihy & Herlihy, Los Angeles, for petitioner.

Edmund J. Thomas, Jr., T. Groezinger, Robert Ball, all of San Francisco, for respondent Industrial Accident Commission.

DRAPEAU, Justice.

Industrial Indemnity Company petitions for a writ of review. Interpretation of Labor Code Section 4702 is involved. Deceased employee left surviving him a widow and two minor grandchildren. Industrial Accident Commission gave to the widow and the grandchildren the maximum award under the law.

Are the grandchildren dependents within the meaning of the law?

The children were the issue of decedent's son's first marriage, which terminated by divorce. The son remarried; the second wife failed to care for the children; they were made wards of the welfare department in Hawaii and placed with decedent and his wife in 1948. Since then they were members of the family of decedent.

Section 3207, Labor Code, defines compensation as every benefit or payment conferred upon an injured employee or in the event of his death upon his dependents.

Section 3501 sets forth the conclusive presumption that, in cases enumerated in the section, issue of the employee are wholly dependent.

Section 3502 provides that in all other cases questions of dependency shall be determined in accordance with the facts as they exist at the time of the injury of the employee.

Section 3503 provides that a person is a dependent if in good faith a member of the family or household of the employee.

[1] The law is to be liberally construed, to the end that the beneficent provisions thereof be extended to employees and their dependents. Labor Code, sec. 3202; Bianco v. Industrial Accident Comm., 24 Cal.2d 584, 150 P.2d 806; Larsen v. Industrial Accident Comm., 34 Cal.2d 772, 215 P.2d 16.

Workmen's compensation laws have been enacted and supported by the people of California with a humanitarian purpose. As said in the brief of the Commission: "It is common knowledge that many homes today include minor children who are not the immediate progeny of the husband and wife. Divorces, second marriages, death of parents, desertions by parents, unfitness on the part of parents, and other factors constantly are creating situations in which minor children are given into the care and custody of couples other than their own parents. Upon the death of the breadwinner of such a family group, the problem of economic readjustment is just as great to the dependent minor children as if a parental relationship had existed between themselves and the decedent."

This Court is thankful that the old, harsh doctrines of the common law, like assumption of risk, negligence of fellow servants, and contributory negligence no longer plague survivors when the man of the family has been taken away by accidents in industry.

[2] The Commission found the fact that these children are dependents. This finding was within the purpose and purview of the law, and the petition for writ of review is denied.

WHITE, P. J., and DORAN, J., concur.

---

98 Cal.App.2d 574

In re BECKER'S ESTATE.

Civ. 14417.

District Court of Appeal, First District,
Division 2, California.
July 25, 1950.

Irma Becker brought a proceeding for probate of the will of George E. Becker, deceased, contested by George H. Becker. From a judgment of the Superior Court in and for the City and County of San Francisco, Lile T. Jacks, J., denying probate, pursuant to a jury's verdict finding testator mentally incompetent, proponent appealed. The District Court of Appeal, Dooling, J., held that the evidence warranted the jury's finding of testator's mental incompetency.

Judgment affirmed.

1. Wills 🔑292, 300, 386

The rules of evidence, weight to be accorded it, and reviewing court's province are the same in will contest as in any other civil case.

2. Appeal and error 🔑930(1)

In reviewing evidence on appeal from judgment on jury's verdict, all conflicts must be resolved in respondent's favor and all legitimate and reasonable inferences indulged to uphold verdict, if possible.

3. Appeal and error 🔑989

On appeal from judgment on jury's verdict, attacked as unsupported by evidence, appellate court can only determine whether there is any substantial evidence, contradicted or uncontradicted, supporting jury's conclusion.

4. Appeal and error 🔑996

When two or more inferences can be reasonably deduced from facts in evidence, reviewing court has no power to substitute its deductions for those of trial court.

5. Evidence 🔑586(3), 587

Direct evidence may be disbelieved and contrary circumstantial evidence relied on to support jury's verdict or finding.

6. Wills 🔑21

Testator's mental condition at very moment of executing will is decisive on question of his competency.

7. Wills 🔑50

To invalidate will on ground of testator's mental incompetency, his loss of mentality must be so complete that he can no longer remember his property or objects of his bounty.

8. Wills 🔑55(9)

Evidence supported jury's finding of testator's mental incompetency to execute will as warranting conclusion that his loss of mentality was so complete that he could no longer remember his property or objects of his bounty.

◆

Talley & Carver, William R. Talley and Clifford R. Carver, all of San Francisco, for appellant.

Fabius T. Finch, James Martin MacInnis, San Francisco, for respondent.

DOOLING, Justice.

Appellant, the widow of decedent George E. Becker, appeals from a judgment following the verdict of a jury denying probate to a will purportedly executed by decedent on September 10, 1947 on the ground of incompetency.

George E. Becker for some time prior to his death was suffering from cancer of the jaw which brought about his death on September 17, 1947. He was attended during his last illness by his son George H. Becker, the contestant, who is a licensed physician. On August 29, 1947, the contestant took his father to an attorney's office where the father executed a will leaving to contestant his only property, a lot in San Francisco improved with a two flat dwelling with a life estate in one of the flats reserved to appellant, his wife.

On September 3, 1947 contestant again took his father to the same lawyer's office where at the father's direction a new will was drawn directing the sale of the property and the division of the proceeds equally between his wife and his son, with provision that the wife might have a lease on the flat in which they were living for a limited period after the testator's death. This will was executed on September 5 in the lawyer's office in the presence of one of his associates, the lawyer who drew the will being that day out of town. At the time of its execution a provision for $40 per month rental to be paid by the widow in case she elected to take the lease provided for was inserted at the testator's suggestion.

On September 10 the will in contest was signed in the decedent's bedroom, having been drawn by another lawyer who was summoned for the purpose by decedent's wife through the medium of a neighbor. By its terms all of decedent's property was given to his wife to the exclusion of his son.

The contestant son, who saw his father daily, morning and evening, except on September 10 when at the suggestion of the wife he did not call in the evening, testified that his father's condition was one of progressive mental deterioration. Between August 29 when the first will was executed and September 3 when the second visit to the lawyer was made he had become noticeably more cloudy and confused and by September 5 when the second will was executed he was, in contestant's opinion, barely competent and able to understand what he was doing. Thereafter he became progressively worse and by the morning of September 10 in this witness' opinion:

"He was incompetent.

* * * * * *

"Q. Were you of the opinion on that day that your father was capable of exercising any of his faculties of free will whatsoever? A. No."

In the opinion of the witness this mental condition had been reached on September 8 at the latest. Asked if after September 8 his father ever exhibited "any change in mental condition which would have cause (sic) you to feel that for even a brief time he became restored to a partial mental competency," the contestant answered: "No, these patients don't."

Decedent was seen on September 3 by two physicians who had been treating him and on September 5 by a third. All agreed in testifying that on those dates the decedent's mentality was being rapidly sapped by his acute physical condition. It was explained that the cancer in the position that it occupied in the jaw pressed upon a major artery leading to the brain and a major vein leading from it, the effect being gradually to diminish the supply of blood to the brain as the cancer grew in size; that toxic material from the cancer also gradually poisoned the system including the brain and that the position of the cancer interfered with the free ingestion of food. The combination of these factors in the opinion of the medical witnesses who had observed decedent would inevitably result in a complete loss of mentality as he reached the terminal stage and his condition was progressive so that once the mind was gone decedent would have no moments when his mind could function. In the opinion of these witnesses, from decedent's condition when they last saw him, by September 10 he would have had no true mentality left.

Opposed to this evidence was the testimony of witnesses who saw him on that date and later that on September 10 he was able freely to discuss his property, his son and wife and to direct how he desired his will of September 10 to be drawn; and the fact was proved that as late as September 12 in his own handwriting he executed a direction to a bank to admit an attorney to his safe deposit box. The direction to the bank was admittedly copied in language suggested by the bank to the attorney and some of the medical witnesses stated that decedent on September 12 might be able to copy such a document although in their opinion he would not understand it. As one physician put it a child who cannot read or write may copy the word "cat" but he will not because of that know its meaning.

[1-4] We approach the decision of the question whether the evidence is sufficient to support the finding of incompetency to execute the will of September 10 controlled by the rule announced in Re Estate of Teel, 25 Cal.2d 520, 526, 154 P.2d 384, 387, quoting from In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689: "The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case. * * * The rule as to our province is: 'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.'"

[5] It is true that there was substantial evidence, as above indicated, that decedent possessed and exhibited on September 10 and afterwards testamentary capacity; but the medical evidence from physicians who had observed him, including contestant who saw him every day, was that by September 10 his physical condition was such that he was no longer able to exercise any more than the most automatic and habit-formed mentality. If that was believed by the jury, as it must have been, then they were entitled to disbelieve the testimony of his mental activity produced by proponent and her witnesses, since it has been said by our supreme court that "it is elementary that direct evidence may be disbelieved and contrary circumstantial evidence relied upon to support a verdict or finding." Gray v. Southern Pacific Co., 23 Cal.2d 632, 641, 145 P.2d 561, 566.

In re Estate of Teel, supra, 25 Cal.2d at page 527, 154 P.2d at page 387, disapproved In re Estate of Casarotti, 184 Cal. 73, 192 P. 1085 and In re Estate of McDonough, 200 Cal. 57, 251 P. 916, which had formulated the rule that: "The testimony of proponent's witnesses must be taken into account in weighing the sufficiency of contestant's case."

[6] Appellant points out the distinction between medical incompetency and legal incompetency to make a valid will, In re Estate of Arnold, 16 Cal.2d 573, 585, 107 P.2d 25, but here from the medical evidence the jury was entitled to find that on September 10 decedent no longer had the mental ability to think or reason on any subject or to entertain any idea; and while, as appellant points out, it is the mental condition at the very moment of executing the will which is decisive, In re Estate of Peterkin, 23 Cal.App.2d 597, 604, 73 P.2d 897, the medical testimony, of physicians who had observed him, was that on September 10 his mind was so far gone that, because of the progressive nature of his illness, there was no possibility of decedent understanding what he was doing or having any recurrence of active mentality.

[7, 8] The evidence shows that decedent would ask for air and water and sometimes write those words on slips of paper furnished for that purpose. The medical testimony was that decedent's ability to perform these simple acts or to be so far roused as to momentarily recognize some person and speak his name was attributable to habit and was not inconsistent with the complete loss of mentality to which they testified. Recognizing the rule that the loss of mentality in these cases must be so complete that the testator can no longer remember his property or the objects of his bounty, In re Estate of Sexton, 199 Cal. 759, 764, 251 P. 778, we are satisfied that there is substantial evidence from which the jury could draw the conclusion that on September 10 the decedent had reached this condition.

Judgment affirmed.

NOURSE, P. J., concurs

---

98 Cal.App.2d 648

LEWIS v. STEIFEL et al.

Civ. 17435.

District Court of Appeal, Second District, Division 3, California.

July 26, 1950.

Hearing Denied Sept. 21, 1950.

Action by Harold Lewis against Samuel H. Steifel and another, for damages for breach of contract. The Superior Court of Los Angeles County, William P. Haughton, J., discharged an attachment levied against property of both defendants, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that an attachment would lie upon a cause of action for damages for breach, since the damages were readily ascertainable by reference to the contract, the basis of the computation was reasonable and definite, and the amount of $26,000 for which the writ was issued was not excessive.

Order reversed.

1. Attachment 🔑5

An attachment will lie upon a cause of action for damages for a breach of contract when the damages are readily ascertainable by reference to the contract and the basis of the computation of damages appears to be reasonable and definite. Code Civ.Proc. § 537.

2. Attachment 🔑8

In action for breach of contract, fact that the damages are unliquidated is not determinative of whether an attachment will lie, but contract sued on must furnish a standard by which amount due may be clearly ascertained, and there must exist a basis upon which the damages can be determined by proof. Code Civ.Proc. § 537.

3. Attachment 🔑8

Where plaintiff made an oral contract with defendants to serve as motion picture production manager for three motion pictures production of which would take approximately one year, at a salary of $500 a week, an attachment would lie upon a cause of action for damages for breach, since the damages were readily ascertainable by reference to the contract and the basis of the computation of damages was reasonable and definite. Code Civ.Proc. § 537.

4. Attachment 🔑107, 228, 229

An attaching plaintiff may claim in his affidavit the maximum amount of the alleged liability of the defendant, and the fact that within such limits the claim appears to be exaggerated, does not furnish ground for discharging the attachment, nor does the fact that there appears to be slight prospect that the plaintiff will recover anything.

5. Attachment 🔑173

Where plaintiff made an oral contract with defendants to serve as motion picture production manager for three motion pictures that defendants informed him would take approximately one year, at a salary of $500 a week, and was discharged after 3 months, in an action for breach of contract, writ of attachment against defendants' property in the amount of $26,000, was not excessive.

6. Attachment ⚷227

Courts may not add to the statutory grounds for the discharge of attachments.

◆

Harry E. Sokolov, Hollywood, for appellant.

Bautzer & Silbert, Beverly Hills, and Bertin A. Weyl, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff appeals from an order discharging an attachment levied against property of both defendants pursuant to a writ in the sum of $26,000 issued at the time the complaint was filed.

In the first amended complaint, plaintiff alleges that on or about the first of November, 1948, defendants entered into an oral contract with him, whereby he was to render services as a motion picture production manager in connection with three motion pictures to be produced by defendants during the year beginning November 1, 1948, and ending November 1, 1949; defendants informed him that the production of these pictures would take approximately one year, and that he was to receive, for his services, the sum of $500 per week; his services were to commence on the day following the formation of the contract and his salary was to accrue from that date but was to be payable at the time defendants went into production of the first of the three pictures. Plaintiff alleges he accepted the employment and rendered services for the defendants until early in February, 1949, when he was informed by them that their plans had been changed and that they would have to release the three proposed motion pictures through United Artists Corporation rather than through RKO Studios; that as a result of this change they would have to employ another production manager and that plaintiff's services were no longer required. Plaintiff alleges that he has been at all times ready, willing and able to perform and that he has been damaged in the sum of $26,000 because of the breach of contract by defendants.

Defendants made a motion to discharge and vacate the attachment, the matter came on for hearing and on May 5, 1949, the court made its order discharging the attachment on the ground that plaintiff's claim was not one for the direct payment of money (Code Civ.Proc., sec. 537(1)), but was for damages for breach of contract and that such damages were unascertainable, speculative and uncertain; and on the ground that the attachment for the sum of $26,000 was excessive.

Plaintiff contends, on this appeal, that his claim comes within the rule that an attachment will lie upon a cause of action for damages for breach of contract where the damages are readily ascertainable by reference to the contract and where the basis of the computation of damages appears to be reasonable and definite. We are of the opinion that this point is well taken.

Section 537, Code of Civil Procedure provides that "The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, in the following cases: 1. * * * *In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this State,* and is not secured by any mortgage, deed of trust or lien upon real or personal property, or any pledge of personal property * * *." (Emphasis added.) Plaintiff's affidavit shows that the contract was "made or is payable in this State" (no point is made that the allegation is in the disjunctive); that such contract was not secured by any mortgage, deed of trust, or lien upon real or personal property, or any pledge of personal property.

[1-3] The question presented here for determination is well settled in this State. The most recent case on the subject, Eaton v. Queen, 78 Cal.App.2d 571, 177 P.2d 997, is in point. The court quoted from Force v. Hart, 205 Cal. 670, 673, 272 P. 583, 584,

as follows: "It is a well-recognized rule of law in this state that an attachment will lie upon a cause of action for damages for a breach of contract where the damages are readily ascertainable by reference to the contract and the basis of the computatiton of damages appears to be reasonable and definite. [Cases cited.] The fact that the damages are unliquidated is not determinative. [Cases cited.] But the contract sued on must furnish a standard by which the amount due may be clearly ascertained, and there must exist a basis upon which the damages can be determined by proof. [Cases cited.]" In Greenebaum v. Smith, 51 Cal.App. 692, 694, 197 P. 675, 676, the court held that merely because the amount is uncertain "consisting of damages to be proven at the trial, is no reason why an attachment may not issue where, as here, such damages are easily ascertainable according to fixed standards supplied by the contract or the law acting upon it." Although the quoted cases did not involve personal service contracts, no valid reason can be advanced why the terms of the contract in the instant case did not furnish a sufficiently definite standard by which the amount due may be determined by proof.

[4-6] Defendants contend that plaintiff could not truthfully depose that defendants were indebted to him in the sum of $26,000; that there was no definite employment for the period of a year nor any basis for claiming that plaintiff's services would have lasted a year; that upon a trial the amount plaintiff had earned or could have earned in other employment within the year would be deducted from the maximum amount plaintiff could have earned if his contract had been completed; plaintiff should have waited until a considerable portion of his salary had accrued and should have then sued an attached for the amount then due. From the standpoint of defendants, and perhaps from that of plaintiff, these are reasonable arguments, but the attachment laws are not framed to allow deviations of procedure to fit the particular case. An attaching plaintiff may claim in his affidavit the maximum amount of the alleged liability of the defendant, and the fact that within these limits the claim appears to be exaggerated, does not furnish a ground for discharging the attachment, nor does the fact that there appears to be but slight prospect that plaintiff will recover anything. It cannot be said upon the record before us that the sum of $26,000 for which the writ of attachment issued was excessive. Baldwin v. Napa etc. Wine Co., 137 Cal. 646, 70 P. 732; Murillo v. Toole, 47 Cal.App.2d 725, 118 P.2d 895. There are remedies when the attachment is wrongful. The courts may not add to the statutory grounds for the discharge of attachments.

The order discharging and vacating the writ is reversed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

98 Cal.App.2d 695

CRAIG et al. v. REED et al.
Civ. 17532.

District Court of Appeal, Second District, Division 1, California.
July 31, 1950.

Rehearing Denied Aug. 17, 1950.
Hearing Denied Sept. 29, 1950.

Unlawful detainer action by James G. Craig and others against Marjorie Reed and others. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgment for the plaintiffs for $5,628.42 and the defendants appealed. The District Court of Appeal, Doran, J., held that evidence sustained finding that defendants and all of them were guilty of unlawful detainer of the two parcels of realty involved and sustained the trial court's determination that treble damages were called for.

Judgment affirmed.

1. Estoppel ⚷92(2)
Landlord and tenant ⚷33

Where pursuant to parol agreement lessees entered into possession of parcel of realty in addition to that originally included in written lease and by one monthly check covering both properties, paid stipulated total rent to lessors, there was a sufficient execution of parol modification to render agreement enforceable, and lessees' conduct was sufficient to work an estoppel in respect to their denial that lease was modified. Civ. Code, § 1698.

2. Landlord and tenant ⚷291(13, 14)

In unlawful detainer action, evidence sustained finding that lessees and all of them were guilty of unlawful detainer of two parcels of realty involved and evidence of aggravated circumstances accompanying lessees' retention of possession and failure to offer explanation of such conduct sustained determination that treble damages were called for.

3. Landlord and tenant ⚷291(13)

In unlawful detainer action, evidence sustained finding that individual defendant who had guaranteed performance of lease as well as being a trustee of lessee corporation, was individually liable.

Norman T. Seltzer, San Diego, for appellants.

Denio, Hart, Taubman & Simpson, Matthew C. Simpson, Long Beach, for respondents.

DORAN, Justice.

The complaint herein, for unlawful detainer, alleges "That under date of January 15, 1945, by written lease, there was leased to defendants * * * that certain brick building 150′ x 100′, being 100′ front, located on the North side of West Anaheim Street (in Long Beach) sometimes numbered 525, 527, or 537, for the term of three years commencing on the 1st day of February, 1948." It is further alleged that the defendant Charles W. Carlstrom, individually, guaranteed in writing the performance of said lease.

It is then alleged that said lease by its terms terminated on February 1, 1948, and that more than 30 days prior thereto, "Plaintiffs notified Defendants, both orally and in writing, that said lease would not be renewed or extended * * * and that possession of the leased premises was demanded as of the date of the end of the term of said lease. * * * that prior to the 1st day of January, 1948, plaintiffs notified defendants that their tenancy of: Lot 4 in Block B of Chapman Tract, in the City of Long Beach * * * would terminate and end on February 1, 1948." The complaint then alleged defendants' refusal to surrender possession; that plaintiffs had agreed to lease the premises to the International Harvester Company at $800 per month; and claimed damages to be trebled, attorney fees and costs.

The answer "admits that said lease by its terms terminated on the 1st day of February, 1948", and that "said Defendants entered into possession of said premises", but denies the other allegations of the complaint. Judgment was rendered for the plaintiffs for restitution together with damages of $850 for failure to remove from the premises, $566.14 for removing septic tanks, and $210 for 14 months rent at $15 per month, in all amounting to $1,626.14 which was ordered trebled. To this was added attorney fees of $750, making a total of $5,628.42.

At the trial defendants offered no evidence, and the trial judge observed that "The defendant having seen fit not to explain to the Court why they kept on in possession there, it seems to be a clear case for treble damages." Among other things the trial court found "that in 1946, after the execution of said lease aforesaid, by mutual agreement, consent and ratification of the parties thereto, there was added to the premises originally covered by said lease, additional territory consisting of a vacant lot described as Lot 4, Block B of Chapman Tract * * * and the rental provided by said lease was increased to the sum of $265.00 per month, and Defendants went into possession * * * and occupied the same in connection with and as a part of the same use and occupancy as that of the building originally described in said lease and under the terms thereof; and each month thereafter, to and including the month of January, 1948, Defendants paid the rental on all of the properties aforesaid with one bank check each month."

The trial court found that the defendants unlawfully detained possession; further, that "said Lot 4 * * * was completely covered and occupied by septic tanks and chemical toilets theretofore placed thereon by Defendants", which the plaintiffs were forced to remove and store for the purpose of regaining possession. The defendants' motion for a new trial was denied, and the present appeal followed.

It is appellants' contention that the trial court's finding "that Chapman Tract property (Lot 4) was added to that described in the lease * * * (is not) supported either by law or evidence"; that defendants "were not guilty of any unlawful detainer with respect to the Chapman Tract and an award of damages predicated thereon is not supported"; that the finding "that Charles W. Carlstrom as an individual was guilty of unlawful detainer finds no support in the record"; that the damages awarded are excessive "and this is not a proper case for treble damages."

The record discloses evidence that in 1946 there was some discussion about a place to store some septic tanks belonging to defendants which had been left on other property belonging to the plaintiffs. As noted in respondents' brief, "on August 14, 1946, a letter was written to Ace Van & Storage Company (defendants' business name) which stated that there was a vacant 50-foot lot across the alley from the leased building, and if defendants cared to store the septic tanks there they could lease it for $15.00 per month." In response to this letter "a telephone call was received from Defendants' Long Beach manager (Mr. Eldridge) and * * * it was mutually agreed that the lot across the alley (Lot 4) would be added to the existing lease * * and that the rent under such lease ($250.00) should be raised to $265.00 per month, and that a single check for $265.00 would thereafter be paid for both properties. This was followed by actual occupancy of the lot by the Defendants", and the sending to plaintiffs of monthly checks for the larger amount.

At the close of the term, February 1, 1948, defendants tendered to plaintiffs a check for $265 for the next month's rent, which check was refused by the plaintiffs. Two months prior to the expiration of the lease, plaintiffs had notified defendants that the lease would not be extended or renewed and that the property had been leased to another party. The defendants refused to surrender possession and continued to occupy the premises until after this action was instituted. Defendants never did remove the septic tanks from the other lot.

Appellants' brief directs special attention "to the paucity of evidence" supporting the trial court's finding. However, the "paucity" of evidence is not a matter here to be considered where the record discloses, as it does in the instant case, substantial evidence to sustain the finding. In reality, appellants' complaint is directed to the trial court's interpretation of the evidence which, under the circumstances, is not a matter for appellate review. When it is remembered that appellants remained silent at the trial and produced no evidence in explanation of the retention of possession, such rule would seem to be peculiarly applicable.

[1] The contention that "A written contract can be altered only by another written contract or by an executed oral agreement", as provided in Section 1698 of the Civil Code, and that therefore there was no valid modification, is answered by respondents' notation that the change in the lease so as to include Lot 4, "was at the very least, an executed oral agreement", and hence in compliance with the statutory requirement. It is uncontradicted that thereafter defendants immediately entered into possession of the additional lot, and by one monthly check covering both properties, paid the stipulated total rent as agreed upon in the modified arrangement. Nothing further remained to be done. Moreover, the defendants' conduct in reference thereto, was undoubtedly sufficient to work an estoppel in respect to the present denial of such amendment.

[2] The appellants' other contentions are likewise untenable. At every point the findings and judgment are sustained by record evidence and are in no wise contrary to law. This is true both in respect to the finding that defendants and all of them were guilty of unlawful detainer of the two parcels involved, and in regard to the award of damages. Not only does the record reveal evidence of unlawful detainer but of

aggrevated circumstances accompanying appellants' retention of possession and a complete failure to offer any explanation of such conduct. That such evidence is sufficient to sustain the trial court's determination that treble damages were called for, cannot well be controverted.

[3] The same may be said concerning the individual liability of the appellant Carlstrom who had guaranteed performance of the lease as well as being a trustee. The record discloses evidence from which the trial court might reasonably draw the conclusion that, as stated in respondents' brief, "Carlstrom was right in the middle of everything that happened thereafter, without any separation of his particular identity as Trustee or as individual, but apparently in both capacities." No reversible error has been pointed out by the appellants.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

98 Cal.App.2d 521

SALOMON et al. v. COOPER et al.

Civ. 17502.

District Court of Appeal, Second District,
Division 2, California.

July 24, 1950.

Abraham Salomon and Sylvia Salomon, as vendors, brought action against Bernard Cooper, also known as B. R. Cooper, and Tillie Cooper to enforce performance of a contract for sale of realty and in the alternative for damages. The plaintiffs waived their right of action to enforce performance and stood on their demand for damages. The Superior Court of Los Angeles County, Joseph Marchetti, J., rendered a judgment in favor of defendants, and the plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that contract was wanting in mutuality and was consequently without binding effect.

Affirmed.

1. Contracts 🔑10(5)

Contract providing that realty was sold for $20,800 and bonds of record with an unnamed unpaid balance, that purchaser should pay all cash up to first trust deed and assume prevailing trust deed, and that vendor was to receive a nonassignable lease without any terms of the lease being specified other than amount of monthly payments and duration, was wanting in mutuality and was without binding effect, and therefore vendor was not entitled to recover damages for breach thereof. Civ. Code, § 1624, subd. 4.

2. Vendor and purchaser 🔑21

An action for damages for breach of contract to convey realty will not lie unless the contract is complete and certain, both as to subject matter and parties.

3. Vendor and purchaser 🔑21

A writing which purports to be a memorial of an agreement for purchase and sale of realty, must contain its essential terms and material elements without recourse to parol evidence of the intention of the contracting parties.

4. Vendor and purchaser 🔑16(1), 17

An agreement to agree at a future time for purchase and sale of realty is nothing and will not support an action for damages.

5. Vendor and purchaser 🔑21

A memorandum of an agreement to sell and convey realty, in order to be valid, must be complete evidence of the terms to which the parties have assented, and if it establishes that there was in fact no contract, if it discloses that on essential terms the minds of the parties did not meet and that such terms were left open for future settlement, then there is no binding obligation on the vendor to convey or the purchaser to accept and pay for the realty.

Mindlin & Levy, Los Angeles, Victor L. Mindlin, Los Angeles, for appellants.

David C. Marcus, Los Angeles, for respondents.

MOORE, Presiding Justice.

Appellants as vendors sued to enforce performance of a contract for the sale of real property and in the alternative for damages. At the trial appellants waived their right of action to enforce performance and stood upon their demand for damages.

The writing, alleged to contain the obligations of respondents, acknowledges receipt of $250 as a deposit on account of the purchase price of the property which was sold "subject to pro rate taxes for fiscal year 1948, conditions, restrictions * * * of record * * * for the purchase price of $20,800 and bonds of record with an unpaid balance" not named, "the balance of the purchase price is to be placed in escrow with Citizens National Trust and Savings Bank of Los Angeles [branch not designated] within 60 days from the date hereof, as follows, to-wit: cash: ———, Buyer to pay all cash up to present first trust deed and assume the prevailing trust deed, Seller to furnish termite clearance by licensed inspector * * * to pay for scraping of floor in dining room of lower apt. Heater to be installed at the Sellers expense in upper apt. Buyer to give a note of returning $15.00 per mo. if seller moves before 30 months.

"And it is hereby agreed: 1st—That in the event said purchaser shall fail to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall be retained by seller in consideration of accepting this agreement."

[1] No amount of scrutiny of the document declared upon has brought to light those provisions essential to an enforceable contract for the purchase of realty. The writing provides that the vendor is to receive a nonassignable lease at $50 per month but not a term of the lease is specified other than the monthly payments and its duration. Since a lease of realty for a period longer than one year is not valid unless in writing, it follows that one important consideration, Civ.Code, sec. 1624, subd. 4, for the contract of sale has not been agreed upon. By reason of the absence of vital factors from the contract it is wanting in mutuality and is consequently without binding effect. Wineburgh v. Gay, 27 Cal.App. 603, 605, 150 P. 1003.

[2-5] An action for damages for breach of contract to convey land will not lie unless the contract is complete and certain both as to subject matter and parties. Talmadge v. Arrowhead Reservoir Company, 101 Cal. 367, 371, 35 P. 1000; Sarina v. Pedrotti, 103 Cal.App. 203, 208, 284 P. 472. The writing which purports to be a memorial of such an agreement must contain its essential terms and material elements without recourse to parol evidence of the intention of the contracting parties. Seymour v. Oelrichs, 156 Cal. 782, 787, 106 P. 88, 134 Am.St.Rep. 154. An agreement to agree at a future time is nothing and will not support an action for damages. Dillingham v. Dahlgren, 52 Cal.App. 322, 330, 198 P. 832. It is indispensable to a valid memorandum of an agreement to sell and convey land that it be complete evidence of the terms to which the parties have assented. If it establishes that there was in fact no contract, if it discloses that upon essential and material terms the minds of the parties did not meet and that such terms were left open for future settlement, then there is no binding obligation upon the seller to convey or the buyer to accept and pay for the land. It will be regarded as merely an inchoate effort. Implications will not be indulged. Breckinridge v. Crocker, 78 Cal. 529, 537, 21 P. 179; Poel v. Brunswick-Balke-Collender Co., 216 N.Y. 310, 314, 110 N.E. 619.

Appellants have striven industriously to establish that (1) the document sued on is a contract of sale and not a mere option; (2) the forfeiture provision relating to the "deposit on account" does not constitute a provision for liquidated damages in event of vendee's default; (3) the forfeiture clause is invalid under section 1670 of the Civil Code; and (4) a vendor is not obliged to repay vendee the moneys paid on the purchase price as a condition to the maintenance of an action for damages. Such considerations are beside the point where there is no valid agreement of sale.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

98 Cal.App.2d 518

SHEPHERD et al. v. PEREA.

Civ. 17391.

District Court of Appeal, Second District,
Division 1, California.
July 21, 1950.

W. W. Shepherd and others sued Joe Perea to recover for work, labor and services performed in repairing a tractor bought by defendant from a third party. The Superior Court of Los Angeles County, J. F. Moroney, J., rendered a judgment adverse to plaintiffs, and plaintiffs appealed. The District Court of Appeal, Drapeau, J., held that evidence sustained judgment for defendant on ground that defendant told representatives of plaintiff that a third party guaranteed tractor and that any work on tractor was to be paid for by third party.

Judgment affirmed.

See also, Cal.App., 220 P.2d 777.

1. Appeal and error 🔑1008(1)

In action to recover for work, labor and services performed in repairing a tractor bought by defendant from third party, determination of weight, value and effect of testimony was for trier of facts.

2. Appeal and error 🔑989

After trier of facts determines weight, value and effect of testimony, only inquiry to be made by a reviewing court is whether there is substantial evidence to support the findings and judgment.

3. Automobiles 🔑368

Where trial court determined that defendant told representatives of plaintiff who performed services in repairing tractor bought by defendant from third party, that third party guaranteed tractor and that any work on tractor was to be paid for by third party, and that defendant did not agree to pay for services performed by plaintiff, defendant could not be held liable on theory that defendant would be unjustly enriched at expense of plaintiffs.

4. Work and labor 🔑4(2)

Ordinarily the law will imply a promise on part of recipient of services to pay for them.

5. Work and labor 🔑30(2)

Whether the recipient of services impliedly promised to pay for services is a question of fact.

6. Appeal and error 🔑1008(1)

A determination by trier of fact that recipient of services did not impliedly promise to pay for services will be supported on appeal.

7. Automobiles 🔑368

In action to recover for work, labor and services performed in repairing a tractor bought by defendant from third party, evidence justified judgment for defendant on ground that defendant told representatives of plaintiff that third party guaranteed tractor and that any work on tractor was to be paid for by third party, and that defendant did not agree to pay for the services performed by the plaintiffs.

◆

William K. Young, of Los Angeles, for appellants.

Charles E. Hobart, of Los Angeles, for respondent.

DRAPEAU, Justice.

Defendant purchased a caterpillar tractor from International Machinery Company. The tractor was guaranteed to be 85% efficient, under O.P.A. regulations, but defendant found that the engine would not run. He notified International Machinery Company, and that company asked plaintiffs to see what was wrong.

One of plaintiffs' mechanics attempted to fix the engine in the field, without success. The engine was pulled out of the tractor, shipped from Lancaster to plaintiffs' machine shop in Los Angeles, and overhauled. It was then sent back to Lancaster and installed in the tractor. The cost of the work was $2,008.38.

Thereafter defendant used the tractor for more than a year, leveling land in the Antelope valley, and sold it for a good price. During this time plaintiffs did other work on the tractor, and defendant paid their bills for this service.

The testimony is in conflict as to who authorized the work on the engine to be done, and who agreed to pay for it. Plaintiffs' witnesses testified that defendant did. Defendant denied that he did. He testified that at all times he specifically told plaintiffs' representatives that the tractor was guaranteed by International Machinery Company and that any work on the engine was to be paid for by them.

Invoices were made to International Machinery Company for the work; bills were mailed to the same company. Then plaintiffs billed defendant, demanded payment from him, and finally sued him for the work, labor, and services performed. The trial court found for the defendant, judgment followed, and appeal was taken.

[1, 2] Applying elementary rules on appeal, the judgment must stand. It was the province of the trial court to determine the weight, value and effect of the testimony. Having so determined, the only inquiry to be made by a reviewing court is whether there is substantial evidence to support the findings and judgment. Jordan v. Guerra, 23 Cal.2d 469, 144 P.2d 349; Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 163 P.2d 756.

Plaintiffs argue that defendant is liable in any event, because he received the benefit of their work and services; that otherwise, defendant would be unjustly enriched at the expense of plaintiffs.

[3-6] Under the facts of this case, the rule of unjust enrichment does not apply. Ordinarily, of course, the law will imply a promise on the part of the recipient of services to pay for them. But the implied promise is a question of fact, and a determination by the trier of fact that there was no such promise will be supported on appeal. Crane v. Derrick, 157 Cal. 667, 109 P. 31. Nothing in Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990, cited by plaintiffs, is contrary to this conclusion.

Plaintiffs allege error in two rulings upon questions of evidence.

Plaintiffs offered in evidence a written contract between defendant and International Machinery Company, objection to which was sustained. Defendant produced a witness who testified, over objection, to hearing a telephone conversation between defendant and some other party relative to details of the purchase of the tractor.

[7] Neither ruling seriously affected the rights of plaintiffs, or the facts before the court. There is sufficient evidence to support the findings in any event. Loper v. Morrison, 23 Cal.2d 600, 145 P.2d 1; Frazure v. Fitzpatrick, 21 Cal.2d 851, 136 P.2d 566.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

98 Cal.App.2d 837

SHEPHERD et al. v. PEREA.

Civ. 17392.

District Court of Appeal, Second District, Division 1, California.

July 21, 1950.

W. W. Shepherd and others brought an action against Joe Perea. The Superior Court of Los Angeles County, Clarence L. Kincaid, J., vacated an order directing disbursement of funds held under an attachment, and defendant appealed. The District Court of Appeal, Drapeau, J., held that the order directing disbursement was final.

Order vacating disbursement order reversed.

Deposits in court 🔑12

An order directing disbursement of funds deposited by defendant with clerk after attachment was final, where no appeal had been taken.

◆

Charles E. Hobart, Los Angeles, for appellant.

William K. Young, Los Angeles, for respondents.

DRAPEAU, Justice.

Plaintiffs were unsuccessful in that part of their cause of action for work done on a tractor belonging to defendant. Shepherd v. Perea, Cal.App., 220 P.2d 776. In his answer, defendant admitted $947.74 due plaintiffs for other work done for him by them. Judgment was rendered for that amount in favor of plaintiffs May 2, 1949.

On attachment proceedings during the action defendant posted cash with the Clerk. May 9, 1949, the court made its order directing the Clerk to pay plaintiffs $947.74, satisfy the judgment, and pay the balance of the deposit to the defendant.

May 31, 1949, the court made a minute order, vacating the order of May 9, 1949. This was done presumably because no notice of the motion had been given to counsel for the opposing party. From this order defendant appeals.

No good can come in prolonging this litigation. The real controversy has been decided. See opinion in Shepherd v. Perea, Cal.App., 220 P.2d 776.

No appeal was taken from the first order, and the same is final.

The minute order vacating the order of May 9, 1949, is reversed.

WHITE, P. J., and DORAN, J., concur.

---

98 Cal.App.2d 653

PEOPLE v. WOLFEART.

Cr. 4458.

District Court of Appeal, Second District, Division 3, California.
July 27, 1950.

Henry Isaac Wolfeart, alias Harry I. Wolf, was convicted in the Superior Court of Los Angeles County, Orlando H. Rhodes, J., of arson, and defendant appealed. The District Court of Appeal, Vallee, J., held that the evidence was sufficient to sustain conviction for arson.

Affirmed.

1. Criminal law 🔑1159(2)

A verdict cannot be set aside on appeal unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to sustain verdict.

2. Arson 🔑37(1)

Evidence was sufficient to sustain conviction for arson.

3. Criminal law 🔑1159(2)

Where question is sufficiency of evidence to sustain verdict, each case must be considered on its own facts.

Harry I. Wolfeart, in pro. per.

Fred N. Howser, Attorney General, Donald D. Stoker, Deputy Attorney General, for respondent.

VALLÉE, Justice.

Defendant was charged with arson in two counts and with a prior conviction of burglary. He admitted the prior conviction. He was tried by a jury on the charges of arson. The jury convicted him as to count one and disagreed as to count two. Count two was then dismissed. He appeals from the judgment. Count one alleged that on August 16, 1945, defendant set fire to a dwelling house at 1138 Washington Boulevard, Los Angeles.

The fire occurred about 4:30 a.m. on Tuesday, August 16, 1949. It was of incendiary origin. It was started with an inflammable liquid. Defendant contends there was no evidence to connect him with the offense.

The building burned consisted of a store with a five-room residence in the rear. A Mrs. Summers, with her three children, occupied four rooms. Mrs. Greenberg occupied one room. At one time defendant and Mrs. Greenberg were planning to be married. Defendant stayed on the premises several nights after May 27, 1949. He slept there over night on the Saturday preceding the fire. On Sunday he and Mrs. Greenberg quarreled. Mrs. Greenberg left and when she returned defendant told her that he did not believe her statement that she had gone to see a lady friend. He said, "I have seen you with another man there." Mrs. Greenberg told him he had better leave. He grabbed her, threw her on a chair, and slapped her face with his hand. She ran out to call the police. She next saw defendant the following day. He came to get his clothes. She refused to give them to him because he owed her money. Defendant said, "If you are not going to give me the clothes, I know how to get it. I have no home. You are not going to have no home."

The same day defendant told Mrs. Summers he wanted his things. She told him to go away. She told him if he did not leave she would call the police. Defendant said, "Call them. I will fix you."

About 7:00 or 7:30 p.m. on August 15, defendant attempted to buy some Butane at a service station, saying that he wanted it for a stove in a trailer. When he could not obtain Butane, he purchased a half gallon of gasoline, saying that he wanted it with which to wash his hands. About 9:10 that evening there was a fire in a pile of rubbish at the side of the house at 1138 Washington Boulevard. Shortly before that Mrs. Summers' daughter saw appellant coming along the side of the house. Mrs. Summers called the fire department which responded and extinguished the fire.

About 3:00 o'clock in the morning of August 16, Mrs. Summers heard someone alongside the house. She arose and saw defendant go by. He was going toward the back gate. She heard the back gate open and someone try the rear door. She heard the gate open again and then heard footsteps going back in the opposite direction. About 4:20 she heard crackling noises coming from the side of the kitchen. She got up, opened the bedroom door, and as she did so smoke hit her in the face. She closed the door, called the fire department, went to see where the fire was located, and saw the kitchen door aflame.

Police officers located defendant about 5:30 a.m. and found him asleep on a mattress in his shed. He was fully clothed. The odor of petroleum or petroleum products emanated from his coat, particularly from the sleeve. Defendant told police officers that he had bought the half gallon of gasoline to wash his hands; that he had really gone to buy some Butane inasmuch as he was contemplating purchasing a house trailer and wanted some Butane for the stove; that the trailer was in Compton. He was asked why he wanted to buy the Butane for the stove if the trailer was in Compton. Later he said he just wanted to try the stove out and later that he did not go to the service station to buy Butane at all; that he went to buy gasoline to wash his hands and had just inquired about Butane to see if they had it so that he could get it when he needed it. He was asked where the can was in which he had obtained the gasoline. He answered that he had thrown it away. The can could not be found. Defendant told the officers he could not remember where he had thrown it. About a teacup full of gasoline was used to start the fire. The fire had burned at least 45 minutes and possibly as long as 2½ hours.

Defendant testified that he had an argument with Mrs. Greenberg on August 14; that he had been living at 1138 Washington Boulevard for some time before that; that during the argument he told Mrs. Greenberg "You should get burned for my part"; that he did not refer to the house; that he "just cursed her to get burned because she was mean to me."

[1, 2] A verdict cannot be set aside on appeal unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to sustain the verdict. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Daener, 96 Cal.App.2d 827, 216 P.2d 511. The evidence reasonably justified the conclusion of the jury that defendant set the fire. Cf. People v. Neal, 97 Cal.App.2d 668, 218 P.2d 556.

[3] People v. Draper, 69 Cal.App.2d 781, 160 P.2d 80 and People v. Gibbons, 93 Cal.App.2d 28, 208 P.2d 411, cited by appellant, are not helpful. In those cases it was held that upon no hypothesis was there sufficient evidence to sustain the verdict. Manifestly

where the question is the sufficiency of the evidence to sustain the verdict, each case must be considered on its own facts.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

98 Cal.App.2d 602

McCORMICK et al. v. McNALLY et al.

Civ. 3978.

District Court of Appeal, Fourth District, California.

July 25, 1950.

Action by Adelaide Gillis McCormick and another against Robert McNally and others to enjoin trespass on plaintiffs' land and quiet their title as against defendants' claim of an easement for road purposes, wherein defendants filed a cross-complaint. The Superior Court of San Diego County, Robert B. Burch, J., entered judgment in favor of plaintiffs and defendants appealed. The District Court of Appeal, Barnard, P. J., held that the evidence sustained findings that any easement which formerly existed had been abandoned and lost by non-use and that defendants had acquired no prescriptive right of easement through recent use.

Judgment affirmed.

Easements ⚷36(3)

In action to enjoin trespass on plaintiffs' land and quiet their title against defendants' claim of prescriptive right to an easement for road purposes, evidence sustained findings that any easement which formerly existed had been abandoned and lost by non-use and that defendants had acquired no right of easement through recent use, which was not under claim of right and was not known to plaintiffs.

Byron F. Lindsley, San Diego, for appellants.

McInnis & Hamilton, John W. McInnis, San Diego, for respondents.

BARNARD, Presiding Justice.

This action involves a claimed easement for road purposes. The plaintiffs own 350 acres of mountainous land and the defendants own 80 acres adjoining it on the west. For many years the defendants have had, and still have, access from their property to the public road over a route other than that here claimed.

A quarrel occurred between Mr. McNally and the then owner of plaintiffs' land in 1934. McNally then built a wire fence on his side of the common line, and the other built a parallel fence on his side. There were no gates in these fences and, so far as known to the other side, the McNallys neither crossed this line nor claimed any right to do so until this controversy arose in 1949. The space along and between these fences became overgrown with trees and brush.

In 1949, McNally suggested to the plaintiffs, who had acquired their property in 1941, that it would be desirable to clear away this brush and rebuild a line fence. It was agreed that the McNallys would do this work and that the plaintiffs would share in the expense. After the work was done, the defendants claimed a right to pass across the way thus cleared, and thence over the plaintiffs' property to the public road

The plaintiffs brought this action to restrain such a trespass, and to quiet their title as against any such easement or claim. The defendants cross-complained, claiming a prescriptive right to an easement for such road purposes. The court, after viewing the premises, found in all respects in favor of the plaintiffs. The defendants have appealed from the judgment, contending that the evidence is insufficient to sustain the findings which are adverse to their claim of prescriptive right, or the further finding that any easement or right of way which ever existed has long since been extinguished by nonuse for more than five years.

There is evidence that an old road existed many years ago which ran across the middle of plaintiffs' property from north to south, and thence across the property to the north to the public road; that the greater part of this road was obliterated by floods in 1916 and 1927; that in 1933 the owner of the property to the north built a wire fence, without gates, along his south line and across this old road; that the then owner of plaintiffs' land, being thus prevented from using that way to reach the public road, constructed a new road of his own a quarter of a mile east of the old road, which he and the plaintiffs have since used; that he installed a gate where this new road entered his land which has been kept locked ever since except when the owner was there; that in 1935, Mr. McNally, who was then leasing the land south of plaintiffs' land, fastened a gate across the old road where it crossed the line, forbidding the owner of plaintiffs' land to pass and claiming that a road no longer existed; and that the portion of the old road on plaintiffs' land had not been used for nearly 20 years.

There is some evidence that years ago a branch road ran west from this old road, near the north line of plaintiffs' property, and that these two roads were formerly used by defendants' predecessor to reach the public road. The defendants' claim of easement is largely based upon the contention that a prescriptive right over that branch roadway accrued many years ago, which has not been lost. The defendants testified that many times since 1931 they had driven a car across this part of plaintiffs' property to a point near the boundary line, and had then walked through the brush to their own land. Also, that at times they had ridden a horse over this route.

It conclusively appears that the portion of the old north and south road which crossed plaintiffs' property was largely obliterated, was effectively cut off at both ends by the acts of others, and was not used by any one for many years. This destroyed any prior existing access from defendants' land to the public road. It also destroyed any practical use of the remaining "branch road", which then led nowhere, and any use at all was effectively destroyed about the same time by the erection of the two fences across it at the boundary line. The evidence is uncontradicted that these fences remained intact, at the point where they crossed this branch road, from 1934 to 1949.

There is ample evidence that any easement which formerly existed was abandoned and lost by nonuse. There is no evidence that any recent use of the "branch road" was under claim of right or that such use, or even the former existence of such a road, was known to the plaintiffs. Any evidence of such recent use is unsatisfactory and indefinite. Having entered plaintiffs' property at some undisclosed place, these witnesses said they proceeded to the line and crossed through the brush, without describing their route. No claim of right was made until the fences and brush were removed. The evidence, including reasonable inferences from defendants' own testimony, supports the findings made.

The judgment is affirmed.

MUSSELL, J., concurs.

98 Cal.App.2d 578

AXE et al. v. LOS ANGELES COUNTY.

Civ. 17601.

District Court of Appeal, Second District, Division 2, California.
July 25, 1950.

Action for partition of a vacant lot by Fred W. Axe and another against the County of Los Angeles. From a judgment that plaintiffs take nothing by their action entered into the Superior Court of Los Angeles, Joseph W. Vickers, J., the plaintiffs appealed. The District Court of Appeal, Wilson, J., held that plaintiffs were estopped from claiming or asserting any interest in the property adverse to the interest of defendant.

Judgment affirmed.

1. Trial 🔑377(2)

Reopening of a trial for further evidence rests in sound discretion of the trial judge.

2. Trial ⚷377(2)

In action for partition of a vacant lot where plaintiffs claimed that they had no reason to anticipate testimony contrary to facts supported by written instruments in their possession denying motion of plaintiffs to reopen trial for further evidence was not abuse of discretion where pleadings of defendant afforded such notice and in view of other evidence.

3. Pleading ⚷79

A "disclaimer" is a denial of insistence upon any claim or right in the thing demanded, and a renunciation of all claim thereto.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Disclaimer".

4. Estoppel ⚷71

In action for partition of vacant lot where plaintiffs' predecessor filed a disclaimer knowing defendant was seeking foreclosure of an assessment constituting a lien against the property and would rely upon the disclaimer and predecessor made no objection to the sale and failed to redeem thereafter, she was estopped from asserting any interest in the property adverse to the interest of the defendant and it was immaterial that judgment was not taken against her.

5. Estoppel ⚷98(2)

In action for partition of a vacant lot where plaintiffs procured a quitclaim deed from their predecessor and they had full knowledge of foreclosure proceedings of assessment lien against the property and the predecessor executed a disclaimer of her interest therein, plaintiffs were in no better position than their predecessor and were estopped from claiming or asserting any interest in the property adverse to the interest of defendant.

◆

Robt. E. Rosskopf, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, and Arthur Loveland, Deputy County Counsel, Los Angeles, for respondent.

WILSON, Justice.

This is an action for partition of a vacant lot. Plaintiffs have appealed from a judgment that they take nothing by their action and adjudging that they have no right, title, interest or estate in or to the property and that they are estopped from claiming or asserting any interest therein adverse to the interest of defendant.

On June 9, 1941, title to the property was vested in Alice M. Filbin and Hilda E. Rawlings, as tenants in common each of an undivided one-half interest. The property was subject to the lien of a street assessment held by the County of Los Angeles. On that date the county commenced an action against the record owners for the foreclosure of the assessment and recorded a lis pendens. Defendants Filbin and Rawlings were both served with summons and complaint and on January 25, 1942, defendant Filbin executed a verified disclaimer of any right, title or interest in or to the property. The disclaimer was filed on April 3, 1944; default of defendant Rawlings was entered and judgment of foreclosure was rendered on April 6, 1944. The judgment made no mention of Filbin, except in the title of the action, and did not mention the disclaimer but did order the entire lot sold. Pursuant to a writ issued for the sale of the lot the sheriff advertised and sold it on July 10, 1944. No redemption having been made the sheriff issued his deed to the County of Los Angeles, dated December 19, 1946, describing the entire property. On January 28, 1947, Alice Filbin executed and delivered to plaintiffs a quitclaim deed of her interest in the property, which deed was recorded February 4, 1947.

At the trial of the action Arthur Loveland, attorney for the county, testified that in a conversation which he had with plaintiff Fred W. Axe in the latter part of 1947 or early in 1948, Axe stated he knew of the disclaimer before he purchased the quitclaim deed from Alice Filbin. After the cause had been submitted plaintiffs moved to reopen the trial for further evidence. Their motion was supported by the affidavit of plaintiff Fred W. Axe in which he alleged that at the time he purchased the quitclaim deed he did not know a disclaimer had been executed by Alice Filbin in connection with the property. Plaintiffs' motion was denied. Judgment followed in favor of defendant.

Plaintiffs contend that (1) the trial court abused its discretion in denying the motion to reopen; (2) the disclaimer in the foreclosure action was not a conveyance; (3) the judgment in that action did not affect Filbin's interest; (4) plaintiffs are not estopped from asserting title.

[1, 2] Plaintiffs concede that the reopening of a trial for further evidence rests in the sound discretion of the trial judge. They assert, however, that in the instant case evidence of their title was entirely documentary and their presence in court unnecessary to prove title; that they had no reason to anticipate testimony contrary to facts supported by written instruments in their possession; that in such circumstances the denial of their motion was an abuse of discretion.

Defendant in its answer to the complaint alleged that "prior to and at the time plaintiffs herein purported to acquire their asserted right and title to the property involved herein from Alice M. Filbin they * * * knew * * * of the disclaimer filed by said predecessor, and of the aforementioned sale and purchase by Defendant in reliance upon said disclaimer and the failure of Plaintiffs' predecessor to assert any interest or claim at the foreclosure sale of said property; that in equity and good conscience Plaintiffs can acquire no greater interest in said property than possessed by their predecessor in title, and that Plaintiffs * * * are estopped and ought not to be permitted to assert any right, title or interest in said property." In view of the fact that defendant's answer alleged plaintiffs' knowledge of the disclaimer prior to their purchase of the quitclaim deed and estoppel based upon such knowledge, plaintiffs should have anticipated that defendant would offer evidence in support of such allegation.

Furthermore, the trial court had before it in considering plaintiffs' motion not only the evidence of Mr. Loveland and the affidavit of plaintiff but also the affidavit of F. B. Murphy, a deputy county tax collector. Plaintiff averred in his affidavit that he purchased the quitclaim deed on January 28, 1947; that "the first connection or information your affiant had with said property was early in December, 1946, at which time your affiant noticed said property was listed for sale at public auction for delinquent taxes by the county tax collector;" that the first information he received from any source that a disclaimer had been executed or filed by Alice M. Filbin was contained in a letter from his attorney which he received about March 5, 1947; that he did not have any knowledge of the disclaimer prior to the purchase. Plaintiff's statement with reference to the listing of the property for sale for delinquent taxes is contradicted by the affidavit of Mr. Murphy which recites that the property in question "came within the provisions of the Moratorium Act and was not and could not be sold at public auction and was never, either in 1945 or in 1946, listed for sale at public auction for delinquent taxes; that in December, 1946, the County of Los Angeles entered into an agreement with the State of California for the purchase of the tax title to said property, and that on January 9, 16, 23, 1947, for the first and only times said property was publicly advertised for sale * * *." Obviously plaintiff could not, as he claims, have noticed in December, 1946, that the property was listed for sale since it was not so listed until the following month. We find no abuse of discretion in the refusal of the trial court to grant plaintiffs' motion to reopen.

[3] It is true, as contended by plaintiffs, that Mrs. Filbin's disclaimer filed in the foreclosure action was not of itself sufficient to constitute a conveyance of her interest. A disclaimer is "a denial of the insistence upon any claim or right in the thing demanded, and a renunciation of all claim thereto; a denial of right or title, although not necessarily a denial of prior possession; * * * an admission upon the record of plaintiff's right, and a denial

of assertion of title on the part of defendant." 26 C.J.S. page 1331; 18 C.J. 1049 and cases cited.

[4] Plaintiffs' predecessor voluntarily filed a disclaimer stating she had no right, title or interest in the property knowing at that time defendant was seeking foreclosure of the assessment which was a lien against the property and would rely upon the disclaimer, and that the foreclosure proceedings would be consummated by the sale of the property at public auction. She made no objection to the sale and failed to redeem after sale. She is, therefore, estopped from asserting any right, title or interest in the property adverse to the interest of defendant and it is immaterial that judgment was not taken against her.

[5] The court found, and the finding is supported by the evidence, that at the time plaintiffs procured a quitclaim deed from Alice Filbin they had full knowledge of the foreclosure proceedings and that she had executed a disclaimer of her interest in the property. They are therefore in no better position than their predecessor and are estopped from claiming or asserting any interest in the property adverse to the interest of defendant.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

---

98 Cal.App.2d 530

KOON v. SHER.

Civ. 17609.

District Court of Appeal, Second District,
Division 2, California.
July 24, 1950.

Charles D. Koon brought an action against Sarah Sher to recover damages for injuries allegedly suffered as the result of plaintiff's having been struck by defendant's automobile. The Superior Court, Los Angeles County, Thomas J. Cunningham, J., entered judgment for the defendant and the plaintiff appealed. The District Court of Appeal, Moore, P. J., held that there was no error in the trial court's instructions.

Affirmed.

1. Appeal and error 🔑1001(1)

Where testimony adopted by jury as proof of ultimate facts is adequate, contrary evidence is of no concern on review of allegedly erroneous rulings.

2. Automobiles 🔑245(6)

In action by pedestrian against driver to recover damages for injuries allegedly suffered from collision with automobile at night, where it appeared that driver was driving her automobile cautiously, that her headlights were burning and that she was on the alert, and that pedestrian was dressed in dark clothing, it was question of fact whether driver was negligent.

3. Automobiles 🔑246(57)

In action by pedestrian against driver to recover damages for injuries resulting from collision with automobile, where it appeared that driver was proceeding cautiously, that her headlights were burning and that she was on the alert and first saw pedestrian at very moment he was falling, and that pedestrian was not in beam from automobile's lights, instruction on unavoidable accident was appropriate.

4. Negligence 🔑141(7)

In appropriate cases, where defendant has not been negligent as matter of law, defendant is entitled to have jury advised that if defendant was unexpectedly confronted with perils arising from either actual presence, or appearance, of imminent danger defendant was not required to use same judgment that is required of person in calmer and more deliberate moments.

5. Automobiles 🔑246(21)

In action by pedestrian against driver to recover damages for personal injuries allegedly resulting from collision with automobile, where it appeared that driver acted as reasonably prudent person as she proceeded along roadway and that pedestrian rose suddenly like apparition before her, driver was entitled to instruction on imminent peril.

6. Appeal and error ⚷1064(1)

In action by pedestrian against driver to recover damages for injuries resulting from collision with automobile, where it appeared that pedestrian had been treated by officer of naval medical corps and had been told that such officer could not appear in court, but no attempt was made to take officer's deposition or to serve him with subpoena, pedestrian would not be prejudiced by instruction that jury should view with distrust any weaker evidence offered on material issue if they should find it was within pedestrian's power to produce stronger proof.

7. Trial ⚷234(8)

Instruction that jury should view with distrust any weaker evidence offered on material issue if they should find it was within party's power to produce stronger proof may be given even though there is no occasion for it.

8. Automobiles ⚷246(58)

In action by pedestrian to recover damages for injuries resulting from collision with automobile, where pedestrian admitted that he was struck in right back, and evidence showed that appellant was lying in roadway and that defendant's automobile was in roadway after accident, and that if pedestrian had been in parking space when struck by left fender of automobile he would have been thrown away from roadway, it was not error for trial court to instruct jury with regard to pedestrian's duty in crossing roadway at crossings other than crosswalks. Vehicle Code, § 562.

9. Trial ⚷296(4)

Where instruction as to crossing roadway used language of sections of Vehicle Code pertaining to duty of pedestrian in crossing roadway at crossings other than crosswalks and also included subsection of Vehicle Code providing that duties imposed by code upon pedestrians should not relieve driver of vehicle from his duty to exercise due care for safety of any pedestrian upon roadway, and trial court gave additional instructions emphasizing that requirement to yield right of way was not absolute, pedestrian was not prejudiced by form of instruction as to crossing roadway. Vehicle Code, § 562 and subd. (b).

10. Trial ⚷228(1), 295(1)

Trial court is not required to state all law in one instruction, and all instructions be read together.

11. Automobiles ⚷245(6)

In action by pedestrian against driver to recover damages for injuries sustained as result of collision with automobile, evidence was insufficient to establish that driver had been negligent as matter of law.

12. New trial ⚷70

In action by pedestrian against driver to recover damages for injury resulting from collision with automobile, where pedestrian reported to hospital that he was knocked down while crossing street, and there was evidence that pedestrian was found lying in traveled portion of street and not within parking area, and there was substantial evidence to support finding of jury that driver had not been negligent, trial judge could reasonably conclude that pedestrian's injuries were caused by his own negligence, and therefore trial court did not err in denying pedestrian's motion for new trial.

13. Appeal and error ⚷977(5)

In deciding motions for new trials, as in approving jury's verdict, trial judge has broad discretion and his conclusions will not be upset where there is substantial support for them.

14. Appeal and error ⚷977(5)

So far as reviewing court is concerned, trial court speaks only through its rulings, orders, judgments and decrees, and in considering trial court's denial of motion for new trial, reviewing court will not take more favorable action as result of any concessions or doubts in mind of trial judge

* * *

Demler & Eckert and John R. Nimocks, Long Beach, Warren H. Eckert, Long Beach, for appellant.

Chase, Rotchford, Downen & Drukker, Los Angeles, Donn B. Downen, Jr., Otto M. Kaus, Los Angeles, for respondent.

MOORE, Presiding Justice.

[1] Appellant sued for damages allegedly suffered from his collision with respondent's automobile. The jury having returned a verdict against him, he now asks for a reversal on the ground of erroneous instructions. The testimony adopted by the jury establishes that (1) appellant was walking easterly on Ocean Boulevard about 30 feet east of Roswell Avenue in Long Beach near the white line which separates the south half of the street from the parking area in the center; (2) respondent was alone driving her sedan, seven feet wide, easterly in the traveled portion; (3) her brakes were "perfect," her headlights in "good condition," on low beam, and the car was "in good working order"; (4) she had slowed down to 15 miles an hour at Roswell; (5) no one was on the avenue as she arrived there; (6) she was familiar with the vicinity; (7) it was customary "for cars to park north on the south half of the parking space," their front ends coming together with the cars on the north side of the parking area; (8) respondent proceeded along more than a foot south of the white line; (9) there was no safety zone on Roswell; (10) nothing obstructed her view of the highway; (11) no cars were in front of her; (12) suddenly in front of her light beam she saw a person falling; (13) at the same time she felt no jolt on her car; (14) she later found it was Mr. Koon. While she made some statements slightly at variance from the summarized proof and while appellant and his wife in some points contradicted her, yet since the testimony of respondent was adequate and was adopted by the jury as proof of the ultimate facts, contrary evidence is now of no concern in considering erroneous rulings.

[2, 3] There is no reasonable ground for holding that the court erred in instructing the jury on unavoidable accident. Respondent was driving cautiously; her headlights burning and she was on the alert. Both Mr. Koon and his wife were dressed in dark clothing. Under such circumstances it was a question of fact whether respondent was negligent. Barry v. Maddalena, 63 Cal.App.2d 302, 304, 146 P.2d 974; Foti v. Morrissey, 57 Cal.App.2d 328, 331, 134 P.2d 51; Garcia v. Conrad, 40 Cal.App.2d 167, 169, 104 P.2d 527. Appellant was walking and not in the beam from respondent's lights. She first saw him at the very moment he was falling. Therefore, since respondent was free from negligence, the instruction was appropriate. Cobarrubia v. Buchanan, —— Cal.App.2d ——, 219 P.2d 31, is not pertinent for the reason that in that case the accident was due to the negligence of one of the parties Also, Scandalis v. Jenny, 132 Cal.App. 307, 22 P.2d 545, cited by appellant, is not in point. Mr. Jenny, while driving in daytime, saw children playing in the street four hundred or five hundred feet away in full view. As he approached within 15 feet one child of three was in the center of the street, looking away. The driver maintained his course which was about three feet from the infant's position. Suddenly the child turned and ran onto the automobile.

[4, 5] There was no prejudice caused appellant by the instruction on imminent peril. If respondent was not negligent as a matter of law, she was entitled to have the jury advised that if she was "unexpectedly confronted with peril arising from either the actual presence, or the appearance, of imminent danger" she was not required to use the same judgment that is required of a person in calmer and more deliberate moments. Having acted as a reasonably prudent person as she proceeded along Ocean Boulevard where appellant rose suddenly like an apparition before her, she was entitled to the instruction. Varner v. Skov, 20 Cal.App.2d 232, 238, 67 P.2d 123; People v. Boulware, 41 Cal.App.2d 268, 270, 106 P.2d 436.

[6, 7] Appellant deems himself aggrieved because the court instructed the jury to view with distrust any weaker evidence offered on a material issue if they should find it was within appellant's power

to produce stronger proof. No prejudice was suffered thereby. Appellant had been treated by Captain Meyers of the Naval Medical Corps who told appellant that he could not appear in court. No attempt was made to take the captain's deposition or to serve him with subpoena. If the jury had found that it was not within appellant's power to produce more satisfactory evidence, then they were not obliged to view the weaker evidence with distrust. If in fact he did explain his failure to produce Captain Meyers, the jury followed the instruction. Woodward v. Southern Pacific Company, 35 Cal.App.2d 130, 151, 94 P.2d 1028. In any event such instruction may be given even though there is no occasion for it. Wilson v. Crown Transfer & Storage Company, 201 Cal. 701, 708, 258 P. 596; Brown v. Sharp-Hauser Contracting Company, 159 Cal. 89, 96, 112 P. 874; Goss v. Pacific Motor Company, 85 Cal.App. 455, 460, 259 P. 455; Lawyer v. Los Angeles Pacific Company, 23 Cal.App. 543, 547, 138 P. 920.

[8] Complaint is made of the court's instructing the jury with regard to appellant's crossing the roadway as requested in "defendant's special requested instructions 1 and 2." The language used was section 562, subsection (a) of the Vehicle Code. The proof showed that appellant was lying in the roadway, head two feet and pedal extremities three feet south of the white line on the south edge of the parking area. Also, "the automobile of respondent was in the roadway," its right front wheel 11½ feet south of the white line and its right rear wheel 11 feet south of the white line. Had appellant been in the parking space when struck by the left fender, he would have been thrown further to the left and away from the roadway, for there was no question but that respondent was driving easterly in the street and on the south side of the parking area and he himself admitted he was struck "in the right back."

[9, 10] Appellant argues that the form of the instruction as to his crossing the roadway was prejudicial, citing Cole v. Ridings, 95 Cal.App.2d 136, 212 P.2d 597. There the instruction was erroneous because it did not include subsection (b) of section 562. In the case at bar the court read subsection (b) and also gave a series of instructions[1] which emphasized that the

---

[1] (Taken from California Jury Instructions Civil.)

"201

"The law imposes upon the operator of any vehicle using a public highway, and upon a pedestrian, the same duty, each to exercise ordinary care to avoid causing an accident from which injury might result. This duty continues even when one has the right of way over the other.

"201-A

"While as to a roadway locality such as that involved in this case, a pedestrian has a right to cross the road at any point, these factors of consideration enter into the question of what conduct is required of him in the exercise of ordinary care. First: if he crosses at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection, the law requires him to yield the right of way to all vehicles on the roadway so near as to constitute an immediate hazard. Second: the amount of caution required to constitute ordinary care increases as does the danger that a reasonably prudent person in like position, would apprehend in the situation.

"201-B

"You may ask yourselves the question: When is a vehicle so near a pedestrian as to be an immediate hazard? The answer is that the vehicle is that near whenever, if a reasonably prudent person were in the pedestrian's position, he would apprehend the probability of an accident were he then to attempt crossing the path of the approaching vehicle. [Requested by Defendant: 201, 201-A, 201-B. Given as requested.]

"201-C

"Before attempting to cross a street that is being used for the traffic of motor vehicles, it is a pedestrian's duty to make reasonable observations to learn the traffic conditions confronting him; to look to that vicinity from which, were a vehicle approaching, it would immediately endanger his passage; and to try to make a sensible decision whether it is reasonably safe to attempt the crossing. What observations he should make, and what he should do for his own safety, while crossing the highway are matters which the law does not attempt to regulate in detail and for all occasions, except in this respect: it does place upon him requirement to yield the right of way was not absolute. It is trite to say that a trial court is not required to state all the law in one instruction and all instructions must be read together. Callet v. Alloto, 210 Cal. 65, 70, 290 P. 438; Stroud v. Hansen, 48 Cal.App.2d 556, 562, 120 P.2d 102.

[11-14] There was no error in denying the motion for a new trial. The testimony of respondent was substantial evidence. Conceding that opposed to it to be equally substantial, still her narrative was adopted by the jury as the truth of the matter. That she was negligent as a matter of law was not established. Appellant's report to the hospital was that while walking *across the street* he was knocked down. When found he was lying in the traveled portion of the street and not within the parking area. From such admissions the trial judge might reasonably have concluded that appellant's injuries were caused by his own negligence. Hall v. Ferguson, 8 Cal.App.2d 444, 446, 47 P.2d 1073. In deciding motions for new trials, as in approving a jury's verdict, the judge has a broad discretion and his conclusions will not be upset where there is substantial support for them. Brooks v. Metropolitan Life Ins. Company, 27 Cal.2d 305, 307, 163 P.2d 689; Abrams v. American Fidelity and Casualty Company, 69 Cal.App.2d 426, 431, 159 P.2d 62; Martin v. Angel City Baseball Ass'n, 3 Cal.App.2d 586, 591, 40 P.2d 287. A more favorable action on the denial of a motion for a new trial will not result from concessions or doubts in the mind of the judge who tried the case. The only matter to be considered under an assignment of the court's refusal to grant a new trial is the order itself. The conversation of the judge is ordinarily of no more importance than that of appellant's counsel. So far as the reviewing court is concerned, the trial court speaks only through its rulings, orders, judgments and decrees and its reasons for them are seldom of any consequence. Stone v. Los Angeles County Flood Control District, 81 Cal.App.2d 902, 907, 185 P.2d 396; Diaz v. Schultz, 81 Cal.App.2d 328, 333, 183 P.2d 717; De Cou v. Howell, 190 Cal. 741, 751, 214 P. 444.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

98 Cal.App.2d 656

ALVA et al. v. SEQUOIA UNION HIGH SCHOOL DIST. et al.

Civ. 14393.

District Court of Appeal, First District, Division 1, California.

July 28, 1950.

Charles Alva and others filed a petition in mandamus against the Sequoia Union High School District and others to compel the District to re-employ petitioners who had been probationary teachers hired by the District before their dismissal. The Superior Court in and for the County of San Mateo, Andrew R. Schottky, J., rendered a judgment adverse to petitioners and they appealed. The District Court of Appeals, Peters, P. J., held that dismissal of petitioners was accomplished at a meeting which was open to the public as required by statute.

Judgment affirmed.

1. Schools and school districts 🔑57

The statute requiring members of school district governing board to have two days notice of special meetings does not require the public to be notified. Education Code, § 3194.

2. Schools and school districts 🔑57

Where date of special meeting of board of trustees of school district to discuss per-

---

the continuing duty to exercise ordinary care to avoid an accident.

"201-F

"It is the duty of the driver of a motor vehicle, using a public highway, to be vigilant at all times and to keep the vehicle under such control that to avoid a collision, he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent driver in like position."

sonnel problems was fixed at a regular public meeting, such notice to public was sufficient.

3. Schools and school districts ⚿141(5)

The making and carrying of motion to dismiss probationary teachers, which was done when board of trustees resumed special meeting in board room following a private executive session at which no members of public would have been permitted, was properly held under the evidence to have been done at a meeting open to the public as required by statute. Education Code, §§ 2204.2, 3194.

Irving G. Breyer, San Francisco, for appellants.

Louis B. DeMatteis, District Attorney of San Mateo County, John A. Bruning, Assistant District Attorney, Keith C. Sorenson, Civil Deputy District Attorney, all of Redwood City, for respondents.

PETERS, Presiding Justice.

By this proceeding in mandamus the nine petitioners seek to compel the Sequoia Union High School District to re-employ them, it being contended that they had not been lawfully discharged by the District. Admittedly, all of the petitioners were formerly probationary teachers hired by the District. Admittedly, the Board of Trustees of the District has the lawful right to refuse to re-employ such teachers, and need give no reason for a discharge. Admittedly, each of the petitioners received a dismissal notice, in proper form, dated May 10, 1949, and postmarked May 11, 1949, notifying the addressee that he or she would not be re-employed for the next school year. Admittedly, such a notice may be given by the Board at any time before May 15th of the particular year involved. Admittedly, the notices of dismissal were authorized by the Board at meetings held on April 29th and May 6, 1949, and the action taken at these meetings was ratified at a meeting held on May 13, 1949. It is a conceded fact that action to dismiss a probationary teacher can only be taken at a public meeting of the Board, and that if notices of dismissal are authorized at a private or executive session of the Board and not at a public meeting, such notices are invalid. The sole contention of petitioners is that their dismissal notices were not authorized by the Board at a meeting open to the public and, it is contended, they were, therefore, ineffective. The trial court found that the notices of dismissal were properly authorized at a meeting of the Board open to the public, and denied any relief to petitioners. From the judgment denying them relief petitioners appeal.

Section 2204.2 of the Education Code provides: "No action authorized or required by law shall be taken by the governing board of a school district except in a meeting open to the public." Section 3194 of that code provides: "All meetings of the high school board shall be open to the public." There is no statutory definition of what constitutes a meeting "open to the public," within the meaning of these sections.

The Board here involved holds its regular meetings on the third Friday of each month at the high school. Special meetings are held as needed. During 1948 and 1949 all meetings, regular or special, were held in the school library, the board room, or the superintendent's office, depending upon the number of people, nonmembers, who attended the meeting. The library is a large room and can accommodate a large number of people. The other two rooms can accommodate but twelve to fifteen people, including the members of the Board. Notices of special meetings were never published. The members of the Board were either notified of such meetings by telephone, or the date for such a special meeting was set at a preceding meeting. Usually, before the Board met formally, in either a regular or special meeting, the members would convene in the superintendent's office and discuss, in private executive session, some of the matters on the agenda. Matters relating to the selection and retention of personnel were always first discussed in such a private conference, policy agreed, upon, and then the appropriate formal action was taken at a public meeting. It is conceded that members of such boards properly may meet privately for discussion purposes.

The key meeting here involved was a special meeting and was held on April 29, 1949. The regular meeting for that month had been held on April 15, 1949, and that was admittedly a public meeting. There is substantial evidence that at the April 15th meeting the date was fixed for a special meeting to be held on April 29th, at which personnel problems were to be passed upon. This April 29th meeting was held in the superintendent's office, a room with one door opening into the main hallway and another into an inner office. These doors were closed at all times here relevant, but not locked. The meeting was held in this office because April 29th was citizens' night, and there were several thousand adults visiting the school that night to view the exhibits and to meet the teachers. The library was in use as an exhibit room. The Board convened at 7:30 p.m., all members being present. By unanimous consent, the meeting was then recessed to permit the members of the Board to visit the various exhibits on display, and to meet with the parents. The meeting re-convened at 9 p.m. in the superintendent's office. No member of the general public was then or later present. The superintendent then made his recommendations as to the retention or discharge of teaching personnel. A discussion was had of these matters. Admittedly, this portion of the meeting was an executive session, and no member of the public would have been admitted had such person requested admittance. No one did. The minutes of that meeting show, and several members of the Board testified, that, after the discussion, and without any formal break in the proceedings, the resignations of certain teachers were accepted, and by formal motion, which was duly seconded and approved unanimously, certain named teachers were re-employed for the next school year. It was then duly moved, seconded and approved unanimously that certain teachers, among them the nine petitioners, should be given notices of dismissal. The minutes of this meeting recite that it was then agreed that there were a few teachers on the dismissed list whose cases deserved reconsideration. Accordingly, it was agreed that the action of the Board would be reviewed at the next special meeting to be held on May 6, 1949. No member of the public requested admission during the period these motions were under consideration.

On May 6, 1949, a special meeting was held in the superintendent's office, under circumstances substantially similar to those of April 29th. No member of the public appeared at this meeting. Various items of Board business were transacted, and then the Board proceeded to reconsider its actions in reference to personnel. Formal motions were passed, similar but not identical as to certain individuals, to those adopted on April 29th, and in particular ordering dismissal notices to be sent to designated teachers, including the nine petitioners. Such notices, in proper form, dated May 10, 1949, and postmarked May 11, 1949, were sent to each of the petitioners.

Another special meeting was held on May 13, 1949, two days before the May 15th deadline for dismissal notices, but after such notices had been sent and received. At this meeting, some items of Board business were transacted and then all of the dismissed teachers who desired to argue their cases, were given a hearing before the Board. The Board then, according to the minutes, "reviewed in detail" the status of all of the teachers who had been given dismissal notices, changed its vote as to several teachers and granted them contracts, but upon motion duly made, seconded, and carried, unanimously "sustained" its former action of ordering dismissal notices mailed to the other teachers, including the petitioners.

Several Board members testified that between 7:30 and 9 p.m. on April 29, 1949, they told several members of the public, including a local newspaper reporter, that a meeting of the Board was to be held later that night. They did not invite these people to attend, nor did they tell them not to attend. Admittedly, the teachers affected were not told of the proposed meeting. Several members of the Board testified that, while the affected teachers and the public generally would not have been admitted to the executive session while the recommendations of the superintendent were being discussed, such persons, had they requested admittance during the time the formal motions were under consideration, would have been admitted.

One of the petitioners testified that on April 29, 1949, he telephoned one of the members of the Board and asked him if he could attend the meeting that night. He was told that the meeting was a closed meeting and that he could not attend. The member of the Board involved admitted telling the teacher that he could not attend, but stated that he had in mind the executive session and not the portion of the meeting at which formal action was to be taken. Various persons testified that, had they known of the meeting, they would have attended, while many others testified they knew of the meeting but did not attend. No one, except the teacher above mentioned, testified that he was denied admittance to the meeting.

It should be mentioned that there is no statutory requirement that probationary teachers be given a hearing prior to dismissal, and no requirement that, at a public meeting, members of the public be given the right to speak, although that courtesy was usually extended if requested. Admittedly, the Board had the right, with or without cause, to order the dismissal notices sent to petitioners. The Board obviously gave careful consideration to the problem. It considered the dismissals at three meetings, and, at the last two, changed its first orders as to certain teachers. While it still had power to renew the contracts, it gave any teacher desiring to do so the right to appear and argue his case. Nevertheless, petitioners contend that the action ordering the dismissals was not taken at a "meeting open to the public" within the meaning of section 2204.2 of the Education Code.

The trial court, as already pointed out, found that the meetings of April 29th and May 6th were "open to the public" within the meaning of the section, and that the letters of dismissal were properly authorized.

Petitioners argue that these findings are unsupported, and contend that, as a matter of law, the evidence demonstrates that the two meetings were private and not public. They point out that the first part of the meeting of April 29th was admittedly private, and that there was no break between this portion of the meeting and the portion when the motions were formally considered. They also emphasize that no formal notice to the public was given of the meeting of April 29, 1949, and contend that such a notice is required under section 3193 of the Education Code.

[1, 2] The arguments of petitioners are unsound. In the first place, section 3193 only requires notice of a special meeting to be given to the members of the Board. There is no statutory requirement that the public be notified of any meeting of the Board. Moreover, in the instant case, there is substantial evidence that the date of the special meeting to discuss personnel problems was fixed at the regular public meeting of April 15th. Under the law, this was sufficient notice to the public.

[3] In the second place, while the evidence would support a finding that the two meetings were private, the evidence does not compel that conclusion. It was for the trial judge to weigh the evidence, and there is credible and substantial evidence, and reasonable inferences therefrom, to support his findings. That this is so, is amply demonstrated by his memorandum opinion filed in the case. In that opinion he (the Honorable Andrew Schottky) stated in part:

"In considering this question the Court must take into consideration the presumption that public officials have performed their duties in a regular manner. This presumption is itself a species of evidence, but it may be overcome by contradictory evidence.

"* * * The Court is convinced that at the time the motion in question was made and adopted the meeting of the trustees was open to the public. It is true that there were no members of the public present at the meeting and, therefore, it was not necessary for the trustees either to retire from the meeting room or to ask the members of the public to retire while the Board discussed the recommendations of the District Superintendent. However the meeting was held in the Board room and the door to said room was not locked and no effort was made to exclude visitors from entering, although it is clear that no one sought to enter. After the recommendations for [of] the District Superintendent had been discussed and the members of the Board had decided what they wished to do, the meeting was resumed and the motion to send notices of dismissal to petitioners and other teachers was made and carried. It is only fair to assume, in line with the presumption hereinbefore referred to, that if any member of the public had desired to be present at the meeting and had come to the meeting room for that purpose, the Board would either have retired for its executive session or would have asked those present to retire during such executive session (depending upon the number present). Under all the facts and circumstances * * * and the inferences which may reasonably be drawn * * * the meeting * * * was a meeting open to the public."

We agree with this analysis.

The judgment appealed from is affirmed.

BRAY and WOOD, JJ., concur.

98 Cal.App.2d 739

STILES v. NUNES.

Civ. 14454.

District Court of Appeal, First District,
Division 2, California.
Aug. 1, 1950.

Lulu Stiles brought action against Emma K. Nunes, administratrix of the estate of Peter Charles Nunes, deceased, to recover on first count for money advanced for benefit of deceased and on second count for reasonable value of nursing care, board, and lodging. The Superior Court of the state of California, in and for the County of Alameda, A. T. Shine, J., rendered a judgment for the plaintiff on the second cause of action, and the defendant appealed. The District Court of Appeal, Nourse, P. J., held that the admission of certain book containing entries as to period over which services were rendered, was not reversible error, and that finding that reasonable value of services rendered was the sum awarded, was sufficient to support judgment on second cause of action notwithstanding plea of a special contract to pay that sum.

Affirmed.

1. Appeal and error 🔑1050(1)

Where there is competent and substantial evidence in record sustaining judgment in a cause tried before court without a jury, admission of some incompetent evidence will not require a reversal.

2. Appeal and error 🔑1050(1)

Where competent testimony of witnesses in action against administratrix to recover reasonable value of nursing care, board and lodging, furnished by plaintiff to deceased, proved fully services rendered by plaintiff, alleged error in admission of a book containing entries as to services rendered, was not reversible error.

3. Executors and administrators 🔑254

In action against administratrix to recover the reasonable value of nursing care, board, and lodging furnished deceased by plaintiff, finding that reasonable value of services rendered was the sum awarded, was sufficient to support judgment notwithstanding plea of special contract to pay that sum, since when the value of non-technical services is the issue, judge or jury may fix value from general knowledge and without use of expert testimony.

J. Emmet Chapman, San Francisco, for appellant.

Dudley H. Nebeker, Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued in two common counts based on rejected claims against the estate—one for money advanced for the benefit of deceased, the other for the reasonable value of nursing care, board and lodging. Defendant had judgment on the first cause of action and plaintiff had judgment on the second.

Competent evidence was taken showing that plaintiff for a period of fourteen months furnished the deceased his room and board and nursed him continually during this period of his last illness. No evidence was offered by defendant. Two competent witnesses detailed the character of services needed by deceased and performed for him by the plaintiff. The latter was permitted to support her claim by the offer of the "little red book" in which she noted the services rendered and entered the sums of money loaned deceased. She also testified over objection as to the type and the reasonable value of the services rendered.

[1, 2] As plaintiff was denied recovery for the loans the question of the propriety of the admission of the "red book" in evidence is no longer material since it proved nothing material to the second cause of action though it did contain entries relating to the period over which these services were rendered during the illness of the deceased and a statement of decedent's promise to pay. The appellant now says it was error to receive it in evidence. But assuming that it was error it will avail appellant nothing. The settled rule of decision is that when there is competent and substantial evidence in the record sustaining the judgment in a cause tried before the court without a jury the admission of some incompetent evidence will not require a reversal. Evans v. Gibson, 220 Cal. 476, 31 P.2d 389; Roy v. Salisbury, 21 Cal.2d 176, 187, 130 P.2d 706; 2 Cal.Jur. p. 1020. Here the competent evidence from other witnesses fully proved the services. There was left only the question of reasonable value.

[3] The finding that the reasonable value of the services rendered was the sum awarded is sufficient to support the judgment on the second cause of action notwithstanding the plea of a special contract to pay that sum. When the value of nontechnical services is the issue the judge or jury may fix the value from general knowledge and without the use of expert testimony. Nylund v. Madsen, 94 Cal.App. 441, 445, 271 P. 374; Lundberg v. Katz, 44 Cal.App.2d 38, 46, 111 P.2d 917; In re Estate of Reinhertz, 82 Cal.App.2d 156, 160, 185 P.2d 858, 186 P.2d 755. Board, lodging and nursing care are all matters of common experience and the value of such services is a matter of general knowledge. Hence the finding of the reasonable value of the services is founded on competent evidence and the testimony of the respondent as to the express promises made was not necessary to the support of the judgment.

For these reasons we do not decide whether the "little red book" was proper evidence. We hold that the competent and undisputed evidence was sufficient to support the finding and the judgment.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

98 Cal.App.2d 838

WHITAKER v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 17423

District Court of Appeal, Second District,
Division 3, California.

July 25, 1950.

Petition by John O. Whitaker against the Industrial Accident Commission and others for a writ to review an award of the commission. The District Court of Appeal, Vallée, J., held that since the Commission did not find on or determine issue raised in controversy of joint employment, award would be annulled and cause would be remanded for further proceedings on entire issue of employment.

Award annulled and cause remanded for further proceedings.

Administrative law and procedure 🔑817
Workmen's compensation 🔑1947, 1949

In compensation proceedings, where one of the issues in controversy was whether employee was jointly employed, but commission did not find on or determine issue award would be annulled and cause remanded for further proceedings as to entire issue of employment.

Nichols, Cooper & Hickson and R. G. Lamb, all of Pomona, for petitioner.

Edmund J. Thomas, Jr., T. Croezinger and Robert Ball, all of San Francisco, for respondent Industrial Accident Commission.

Anthony C. Tomczak, Los Angeles, for respondent Colonial Ins. Co.

VALLÉE, Justice.

Review of proceedings of the Industrial Accident Commission. This is a companion case to Pierson v. Industrial Accident Commission, Cal.App., 220 P.2d 794.

The facts are generally the same as in the Pierson case. In his application for adjustment of claim Whitaker named "Livingston Greenwood" as his employer. By stipulation this and the Pierson case were consolidated for hearing, the evidence in one case to be considered in the other in so far as it was material. The original finding of the commission in this case was that at the time of the injury Whitaker was employed by Baldoro Mines, Inc., a corporation. It found that the proceeding should be dismissed as to "Livingston Greenwood, doing business as Baldora Mines," and Colonial Insurance Company. An award was made in favor of Whitaker against Baldoro Mines, Inc. The proceeding was dismissed as to Livingston Greenwood, doing business as Baldora Mines, and Colonial. Petitioner Whitaker—applicant before the commission—seeks to annul the award.

Whitaker was one of the crew employed by Pierson at the direction of Greenwood. He was engaged in the preparatory work at the time he was injured December 20, 1947. During the entire time Whitaker worked at the mine his wages were paid by Greenwood personally. Pierson told Whitaker he (Whitaker) was working for Greenwood. He was not told that he was working for a corporation.

One of the issues in the controversy was whether petitioner was employed by Greenwood and Baldoro Mines, Inc., jointly. The commission did not find on or determine this issue.

For the reasons stated in the opinion in the Pierson case and because of the failure of the commission to find on the issue of joint employment, the award is annulled and the cause remanded to the commission for further proceedings upon the entire issue of employment.

SHINN, P. J., and WOOD, J., concur.

98 Cal.App.2d 598

PIERSON v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 17422.

District Court of Appeal, Second District,
Division 3, California.
July 25, 1950.

Petition by George D. Pierson against the Industrial Accident Commission and others for a writ to review an award of the Industrial Accident Commission. The District Court of Appeal, Vallée, J., held that in view of the failure of the commission to find on or determine the issue of joint employment, the award would be annulled and cause remanded for further proceedings on that issue.

Award annulled and cause remanded for further proceedings on an entire issue of employment.

1. Administrative law and procedure 🔑485
Workmen's compensation 🔑1733

It is the duty of the Industrial Accident Commission after final hearing to make findings on all facts involved in controversy. Labor Code, § 5800.

2. Administrative law and procedure ⚷486
Workmen's compensation ⚷1738, 1743

The findings of the Industrial Accident Commission should conform to the general rules applicable to findings and trials which are conducted in the Superior Court and Commission should make specific findings on all material issues presented in a claim for compensation. Labor Code, § 5800.

3. Administrative law and procedure ⚷486
Workmen's compensation ⚷1738, 1765

In compensation proceedings it is essential that findings be such that truth or falsity of each material allegation in issue can be demonstrated from findings and an award cannot stand where there is a failure to find on a material issue. Labor Code, § 5800.

4. Workmen's compensation ⚷235

In compensation proceeding, where from time of petitioner's employment from time of injury right to control and direct his work was possessed by individual employer personally, right to control and direct petitioner's work gave rise to an employment relationship between the parties.

5. Master and servant ⚷1

The right to control and direct activities of an alleged employee or manner or method in which work is performed, whether exercised or not, gives rise to employment relationship.

6. Administrative law and procedure ⚷817
Workmen's compensation ⚷1947, 1949

In compensation proceeding, where evidence was such as to require a finding on issue of whether petitioner was jointly employed by individual and by a corporation, but no finding on issue was made, award would be annulled and cause remanded for proceedings on entire issue of employment. Labor Code, § 5800.

◆

Nichols, Cooper & Hickson and R. G. Lamb, all of Pomona, for petitioner.

Edmund J. Thomas, Jr., T. Groezinger and Robert Ball, all of San Francisco, for respondent Industrial Accident Commission.

Anthony C. Tomczak, Los Angeles, for respondent Colonial Ins. Co.

VALLÉE, Justice.

Review of proceedings of the Industrial Accident Commission. November 14, 1947, petitioner George D. Pierson, while employed as a mine foreman, sustained injury arising out of and in the course of his employment resulting in total disability.

The commission found that at the time of the injury Pierson was employed by Livingston Greenwood who was then insured by Colonial Insurance Company. An award was made accordingly. Thereafter, on petition of Colonial, a rehearing was granted. After further hearings the commission found that at the time of the injury Pierson was employed by Baldoro Mines, Inc., a corporation, which was uninsured, and not by Livingston Greenwood. An award was made in favor of Pierson against Baldoro Mines, Inc. The proceeding was dismissed as to Livingston Greenwood and Colonial. Petitioner—applicant before the commission—seeks to annul the award.

December 27, 1946, Livingston Greenwood and Edward F. Cavanaugh, as lessees, leased some mining property in the county of Los Angeles, known as "Baldoro Mines." Although Cavanaugh was named as lessee, the leasehold interest was in fact the property of Greenwood. Greenwood acquired the lease with the intention of individually doing all preparatory work, including road building; and when actual mining operations began he intended to form a corporation in the state of Washington, and after the corporation qualified in California, to transfer the leasehold interest to the corporation.

February 17, 1947, a policy of workmen's compensation insurance was issued by Colonial insuring Greenwood. Premiums on the policy were calculated on a payroll audit submitted by Greenwood, which included the payroll of Pierson. The policy expired February 17, 1948. During its life Colonial paid two accident claims other than that of Pierson.

July 3, 1947, Baldoro Mines, Inc., was incorporated in the state of Washington. July 25, 1947, Greenwood and Cavanaugh assigned their interest in the lease to Baldoro Mines, Inc. The assignment was never recorded in California. The board of directors of Baldoro Mines, Inc., never held a formal meeting. The corporation, as such, never functioned at any time. It did not transact or carry on any business in California prior to May 21, 1948, when it qualified to do business in this state. It appears from the record that the corporation is a mere shell, without any assets of value, and that the award against it is worthless.

From January 1 until about November 1, 1947, Cavanaugh was superintendent of the preparatory work then being done. He was paid by Greenwood personally. As many as eight men worked under Cavanaugh. They were all paid by Greenwood personally. October 14, or 15, 1947, Greenwood employed Pierson as superintendent. The road work had not been completed and the mine was not in production at the time Pierson was employed. Pierson purchased and rented equipment in Montana, obtained a crew there and brought the equipment and crew to the mine. He charged part of the equipment to Greenwood and paid for part of it himself. He was later reimbursed by Greenwood, personally, for the equipment and the expense of bringing the crew to the mine.

At the hearing Greenwood, when asked if any one was appearing for the corporation, stated: "I am Baldoro Mines; I am doing business as Baldoro Mines" and "I admit that the man was injured when he was in my employ." Greenwood testified: "I pay all the bills; every check has been made by Livingston Greenwood. Some $48,892.73 has been spent, every check signed by myself. * * * Every check that has ever been paid has been signed by me personally and not Baldoro Mines, or any other organization.

"Q. You have never signed any checks for the Baldoro Mines in connection with this property, this Camp Baldy property, as president or any other officer of the— A. No, Ma'am, never have.

"Q. These payroll checks that Mr. Pierson testified to were the checks that you sent to Pierson to his order to have cashed and then pay the men? A. Yes.

"Q. And those were all signed by you personally? A. All signed by me personally. * * * After Mr. Pierson came, he would send me the bill and I would send him the total amount including the check to Mr. George D. Pierson, and then he would cash the check and pay the men's wages."

He also testified that after Pierson was employed he (Greenwood) was Cavanaugh's employer, "there wasn't anybody else." He stated: "I am Baldoro Mines as far as that is concerned and I cannot enter in the State of California to do business other than Livingston Greenwood." When asked if he wished to cross-examine Pierson, he said: "I have no questions to ask my employee. I hired him and I paid him and that's all there is to it as far as I am concerned."

All wages and all other expense in connection with the work done at the mine were paid by Greenwood from his personal checking account at Seattle. The corporation did not at any time have a checking account except at its inception in order to qualify under Washington law. No checks were ever written or signed by Greenwood as president of Baldoro Mines, Inc. No wages or other expense of the mine were ever paid with funds of Baldoro Mines, Inc. It never had a bank account in California. Greenwood personally paid all United States withholding taxes and state unemployment insurance upon the men employed at the mine with the exception of Pierson and Cavanaugh. Pierson took care of his own payroll deductions. There is no evidence that Greenwood was reimbursed by the corporation for the moneys expended by him. A fair inference from the evidence is that he was not reimbursed.

The mine was never brought into production. The work done was all preparatory.

[1-3] Petitioner in his application for adjustment of claim alleged that his employer was "Livingstone Greenwood, Baldoro Mines, Inc." One of the issues before the commission was whether petitioner was employed by Greenwood and Baldoro Mines, Inc., jointly. The commission did not find on or determine this issue. It is the duty of the commission after final hearing to make findings "upon all facts involved in the controversy." Labor Code, sec. 5800. The findings of the commission should conform to the general rules applicable to findings in trials which are conducted in the superior court. Gouanillou v. Industrial Acc. Com., 184 Cal. 418, 420, 193 P. 937; Dawson v. Ind. Acc. Com., 54 Cal.App.2d 594, 600, 129 P.2d 479. The commission should make specific findings on all material issues presented in a claim for compensation. California Shipbuilding Corp. v. Ind. Acc. Com., 85 Cal.App.2d 435, 436, 193 P.2d 61; Anno. 146 A.L.R. 123. As said in Simmons Co. v. Ind.Acc. Com., 70 Cal.App.2d 664, 674, 161 P.2d 702, 707, "It is 'essential that findings be such that the truth or falsity of each material allegation in issue can be demonstrated from the findings.'" An award cannot stand where there is a failure to find on a materital issue. General Accident Fire & Life Assur. Corp. Limited of Perth, Scotland v. Indus. Acc. Com., 196 Cal. 179, 191, 237 P. 33; California Casualty Indemnity Exch. v. Indus. Acc. Com., 190 Cal. 433, 213 P. 257; Moore Shipbuilding Co. v. Indus. Acc. Com., 70 Cal.App., 495, 233 P. 392.

[4, 5] Petitioner was employed by Greenwood personally. The evidence is without conflict that from the time of his employment to the time of his injury the right to control and direct Pierson's work was possessed by Greenwood personally. The right to control and direct Pierson's work, possessed by Greenwood personally, gave rise to an employment relationship between them. Industrial Ind. Exch. v. Ind. Acc. Com., 26 Cal.2d 130, 156 P.2d 926, involved a question of a dual employment relationship. The court in that case, speaking through Chief Justice Gibson, said, 26 Cal.2d at page 135, 156 P.2d at page 928, "The right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not, gives rise to the employment relationship. Riskin v. Industrial Acc. Com., 23 Cal.2d 248, 144 P.2d 16; Guarantee Ins. Co. Limited Mutual v. Industrial Acc. Com., supra [22 Cal.2d 516, 139 P.2d 905]; Press Publ. Co. v. Industrial Acc. Com., 190 Cal. 114, 210 P. 820."

[6] As we have said, petitioner was employed by Greenwood personally. That employment was never terminated. Petitioner was paid by Greenwood personally, never by the corporation. That fact is strong evidence of continued employment by Greenwood. The fact that there is evidence from which an inference may be drawn that Pierson was also employed by the corporation is not inconsistent with the fact that the original employment by Greenwood was never terminated and that he was in the employ of Greenwood at the time of the injury on November 14, 1947. The evidence was such as to require a finding on the issue of joint employment.

In view of the failure to find on the issue of joint employment, the award is annulled and the cause is remanded to the commission for further proceedings upon the entire issue of employment.

SHINN, P. J., and WOOD, J., concur.

98 Cal.App.2d 767

SUBURBAN GAS SERVICE, Inc., et al. v. HIGGINS et al.

Civ. 4151.

District Court of Appeal, Fourth District, California.

Aug. 1, 1950.

Suburban Gas Service, Inc., a corporation, and E. D. Van Dorsten sued Fred Higgins and Imperial Gas Company, a corporation, to enjoin defendant Higgins from soliciting or selling or delivering liquified petroleum gas to customers served by such defendant while employed by plaintiff Van Dorsten while plaintiff Van Dorsten was agent for defendant Imperial Gas Company, and while plaintiff Van Dorsten was distributor for defendant Imperial Gas Company, and to enjoin defendant Imperial Gas Company from using defendant Higgins to solicit or deliver to customer served by defendant Higgins while employed by plaintiff Van Dorsten, and from dealing with customers once served by defendant Higgins. The Superior Court of Riverside County, John G. Gabbert, J., granted a preliminary injunction and defendants appealed and applied for writ of supersedeas pending appeal. The District Court of Appeal, Barnard, P. J., held that circumstances justified a stay of part of judgment enjoining defendant Imperial only.

Order in accordance with opinion.

1. Appeal and error ⚷478

Whether District Court of Appeal should issue writ of supersedeas in behalf of appellant against which a prohibitory injunction has been issued does not depend on a balancing of convenience or hardships, and respective rights of litigants should be considered in view of either an affirmance or a reversal.

2. Appeal and error ⚷458(3)

Where a different situation exists as between two parts of prohibitory injunction, a writ of supersedeas in behalf of appellant may be granted as to one part only.

3. Appeal and error ⚷479(1)

Where question as to whether a defendant should be enjoined from soliciting or selling or delivering liquified petroleum gas to customers served by such defendant while employed by plaintiff while plaintiff was agent for codefendant, and while plaintiff was distributor for codefendant was a close question and was main question involved on appeal from preliminary injunction restraining defendant from such activities, District Court of Appeal would not disturb discretion of trial court by issuing writ of supersedeas staying enforcement of preliminary injunction.

4. Appeal and error ⚷479(1)

Where company operated in area for years, and had not given up rights to sell products in such area, and right of plaintiff to sell for defendant under a prior agency agreement, or under a prior distributorship agreement, had been canceled, and rights claimed by plaintiff were based upon plaintiff's violation of agreement to act for defendant, District Court of Appeal would grant writ of supersedeas staying enforcement of preliminary injunction restraining defendant from using a codefendant who had worked for plaintiff to solicit customers served by codefendant while employed by plaintiff.

◆

George W. Nilsson, Los Angeles, John Neblett, Sarau, Adams, Neblett & Sarau, all of Riverside, for appellants.

Oregon Smith, Ontario, for respondents.

BARNARD, Presiding Justice.

This is an application for a writ of *supersedeas* staying the enforcement of a preliminary injunction.

The Imperial Gas Company has been selling liquified petroleum gas in the Hemet area of Riverside County for 23 years. From 1941 to 1945, E. D. Van Dorsten acted as its agent there. In 1945, Imperial appointed Van Dorsten as its distributor and sold to him certain equipment and a list of customers. The contracts provided that for ten years he should act as sole distributor, and should buy gas only from Imperial; that if he violated the agreement Imperial might sell directly to, or serve, any customers in the area; and that a stated part of the purchase price need not be paid if he fully complied with the contracts.

Van Dorsten purchased only half of his gas from Imperial in 1948, less in 1949, and notice of default was given by Imperial. As a result of negotiations and $4500 paid by Van Dorsten, a mutual release was executed in October, 1949, cancelling the 1945 contracts and completely releasing each party from all obligations or claims arising therefrom. Van Dorsten then sold his business to Suburban Gas Service, Inc., and Imperial began to solicit customers and sell gas in this area. Fred Higgins had begun to work for Van Dorsten, delivering gas to customers, about a year before the distributor contracts of 1945 were executed. He continued so to work until April, 1949, when he was discharged by Van Dorsten. Some six months later he began to work directly for Imperial.

An action was brought to restrain Higgins and Imperial from soliciting any customers served by Higgins while in the employ of Van Dorsten. After a hearing on an order to show cause, a preliminary injunction was issued containing two parts. The first part restrains Higgins from soliciting, or selling or delivering to, any customers served by him while employed by Van Dorsten. The second part restrains Imperial from using Higgins in any way in that connection, and also from otherwise dealing with, or accepting orders from, any customers who had ever been served by Higgins, regardless of any other circumstance or condition.

The defendants seek a stay pending their appeal. They argue that the injunction as issued would deprive Imperial of its right to do business in this area, which it never abandoned and which was fully restored by the mutual release wiping out any previous limitation thereon; that the respondents are not in court with clean hands since their claims are based upon a violation of contract; and that Higgins acquired no confidential information the use of which could be restrained.

[1, 2] A balancing of convenience or hardships is not the controlling test in a proceeding of this nature, and the respective rights of the litigants should be considered in view of either an affirmance or a reversal. Food & Grocery Bureau of Southern California v. Garfield, 18 Cal.2d 174, 114 P.2d 579. And where a different situation exists, as between two parts of a judgment, partial relief may be granted. Messenkop v. Duffield, 211 Cal. 222, 294 P. 715; Smith v. Smith, 18 Cal.2d 462, 116 P.2d 3.

[3] With respect to the first part of this injunction, the situation differs somewhat from that found in the ordinary cases of milk or laundry routes, and the like. For the first year Higgins worked substantially as a subagent of Imperial. His later work, for Van Dorsten as Imperial's distributor, was also for the benefit of Imperial and in furtherance of the common purpose. Whether he should be enjoined at all is not only a close question but is the main one involved on the appeal, and one which may be controlling on the final trial of the action. In such a situation the discretion exercised by the trial court should not be disturbed on this proceeding.

[4] A different situation appears with respect to the second part. It goes beyond anything in the complaint or the order to show cause and would largely, if not entirely, prevent Imperial from operating at all in that district pending a final decision. Imperial had operated there for 23 years, had never given up its right to sell its products there, any right of Van Dorsten to sell for it had been cancelled, and the rights now claimed are based upon Van Dorsten's violation of his own agreement to act for Imperial. The circumstances are sufficient to justify a stay of that part of the judgment pending the appeal. Food & Grocery Bureau of Southern California v. Garfield, 18 Cal.2d 174, 114 P.2d 579.

It is therefore ordered that a writ of *supersedeas* issue commanding the respondents to refrain from making any attempt to enforce the second part of the preliminary injunction, as above described.

MUSSELL, J., concurs.

98 Cal.App.2d 582

SALVATI et al. v. CUSOLITO et al.

Civ. 17650.

District Court of Appeal, Second District, Division 2, California.

July 25, 1950.

Hearing Denied Sept. 21, 1950.

Action by Michael L. Salvati and another against Domenick Cusolito and another, charging fraud on part of defendants in the exchange of real property. The Superior Court of Los Angeles County, R. R. Sischo, J., rendered judgment in favor of plaintiffs and defendants appealed. The District Court of Appeal, Wilson, J., held that where plaintiffs were unfamiliar with area and with crops thereon, and defendants misrepresented value of property, income therefrom and utilities thereon, for purpose of deceiving plaintiffs, and plaintiffs relied on said representations in exchanging their property for defendants, plaintiffs were entitled to damages for difference between their property and defendants, even though they made only a brief examination of defendants' property before exchange.

Affirmed.

1. Fraud ⚷11(1, 2)

Expressions of opinion do not constitute a ground for an action of fraud, yet when statements of value of property are made with purpose and intent of deceiving and defrauding another, and when made under such circumstances as would indicate defrauded party relies on speaker's knowledge and statements, a positive representation of value of property may be actionable fraud.

2. Fraud ⚷22(1)

When a misrepresentation is intentional rather than negligent, a plaintiff's failure to discover falsity of statement is no defense and fact that an investigation would have revealed falsity would not always bar a recovery.

3. Fraud ⚷11(1)

Expressions of opinion must be of an opinion honestly entertained to avoid an action for deceit or fraud.

4. Fraud ⚷22(1)

Where plaintiffs were unfamiliar with area and crops thereon, and defendants misrepresented value of property, income therefrom and utilities thereon, for purpose of deceiving plaintiffs, and plaintiffs relied on such representations in exchanging their property for defendants, plaintiffs were entitled to damages for difference between property they exchanged even though they made only a brief examination of defendants' property before exchange.

◆

Clifton A. Hix, San Pedro, for appellants.

Shepherd & Shepherd, Los Angeles, for respondents.

WILSON, Justice.

The complaint charges fraud on the part of defendants in the exchange of real property. Defendants failed to offer evidence as to the value of the respective properties. Upon undisputed evidence and the admissions in the pleadings the court found that in the exchange plaintiffs received acreage property valued at $9,864 and that they parted with a promissory note in the sum of $10,500, equity in real property valued at $5,900 and cash $700, making a total of $17,100. Judgment was rendered in favor of plaintiffs for $7,236, the difference between the two amounts, from which judgment defendants have appealed.[1]

The court found that plaintiffs were induced to make the exchange of properties through the fraud of defendants in that during the course of negotiations leading to the execution and consummation of the agreement of exchange defendants represented that: (1) the fair market value of their (defendants') property was approximately $16,500 including eight shares of water stock; (2) the fair market value of the water stock was $4,000; (3) the dwelling house located on the real property was connected with public utilities and had gas available for heating and cooking; (4) the fruit and crops on the property had produced and would produce a return of approximately $2,000 annually; (5) the equity in plaintiffs' property which they were transferring to defendants was fairly equal in market value to the property being received by plaintiffs.

---

[1] Defendants' brief does not conform with Rule 15 of the Rules on Appeal (22 Cal. 2d 12) in that in the statement of facts there is no reference whatsoever to any part of the transcript supporting any alleged statement of fact or quotation of the evidence.

The court found that the foregoing representations were all untrue and that (1) the fair market value of defendants' property, including the water stock, was $9,864; (2) the fair market value of the water stock was $120; (3) the dwelling house on defendants' property was not connected with any public utility and that no gas was available for heating or cooking other than that which could be purchased in tanks and attached to pipes located in the dwelling house; (4) the fruit and crops on the property had not produced and would not produce a value in excess of $100 annually; (5) defendants' property involved in the exchange and conveyed to plaintiffs was not worth the amount of the $10,500 note given by plaintiffs to defendants and while plaintiffs parted with an equity in real property of approximately $5,900 and paid out $700 in cash the equity received by them from defendants amounted to nothing.

[1-3] Misrepresentations numbered **3** and 4, relating to the public utilities and to the value of fruit and crops that had been produced on the property, were unquestionably material statements of fact which the court found to be untrue and in themselves justified the judgment. It is true, as defendants contend, that misrepresentations relating to the value of property are usually deemed to be "trade talk" and expressions of opinion and do not constitute a ground for an action for fraud, yet when definite statements of the value of property are made with the purpose and intent of deceiving and defrauding another and when made under such circumstances as would indicate the defrauded party relies on the speaker's knowledge and statements, a positive representation of the value of property may be actionable fraud. Palm v. Smither, 52 Cal.App.2d 500, 505, 126 P.2d 428. When a misrepresentation is intentional rather than negligent a plaintiff's failure to discover the falsity of the statement is no defense and the fact that an investigation would have revealed the falsity will not always bar a recovery. Anderson v. Thacher, 76 Cal.App.2d 50, 70, 172 P.2d 533. Expressions of opinion, to avoid an action for deceit or fraud, must be of an opinion honestly entertained. Id., 76 Cal.App.2d page 71, 172 P.2d page 544.

It is obvious that defendants did not honestly believe any of the representations made by them were true, and it is equally obvious that their statements were made for the purpose of deceiving and defrauding plaintiffs. Defendants had owned the property for three years prior to the exchange involved in this action and had therefore produced or had the opportunity of producing three crops, the value of which was well known to them. Their acquaintance with the property enabled them to have knowledge of its value. From all the evidence it is manifest that their representations as to the value of the real property and the water stock were made for the purpose of deceiving plaintiffs and that the latter relied on such representations. Defendants also knew the property was not connected with any public utilities and that gas was available only when transported to the property in tanks.

Defendants had listed the property with one Simoni, a real estate broker, and had informed him, who in turn stated to plaintiffs, that the income was $2,000 annually and that the water stock was worth $4,000. Before the agreement of exchange was signed Mr. Cusolito told Mrs. Salvati that they made an income of about $2,000 from the property. Plaintiffs had been shown a gas stove in the dwelling and Mrs. Cusolito told Mrs. Salvati that the gas bill would be about $2.75 a month.

[4] Plaintiffs had moved to Southern California shortly before the transaction took place. Salvati made one visit to the property with Simoni and one accompanied by his wife, both being of brief duration. He was unfamiliar with such properties and was unable to identify the crops growing on the Cusolito land. He accepted

Cusolito's and Simoni's statements as being true. Under all the circumstances plaintiffs were entitled to rely on the representations made by defendants and their broker and are not precluded from recovery by reason of the brief examination which they made of the property. Bagdasarian v. Gragnon, 31 Cal.2d 744, 748, 192 P.2d 935.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

---

98 Cal.App.2d 539

RALPHS GROCERY CO. v. AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 439 et al.

Civ. 17751.

District Court of Appeal, Second District, Division 2, California.

July 24, 1950.

Rehearing Denied Aug. 2, 1950.

Hearing Denied Sept. 21, 1950.

Action by Ralphs Grocery Company, a corporation, against Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 439, an unincorporated voluntary association, and another, for declaratory relief. The Superior Court, Los Angeles County, William B. McKesson, J., rendered a judgment of dismissal, and the plaintiff appealed. The District Court of Appeal, Moore, P. J., held that a plaintiff seeking interpretation of a union contract determining the wage scale for meat market employees was entitled to declaratory relief.

Judgment reversed with instructions.

1. Declaratory judgment 🔑273

Superior Court has jurisdiction over declaratory relief actions regardless of amount of money involved. Code Civ.Proc. § 1060.

2. Declaratory judgment 🔑6

Where no basis for relief is shown, and where court's discretion is wisely exercised, court may decline to take jurisdiction of action for declaratory relief, but discretion cannot be abused in denying that relief even where other remedies are available. Code Civ.Proc. §§ 1060, 1061.

3. Declaratory judgment 🔑6

Where action for declaratory relief is legally available and complaint is sufficient in facts stated, court must hear and determine facts and declare law as applied to them. Code Civ.Proc. § 1060.

4. Declaratory judgment 🔑6

Where plaintiff alleges facts disclosing existence of actual controversy involving legal rights and duties of parties under a writing and requests that rights thereunder be adjudged, plaintiff is entitled to declaratory relief. Code Civ.Proc. § 1060.

5. Declaratory judgment 🔑2

Purpose of action for declaratory relief is to set at rest unsettled questions which have arisen in attempts of contracting parties to interpret their written agreement. Code Civ.Proc. § 1060.

6. Declaratory judgment 🔑313

In action for declaratory relief, it is not essential to statement of cause of action that thesis of petitioner be adopted by court in order for him to be entitled to trial and decree. Code Civ.Proc. § 1060.

7. Declaratory judgment 🔑313

In action for declaratory relief, complaint is sufficient if decree would serve in practical way to stabilize dispute which otherwise might lead to disastrous results or defer realization of purposes of the contract. Code Civ.Proc. § 1060.

8. Declaratory judgment 🔑147

Where employer made contract fixing wages of meat cutters and backroom men and defined latter as those who spent certain hours in backroom of meat market, and thereafter employer allegedly used new marketing methods under which journeymen worked in back room, and controversy arose as to whether journeymen were entitled to higher pay specified for back room men, and union contended that change in marketing methods changed applicable wage scale, operator was entitled to declaratory relief interpreting the contract. Code Civ. Proc. § 1060.

9. Appeal and error 🔑**901**

In action for declaratory relief, party appealing from judgment denying relief must affirmatively show by the record that relief was improperly refused. Code Civ. Proc. § 1060.

◆

McLaughlin & Hutchinson, Los Angeles, for appellant. By James A. McLaughlin, Los Angeles.

Charles P. Scully, San Francisco, for respondents.

MOORE, Presiding Justice.

Appeal from a judgment of dismissal made pursuant to an order sustaining a demurrer without leave to amend.

The complaint alleges substantially as follows. Appellant operates a chain of retail grocery markets in Los Angeles county. Those located in Pasadena and Alhambra are within the area of bargaining activity of respondent union. Appellant contracted with respondent to fix the wages, hours, and other terms of its meat market employees. Fourteen types of employees are listed ranging from a market operator or head meat cutter at $95 a week and back-room man at $85 per week down to wrappers at $60 a week. A controversy arose over what employees fall within the category of back-room men. The contract defines the back-room man as one who puts in 20 hours or more of his work week in the back room. The work is not to be divided between two or more men in any one market to defeat the purpose of this clause. The same definition appears in each of the annual collective bargaining agreements since 1943. The description of a back-room man in the contract at first impression was explicit but upon reflection it merely defines him as to the place where he works. When the definition of a back-room man was first incorporated in the contracts the work he performed was well known in the trade, to wit, breaking down the large sides of animals into smaller cuts for display in the meat counters, grinding meats and maintaining the storage cooler in a clean and orderly condition.

In September, 1947, at the Pasadena market and in July, 1949, in the Alhambra market, appellant installed a new method of marketing meats by cutting them into a size suitable for domestic use, wrapping such cuts and displaying them in self-service refrigerated counters where the customers make their selections. The meats so chosen are taken to a cashier who collects the price marked on each. The over-all effect of the new method substitutes the frozen food display refrigerator for the meat counter behind which the journeyman formerly cut meat in accordance with a customer's directions. With the frozen food display the journeyman is no longer used behind the meat counter but works in the back-room. Although he and the back-room men now work in the back room the distinction between the character of work done by each is maintained; back-room men do the heavy work of breaking down the large carcasses and of grinding meat while the journeymen cut and prepare the pieces in sizes suitable for cooking.

The controversy has arisen because respondents contend that the place where the work is done, as distinguished from the character of the work done in such place, determines the wage category into which the employees fall. The contract fixed the journeyman's pay at $80 per week.

It is alleged that there is an ambiguity in the definition of the back-room man arising from the fact that such definition was adopted prior to the commencement of the precutting and self-service for selling meats, and when the function and duties of a back-room man were clearly established and were understood between appellant and respondents and among all employers and employees engaged in retailing fresh meat products.

It was not the intention of the contract to define a back-room man by the character of the work done by him in that his functions were well understood in the trade, but the provision in the contract was for the sole purpose of specifying the number of hours that any person should work in a back room in order to qualify him for the back-room man's wage and to prevent appellant from dividing the functions of a back-room man among several employees in order to obviate a higher wage scale. The contract provided that a man who was actually employed 20 hours or more per week in the back room was a back-room man. The purpose of this language is indicated by the next sentence that specifies that "the work is not to be divided between two or more men in any one market to defeat the purpose of this clause."

A number of questions were argued in support of the complaint and of the demurrer. On this appeal appellant contends that the complaint states a cause of action despite the fact that it does not show that more than $2,000 is involved, and also because an actual controversy is shown to exist involving the counter question of contract. And finally it says that the essence of the controversy is whether the journeyman meat cutter in the back room of the meat market entitles him to the higher scale of pay which the contract specifies for a back-room man. In response to such declaration of the issues respondents say "The sole issue on appeal is whether appellant has shown affirmatively that the trial court abused its discretion in denying relief pursuant to section 1061 of the Code of Civil Procedure."

[1–7] Appellant contends that all declaratory relief actions are vested in the superior court regardless of the amount of money involved. From the language of section 1060 of the Code of Civil Procedure appellant is correct and from section 89 of the same code, in prescribing jurisdiction of the municipal courts, declaratory relief is not mentioned. The complaint states a clearly defined controversy. A declaration of appellant's rights under the contract should be made by judicial pronouncement. Section 1060, Code of Civil Procedure, specifically confers upon the superior court all actions for declaratory relief. American Telephone and Telegraph Co. v. California Bank, 59 Cal.App.2d 46, 51, 138 P.2d 49. While a court may decline to take jurisdiction where no basis for relief is shown, Vincent v. Security First National Bank, 67 Cal.App.2d 602, 611, 155 P.2d 63, and where the court's discretion is wisely exercised, Caldwell v. Glen Packing Company, 52 Cal.App.2d 80, 84, 125 P.2d 901, such discretion cannot be abused in denying declaratory relief even where other remedies are available. If an action is legally available and the complaint is sufficient in the facts stated it is the court's bounden duty to hear and determine them and to declare the law as applied to them. Phelps v. Loop, 53 Cal.App.2d 541, 544, 128 P.2d 63. It is sufficient if a plaintiff alleges such facts as disclose (1) the existence of an actual controversy involving the legal rights and duties of the parties under a writing and (2) a request that the rights thereunder be adjudged. Pacific States Corporation v. Pan-American Bank of California, 213 Cal. 58, 63, 1 P.2d 4, 981. The very purpose of an action for declaratory relief is to set at rest the unsettled questions which have arisen in the attempts of the contracting parties to interpret their written agreement. It is not essential to the statement of a cause of action that the thesis of the petitioner be adopted by the court in order for him to be entitled to a trial and a decree. Columbia Pictures Corporation v. DeToth, 26 Cal. 2d 753, 760, 161 P.2d 217, 162 A.L.R. 747. A complaint is sufficient if a decree would serve in a practical way to stabilize a dispute which otherwise may lead to disastrous results or defer the realization of the purposes of the contract. See Maguire v. Hibernia Savings & Loan Society, 23 Cal. 2d 719, 728, 146 P.2d 673, 151 A.L.R. 1062.

[8] The complaint at bar fills all the requirements of the statute and of the cited decisions. Respondents contend that the location of the employee in doing his work and not the character of his labors should determine his classification. Appellant insists that the term "back-room man" is a traditional term in that it is a hang-over from the era when the only employees in the back room did the work of breaking down carcasses and sides of animals and ground the meat. It contends that because a journeyman meat cutter works in the back room and fabricates the big cuts into smaller sizes for marketing in the self-

service refrigerators he is not for that reason automatically entitled to the higher salary classification. Appellant asserts the proposition that under a reasonable construction of the contract the character of work done by an employee determines the schedule of pay he is to receive. Since the complaint alleges that both the employer and the union have always understood the functions of a back-room man and that it was not intended that they should be changed it is necessary that a trial be had and a decree be entered adjudging whether appellant's construction is the true one or whether the contrary interpretation asserted by respondents more nearly conforms with the truth.

A situation similar to that involved in the instant case came before the court for determining what the language of the contract was intended to mean. It was held that a trade usage was admissible to show the meaning of the disputed language. The court said that "while words in a contract are ordinarily to be construed according to their plain, ordinary, popular or legal meaning, as the case may be, yet if in reference to the subject matter of the contract, particular expressions have by trade usage acquired a different meaning, and both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage. Parol evidence is admissible to establish the trade usage, and that is true even though the words are in their ordinary or legal meaning entirely unambiguous, inasmuch as by reason of the usage the words are used by the parties in a different sense." Ermolieff v. R. K. O. Radio Pictures, 19 Cal. 2d 543, 550, 122 P.2d 3, 6.

[9] Respondent cites decisions, A. Hamburger & Sons v. Kice, 129 Cal.App. 68, 18 P.2d 115; Rapaport v. Forer, 20 Cal.App.2d 271, 66 P.2d 1242; Simpson v. Security First National Bank, 71 Cal.App.2d 154, 162 P.2d 494, which hold that the superior court has discretionary authority to decline to entertain actions for daclaratory relief. Such rulings were based upon the facts reported. They hold also that it is incumbent upon appellant to show affirmatively by the record that relief was improperly refused. This, the appellant has done. The contents of the complaint leave no doubt that a genuine controversy exists concerning the interpretation of a written contract covering important obligations and rights of the respective parties.

Judgment reversed with instructions to overrule the demurrer.

McCOMB and WILSON, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

---

98 Cal.App.2d 639

In re KROMREY'S ESTATE (three cases).
HEWLETT v. McDONALD.

Civ. 14476.

District Court of Appeal, First District,
Division 1, California.

July 26, 1950.

Rehearing Denied Aug. 25, 1950.

Hearing Denied Sept. 21, 1950.

Proceeding in the matter of the estate of Fred Frank Kromrey, deceased, in the matter of the estate of August Kromrey, deceased, and in the matter of the estate of Agnes Kromrey, deceased. Orders were entered in the Superior Court in and for the City and County of San Francisco, T. I Fitzpatrick, J., removing George Hewlett as administrator and granting letters of administration to Amanda Matilda McDonald, administratrix of the estate of George August Kromrey, deceased, and Hewlett appealed. The appeals were consolidated. The District Court of Appeal, Schottky, J. pro tem., held that Hewlett was properly removed as administrator.

Orders affirmed.

1. Executors and administrators ⚷35(1, 19)

Court has a large discretion in determining whether representative whom it has appointed shall be suspended or removed and unless such discretion has been abused action of the trial court will not be disturbed on appeal. Probate Code, §§ 401, 420, 521.

2. Executors and administrators ⚷35(15)

Evidence justified removal of administrator on the ground that he took advantage of a confidential relationship existing between him and the deceased and thereby improperly gained possession of a large amount of property which he claimed as a gift and that his general conduct was such as to show a lack of integrity making him unfit to be the administrator. Probate Code, §§ 401, 420, 521.

3. Attorney and client ⚷123(1)

Where a confidential relationship exists such as between attorney and client there is a presumption of undue influence by the attorney and the law presumes that any agreement or transaction between the attorney and client was obtained by the exercise of undue influence by the attorney.

4. Trusts ⚷103(1)

One holding a confidential relation towards another may not take advantage thereof in favor of himself or deal with the other upon terms of his own making.

5. Evidence ⚷89

Presumption that in transactions between persons standing in confidential relationship that he who had an influence over the other exercised it unduly to his own advantage is "evidence".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Evidence".

6. Executors and administrators ⚷35(19)

Where presumption obtained that attorney subsequently appointed as administrator for decedent allegedly took advantage of the confidential relationship existing between them and thereby improperly gained possession of a large amount of property of the decedent which he claimed as a gift whether the evidence offered by the administrator outweighed the presumption was for the trial court. Probate Code, §§ 401, 420, 521.

7. Executors and administrators ⚷35(19)

Where order was entered by the trial court removing a general administrator and another administrator was appointed, upon filing of a notice of appeal, the powers of the subsequent administrator as general administrator were suspended.

◆

George K. Ford, Simpson Finnell, Jr., San Francisco, for appellant.

James F. Brennan, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

On June 6, 1949, orders were filed by the superior court removing George Hewlett as administrator in each of the estates of Fred Frank Kromrey, August Kromrey and Agnes Kromrey, and granting letters of administration to Amanda M. McDonald. Hewlett has appealed from such orders, and the three appeals have been consolidated.

Before discussing the legal questions involved, we shall summarize briefly the factual situation as shown by the record.

George and Fred Kromrey and their mother and father, Agnes and August Kromrey, lived together in a flat on Clayton Street in San Francisco. Fred died in December of 1943 and George was appointed administrator, with Hewlett as attorney. In May and June of 1947, the mother and father died, and George Kromrey became administrator of their estates. He was the sole heir and owner of the three estates.

Mrs. Amanda Matilda McDonald was a trained nurse, who with her husband lived in the flat below the Kromreys, from whom they rented, and at times she cared for the mother and father. After their death she cared for George Kromrey. He suffered from a tumor on his brain and had periods of blackout and mental confusion. He spent most of his time in the flat of the McDonalds and ate most of his meals there.

On October 28, 1948, George Kromrey evidently was overcome with one of his blackout spells, and was found in his flat in a dazed condition by Mrs. McDonald. She called his doctor who sent him to the psychiatric ward of the San Francisco Hospital. Mrs. McDonald learned that Hewlett had been Kromrey's attorney, and telephoned him as to George Kromrey's condition. The following day, according to her testimony, Mrs. McDonald was taken to Hewlett's office by his secretary, Mrs. Montgomery, where Hewlett drew up instruments appointing Hewlett general agent for Kromrey and appointing Hewlett administrator in the place of Kromrey in the estates of his family. Mrs. McDonald then went with Hewlett and his son, Palmer Hewlett, to the hospital to see Kromrey, who was still in a very dazed condition. Mrs. McDonald testified as to his condition: "Hazy—just hazy, in a sort of halfway stupor, if you can understand that. A haziness—a blank. * * * he didn't know anything he was doing—he just did what you told him." She also testified that Hewlett had Kromrey sign the papers while she held him up, with the assistance of Palmer Hewlett. No notarization of the papers was made. They then left the hospital.

The next day, October 30, 1948, Palmer Hewlett and Hewlett's secretary, Mrs. Montgomery, appeared at Mrs. McDonald's flat and announced that they intended, evidently on George Hewlett's instructions, to go up to Kromrey's flat to look for whatever valuables might be there which should be placed in safe-keeping. (At the hospital, Kromrey claimed there was approximately $15,000 in his home.) Mrs. McDonald accompanied them, unlocked the door of Kromrey's flat and was present during the search. $8,500 or more in cash (according to testimony of Palmer Hewlett and Mrs. Montgomery) was found and this, plus personal property consisting of checks, private papers, stock certificates, old coins, watches, et cetera, was taken by the two, without receipt to Mrs. McDonald, and turned over to George Hewlett, whom they met outside on the street as he was approaching the house.

On November 1, 1948, Hewlett reported to the hospital, contrary to his earlier statement, that Kromrey's property was all tied up in probate and there was not enough to provide for private care. Mrs. McDonald had possession of approximately $31,000 which previously had been turned over to her by Kromrey and, through representations that such sum belonged to the three estates of which Hewlett had been named administrator and that he was general agent for Kromrey, Hewlett prevailed upon Mrs. McDonald to turn the money over to him. A receipt was given to her, and Hewlett placed the sum in a safe deposit box of the American Trust Company in his own name. He similarly placed the money he had earlier obtained from the Kromrey flat.

Thereafter, on November 4, according to Hewlett's testimony, Kromrey asked Hewlett to prepare a will revoking his former wills, and on the following day Hewlett drew one which Kromrey signed, which merely revoked former wills and appointed Hewlett executor, and, as Hewlett explained, "left" his property to his heirs by reason of the will, in that it went by succession. Hewlett testified that he also drew a will for Kromrey in which he left his property to his aunt, Mrs. McKay, but that Kromrey never signed it.

Another son of Hewlett, George, Jr., testified that when visiting Kromrey at the hospital early in November, 1948, Kromrey praised Hewlett and said that he wanted Hewlett to "have everything." George Hewlett testified that on November 7 Kromrey gave him all his property "verbally," and that on November 8 Kromrey gave it to him by a written instrument, which he had drawn up and Kromrey signed, in the following language: "I have delivered and now confirm delivery to George Hewlett, my good friend, all of my money and personal property, or all to which I am entitled as heir, and I give the same absolutely and he has accepted the same."

Kromrey was subsequently moved to the French Hospital, and then, on December 1, was returned to the apartment house on Clayton Street, where he stayed in Mrs. McDonald's flat, the furniture having been moved out of his own. Hewlett never saw Kromrey after November 30, 1948. Shortly thereafter he received a letter dated December 1, 1948, and signed with Kromrey's name, rescinding the power of attorney given him; and in an envelope postmarked January 14, 1949, he received notices of hearing for the revocation of letters of administration in the estates of Agnes, August and Fred Kromrey, which was set for January 28.

After Kromrey was taken home from the French Hospital, Hewlett sought to have him returned to the hospital on the theory that he was in a critical condition (though on the trial Hewlett testified that Kromrey "was not suffering from anything"), and that he had been forcibly removed from the hospital.

After Kromrey had sent Hewlett the letter revoking the power of attorney, numerous attempts were made by Attorney James F. Brennan, in behalf of Kromrey, to get in touch with Hewlett in order to have the money and estate matters straightened out. There is evidence to justify a conclusion that Hewlett was avoiding both Brennan and Kromrey. Hewlett finally appeared in court on February 15, 1949, where he testified that Kromrey had given him the property in question. George Kromrey had died on February 14, 1949.

George Hewlett had been appointed general administrator in the three estates (Fred, Agnes and August Kromrey) on November 15, 1948, pursuant to a petition filed by him on November 3, 1948. On January 11, 1949, George Kromrey, through attorneys Saul Perlis and James F. Brennan, petitioned for Hewlett's removal as such administrator; and on April 12, Mrs. Amanda Matilda McDonald, who had been appointed "Special Administratrix with General Powers of the Estate of George August Kromrey, Deceased," was substituted as petitioner in the petition filed January 11 by George Kromrey. The petition was granted by minute order of April 18. On June 6, 1949, the court revoked letters of administration issued to George Hewlett and appointed Mrs. McDonald administratrix of the estates of Fred, Agnes and August Kromrey. Notices of appeal from the orders removing him as administrator were filed by Hewlett on August 4. An order consolidating the appeals in the three estates was filed September 29, 1949.

The court in its order removing Hewlett as administrator finds: "That George Hewlett is neither a fit, proper, competent nor qualified person to administer upon said estate. * * * That between October 28, 1948 and December 1, 1948, George Hewlett was acting both as attorney and general agent of George August Kromrey, and by virtue thereof there did exist between them a confidential relationship." The court then continues with statements of claims "by the said petitioners," and subsequently finds: "That George Hewlett did take said cash and personal property into his possession between the dates of October 28, 1948 and December 1, 1948 as the administrator of the above-entitled estate and upon the statement and representation that he was the administrator of the above-entitled estate. * * * That George Hewlett has taken into his possession and control, and does now conceal and maintain in his possession and control, monies in the approximate sum of $45,000.00, and items of personal property consisting of old coins, furniture and clothing, all of which were taken into his possession and control from the premises located at 758 Clayton Street, San Francisco, California, in which George August Kromrey and the above-named decedent resided; that George Hewlett has claimed and does now claim as his own property the aforesaid monies in the approximate sum of $45,000.00 and items of personal property; that by virtue of the claims of George Hewlett, as aforesaid, he has maintained and does now maintain and claim a position adverse to the above-entitled estate and adverse to the best interests thereof, and the maintenance of said position of and by George Hewlett will substantially affect and impair the rights and interest of this estate in and to the monies and personal property referred to hereinbefore; that the removal of George Hewlett as administrator of the above-entitled estate is necessary and essential in order that the above-entitled estate may reclaim and take into its possession such portions of the monies and property taken into the possession of George Hewlett as comprise a part of this estate. * * * That demands have been made upon George Hewlett prior to the filing of the petition herein for the return of both of the monies and personal property of

George August Kromrey and of the monies and property belonging to the above-entitled estate, which were taken into the possession of George Hewlett from October 28, 1948 to December 1, 1948, and that George Hewlett made no reply to such demands, concealed himself and did fail and refuse to see or speak to George August Kromrey prior to his death, or to the petitioner Amanda Matilda McDonald, or their attorneys or agents, and has failed and refused to turn over or relinquish possession of any of the monies or property above mentioned."

Appellant Hewlett first contends that the court was not justified in removing him as administrator because the evidence was insufficient to establish "that he was guilty of fraud or wrongful practice as alleged in the petition for his removal."

The grounds for removal of an administrator are found in section 521 of the Probate Code, which reads: "Whenever a judge of the court has reason to believe from his own knowledge, or from credible information, that any executor or administrator has wasted, *embezzled or mismanaged,* or is about to waste or embezzle the property of the estate committed to his charge, *or has committed or is about to commit a fraud upon the estate, or is incompetent* to act * * * he must cite such executor or administrator to appear and show cause why his letters should not be revoked * * *." (Italics added.)

Section 420 of the Probate Code provides that no person is competent to serve as an administrator or administratrix who does not have the qualifications required of an executor or executrix, and section 401 provides: "No person is competent to serve as an executor or executrix who is under the age of majority, convicted of an infamous crime, or adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or *want of* understanding or *integrity.* * * *" (Italics added.)

[1] In 11a California Jurisprudence, at page 403, section 283, it is stated: "The court has a very large discretion in determining whether, upon the facts presented to it, the representative whom it appointed shall either be suspended or removed, and unless it appears that such discretion has been abused, and especially where the evidence is such that different minds might reach different conclusions thereon, the action of the trial court will not be disturbed on appeal. [Citing cases.] It has been held that an appellate court should not interfere unless it is clearly shown that there has been a gross abuse of discretion. [Citing cases.]"

[2] In the instant case it is clear that the learned trial judge reached the conclusion that appellant Hewlett, an attorney at law, took advantage of the confidential relationship that existed between him and his client, George Kromrey, and thereby improperly gained possession of a large amount of money and other personal property which he claimed was a gift, and that his general conduct in such transaction, and others in connection therewith, was such as to show a lack of integrity to such a degree as to make him unfit to be the administrator of any estate.

[3] Appellant's argument is so unsound and fallacious that it deserves little attention. He argues that no confidential relationship was shown to exist between himself and George Kromrey, and then he argues that the evidence shows that the gift was voluntary and free from undue influence. Appellant ignores entirely the well-established rule that where a confidential relationship exists, and especially one between attorney and client, there is a presumption of undue influence on the part of the attorney, and the law presumes that any agreement or transaction between the attorney and the client was obtained by the exercise of undue influence by the attorney.

[4] In Ross v. Conway, 92 Cal. 632, at pages 635–636, 28 P. 785, at page 786, it was said: "The rule is inflexible that no one who holds a confidential relation towards another shall take advantage of that relation in favor of himself, or deal with the other upon terms of his own making; that in every such transaction between persons standing in that relation the law will presume that he who held an influence over the other exercised it unduly to his

own advantage; or, in the words of Lord Langdale in Casborne v. Barsham, 2 Beav. 78, the inequality between the transacting parties is so great 'that, without proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this court will impute an exercise of undue influence;' that the transaction will not be upheld unless it shall be shown that such other had independent advice, and that his act was not only the result of his own volition, but that he both understood the act he was doing and comprehended its result and effect. This rule finds its application with peculiar force in a case where the effect of the transaction is to divert an estate from those who, by the ties of nature, would be its natural recipients, to the person through whose influence the diversion is made, whether such diversion be for his own personal advantage, or for the advantage of some interest of which he is the representative. It has been more frequently applied to transactions between attorney and client or guardian and ward than to any other relation between the parties, but the rule itself has its source in principles which underlie and govern all confidential relations, and is to be applied to all transactions arising out of any relation in which the principle is applicable. It is termed by Lord Eldon 'that great rule of the court that he who bargains in any matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence.' Gibson v. Jeyes, 6 Ves. 278." See, also, Estate of Cover, 188 Cal. 133, 144, 204 P. 583; Herbert v. Lankershim, 9 Cal.2d 409, 421, 71 P.2d 220; Khoury v. Barham, 85 Cal.App.2d 202, 212, 192 P.2d 823.

[5, 6] This presumption is evidence. Standing alone, it supports a finding against contradictory evidence offered by appellant. Lieber v. Rigby, 34 Cal.App.2d 582, 584, 94 P.2d 49; Khoury v. Barham, supra. It was for the trial court to say whether the evidence offered by appellant outweighed the presumption. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; People v. Chamberlain, 7 Cal.2d 257, 60 P.2d 299; Lane v. Whitaker, 50 Cal. App.2d 327, 123 P.2d 53; Fortier v. Hogan, 115 Cal.App. 50, 1 P.2d 23.

Applying these well-settled principles of law to the evidence hereinbefore set forth, the trial judge was fully justified in concluding "That George Hewlett is neither a fit, proper, competent nor qualified person to administer upon said estate." Indeed, it is difficult to understand how counsel for appellant can seriously contend before this court that the record does not support such conclusion of the trial court. The record in the instant case not only justifies but almost compels the conclusion that appellant not only violated the confidential relationship between attorney and client but also violated the ethics of the legal profession. All the perfumes of Araby could not impart a pleasing odor to such a transaction.

Appellant contends that certain other findings included in the order appealed from are not sustained by the record. It is unnecessary to discuss this contention because the finding next hereinbefore discussed that appellant was "neither a fit, proper, competent nor qualified person to administer upon said estate" is sufficient to support the order removing appellant as administrator, and such finding is amply supported by the record.

[7] Appellant next contends that the court did not have power to appoint another general administrator while there was still pending an appeal from the order removing him. However, the record shows that the order removing appellant and appointing respondent was entered on June 6, 1949, and that no appeal therefrom was filed by appellant until August 4, 1949—59 days afterward. In the meantime, letters of administration were issued to respondent. Upon the filing of the notice of appeal, the powers of respondent as general administrator were, of course, suspended; and it is stated in respondent's brief, and not denied by appellant, that thereafter respondent was appointed special administrator.

No other points raised require discussion.

In view of the foregoing, we conclude that the trial court did not abuse its discretion in determining upon the record in the instant case that appellant should be removed as administrator in each of the three estates, and that the orders appealed from should be, and the same hereby are, affirmed.

PETERS, P. J., and BRAY, J., concur.

98 Cal.App.2d 778

CENTRAL VALLEY EQUIPMENT CO. v. STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 14251.

District Court of Appeal, First District,
Division 2, California.
Aug. 4, 1950.

Central Valley Equipment Company, a corporation, sued State of California, City and County of San Francisco and others, in an action attacking deeds of tax collector to State of California for delinquent and unpaid city and county taxes. The Superior Court in and for the City and County of San Francisco, Milton D. Sapiro, J., rendered a judgment adverse to plaintiff and plaintiff appealed. The District Court of Appeal, Dooling, J., held that statutes providing one year limitation on actions attacking tax deeds were applicable.

Judgment affirmed.

1. Limitation of actions 🔑4(1)

Statutes of limitation can bar the right to attack a tax deed for jurisdiction defects if plaintiff is allowed a reasonable time to sue.

2. Taxation 🔑805(2)

In action attacking deeds of tax collector to state for delinquent and unpaid city and county taxes, on grounds that lots were not properly described on assessment roll and that assessments were excessive and discriminatory, brought by alleged owner who was not in actual possession, statutes providing one year limitation on actions attacking tax deeds were applicable. Revenue and Taxation Code, §§ 175, 3521.

3. Taxation 🔑805(2)

Constructive possession by owner of vacant and unimproved land will not prevent limitations from running against right of owner to attack a tax title.

Henry J. Kleefisch, San Francisco, for appellant.

Fred N. Howser, Attorney General of the State of California, E. G. Benard, Assistant Attorney General, Irving H. Perluss, Deputy Attorney General, for respondent, State.

Dion Holm, City Attorney of the City and County of San Francisco, Lawrence S. Mana, Deputy City Attorney, San Francisco, for respondents, City and County of San Francisco, Russell L. Wolden, Edward T. Bryant and H. D. Long.

DOOLING, Justice.

Plaintiff appeals from an adverse judgment entered after sustaining demurrers to its complaint without leave to amend. The property involved, ten vacant and unimproved lots in the City and County of San Francisco, was deeded by the Tax Collector to the State of California in 1935 for delinquent and unpaid City and County taxes levied and assessed in 1929. Plaintiff alleged that it is the owner, that the lots were not properly described on the assessment roll and that the assessments were excessive and discriminatory. By demurrer defendants set up that the cause of action was barred by sections 175 and 3521 of the Revenue and Taxation Code. Each section provides a one year period of limitation and the action was not commenced until April 21, 1948—over twelve years after the deed to the state, nearly seven years after the effective date of sec. 3521 and three years after that of sec. 175.

[1, 2] The action is clearly barred under the terms of either section if operative.

Appellant argues that the sections cannot affect its rights because a curative act cannot operate to cure "jurisdictional" defects. The courts have plainly distinguished curative statutes from statutes of limitations holding that the latter can bar the right to attack a tax deed if plaintiff is allowed a reasonable time to sue. Davault v. Essig, 80 Cal.App.2d 970, 183 P.2d 39, certiorari denied Davault v. Erickson, 333 U.S. 843, 68 S.Ct. 660, 92 L.Ed. 1126; Tannhauser v. Adams, 31 Cal.2d 169, 187 P.2d 716, 5 A.L.R.2d 1015; Union Title Ins. & Trust Co. v. Thorp, 94 Cal.App.2d 421, 210 P.2d 905; Jones v. Bartlett, 94 Cal.App.2d 418, 210 P.2d 903.

[3] Certain limitations on the rule are suggested in the Tannhauser case, 31 Cal. 2d pp. 173–176, 187 P.2d 716, 5 A.L.R.2d 1015, and the boundaries of the area within which a statute of limitations may properly operate in tax cases have not yet been closely marked out by our courts; but we can discover no valid distinction between this case and the cases above cited in which the limitation statute has been applied. certainly appellant has not brought itself within the suggested class of plaintiffs in possession to whom the Tannhauser case suggests the limitation statute may not apply. Not only does the complaint not allege that plaintiff is in possession of the lots but it alleges affirmatively that the lots "are vacant and unimproved". Whatever may be the rights of a plaintiff in possession under the Tannhauser decision that possession must be an actual, and not a merely constructive, one. Jones v. Bartlett, supra, 94 Cal.App.2d p. 420, 210 P.2d 905; Union Title Ins. & Trust Co. v. Thorp, supra, 94 Cal.App.2d pp. 424–425, 210 P.2d 903; Luberco, Ltd. v. Kipp, 94 Cal.App.2d 409, 411–412, 210 P.2d 901.

Under the decisions and the facts alleged it is clear that the action is barred by the pleaded sections of the Revenue and Taxation Code.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

---

98 Cal.App.2d 662

PEOPLE v. HARRIS.

Cr. 2653.

District Court of Appeal, First District, Division 1, California.

July 28, 1950.

Grant E. Harris was convicted in the Superior Court in and for the County of Marin, Edward I. Butler, J., for unlawfully possessing a sharp instrument while an inmate of a state prison, and he appealed. The District Court of Appeal, Peters, P. J., held that the evidence supported the conviction.

Judgment affirmed.

1. Convicts ⚷5

Evidence supported conviction of state prison inmate for unlawful possession of a sharp instrument. Pen. Code, § 4502.

2. Criminal law ⚷637

In prosecution for unlawful possession of sharp instrument while defendant was inmate of state prison under sentences on convictions of second degree murder and conspiracy to commit armed robbery, trial court's permission of an armed prison guard, not called as witness, to remain in court room during trial to watch defendant after exclusion of guards called as witnesses by district attorney, did not create prejudicial atmosphere depriving defendant of fair trial, but was reasonable precaution. Pen. Code, § 4502.

3. Criminal law ⚷637

The fact that reasonable precautions taken to prevent escape of one being tried for offense committed while he was inmate of state prison necessarily bring before jury fact that defendant is a convict and perhaps a dangerous character does not deprive him of fair trial.

4. Criminal law ⚷1037(1)

Defendant, making no objection to questions asked him by district attorney on cross-examination, cannot complain thereof on appeal from conviction.

5. Criminal law ⚷1037(1)

Normally, defendant's failure to object to, or assign as misconduct, asking of improper questions on his cross-examination by district attorney, constitutes waiver of error therein and precludes him from raising such point on appeal from conviction.

6. Witnesses ⚷277(4)

In prosecution of state prison inmate for unlawful possession of sharp instrument, district attorney's cross-examination of defendant as to whether he unlawfully carried a knife and stabbed another therewith in another state prison on previous occasion was proper as within scope of defendant's direct testimony that he never had possession of a knife while a prison inmate. Pen. Code, § 4502.

7. Witnesses ⚷277(4)

Cross-examination of defendant in criminal case on any relevant and material matter elicited on his direct examination is proper for purpose of showing his conduct or statements inconsistent with his direct testimony.

8. Criminal law ⚷13

The statute declaring state prison inmate, possessing, carrying or having custody of any dirk, dagger or sharp instrument, guilty of felony, is not invalid as indefinite, uncertain and unambiguous because of failure to define what constitutes a sharp instrument. Pen.Code, § 4502.

9. Statutes ⚷241(1)

Criminal statutes must not be strictly construed, but all Penal Code provisions must be construed according to fair import of their terms with view to effect objects thereof and promote justice. Pen. Code, § 4.

10. Criminal law ⚷13

The legislature was not required to list every type of sharp instrument in statutory prohibition of state prison inmates' possession of such instruments, but was only required to define such crime clearly so that any reasonable person would know what constituted violation of statute. Pen. Code, § 4502.

11. Criminal law ⚷351(3)

Immediate flight of one suspected of crime may afford persuasive evidence of his consciousness of guilt, even in absence of any accusation.

12. Convicts ⚷5

The statute declaring state prison inmate possessing any sharp instrument guilty of felony should be reasonably construed to accomplish its beneficent purpose of protecting state prison inmates and officers from peril of assaults with dangerous weapons by armed prisoners. Pen. Code, § 4502.

* * *

Charles R. Garry, San Francisco, attorney for appellant.

Fred N. Howser, Attorney General, Clarence A. Linn, Deputy, Wm. M. Bennett, Deputy, attorneys for respondent.

PETERS, Presiding Justice.

Section 4502 of the Penal Code makes it a felony for any prisoner committed to a state prison to possess, carry upon his person, or have under his custody, among other things, "* * * any dirk or dagger or sharp instrument * * *." Harris was charged with and convicted of a violation of this section in that on March 6, 1949, while an inmate of San Quentin, he unlawfully possessed "a sharp instrument, to-wit: a metal wood chisel * * * with a sharpened point." At the trial Harris elected to conduct his own defense, but on this appeal is represented by counsel. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

[1] The chisel was introduced into evidence and has been examined by this court. It is a steel wood chisel, with the wooden handle broken off, is about six inches long, three-quarters of an inch wide, an eighth of an inch thick, and has a sharpened point.

The evidence shows that on March 6, 1949, Harris, then serving time for second degree murder, and conspiracy to commit robbery, was possessed of this chisel in violation of the above section. Ballard, a guard at the prison, testified that on the morning of the day in question he saw Harris, whom he knew by sight, walking across the big yard. When Harris was about twenty feet distant he noticed an oblong object in Harris' pocket. He called to Harris to stop. Harris immediately started to run away, whereupon Ballard took up the chase yelling to Harris to stop and blowing his warning whistle. He saw Harris take an object from his pocket with his right hand. About this time Harris fell, dropped the object, picked it up with his left hand, got up, and continued to run away. Harris was at all times within sight of Ballard until Harris rounded a corner of the south cell block. Just after Harris turned this corner he was captured by Maxwell and Keffer, two other guards. While these two guards, and several more who had arrived, were struggling with and trying to subdue Harris, Keffer yelled at Ballard that Harris had dropped a metal object on the pavement. Ballard picked it up about five inches from Harris' feet. It was the chisel in question. While several guards testified that they did not see Harris drop the chisel, two guards positively testified that they saw the chisel in Harris' hand, and saw him drop it. Keffer testified that he grabbed Harris' right arm and twisted it behind Harris' back, and that Sergeant Todd grabbed Harris' left hand and arm and forced him to drop the chisel. Todd testified that it was he who forced Harris to drop the chisel. This testimony is ample to support the judgment.

Harris tried to show by his own testimony, and that of several inmates, that it was not he but another negro convict that was running in the yard, but the identification of Harris as the running man was overwhelming. Harris testified that he at no time was possessed of the chisel and that what he had in his left hand was his wrist watch. The guards did testify that Harris had a wrist watch with the band wrapped around the fingers of his left hand. It was defendant's theory that the guards had "framed" him, and that some other convict had thrown the chisel away when frightened by the whistles and the guards converging on the south cell block entrance. This theory was unsupported by any credible evidence, and was obviously and properly disbelieved by the jury.

[2, 3] The first contention of defendant is that he was deprived of a fair trial because of an incident that occurred just after the first prosecution witness, a guard from San Quentin, had been called by the district attorney. The defendant asked that all other guards that were present, and who were to be called as witnesses, be excluded from the courtroom. The court granted this request but stated that one guard, in addition to the one testifying, would be permitted to remain in the courtroom. During the ensuing colloquy, a guard in the body of the courtroom stated that he was present and was not going to testify. Thereupon, the district attorney asked that such guard be permitted to remain in the courtroom and be permitted to be armed. The court granted these requests.

It seems to be the thought of defendant that, because this event called attention to the fact that he was a convict, and because an armed guard was permitted to remain in the courtroom to watch him, an atmosphere of prejudice was created so that he was prevented from having a fair trial.

There is nothing in this occurrence that supports the conclusion that this defendant was deprived of a fair trial. Certainly, keeping an armed guard in the courtroom when a person already convicted of murder and conspiracy to commit armed robbery is on trial, is an elementary and reasonable safeguard. While it is true that, where a prisoner is kept in chains and shackles throughout the trial, and no necessity exists for such stringent measures, such conduct is prejudicially erroneous, People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296, where reasonable precautions are taken, the fact that such precautions necessarily bring before the jury the fact that the defendant is a convict and perhaps a dangerous character does not deprive him of a fair trial. People v. Kimball, 5 Cal.2d 608, 55 P.2d 483; People v. Metzger, 143 Cal. 447, 77 P. 155; People v. Thompson, 23 Cal.App.2d 339, 72 P.2d 927; People v. David, 12 Cal.2d 639, 86 P.2d 811; People v. Loomis, 27 Cal.App.2d 236, 80 P.2d 1012. It was not the fault of the prosecution that defendant was on trial, nor was it the fault of the prosecution that the defendant was a man who had already been convicted of several crimes of violence. The precaution here taken was reasonable. The court was as lenient as the circumstances of the case permitted.

[4-7] Defendant next complains of certain questions asked him by the district attorney. The defendant elected to take the stand and he testified at some length. On direct examination he denied ever having had possession of the chisel, and denied that he ever possessed such weapons. His exact statement on direct examination was: "I didn't have that in my possession. I don't need it. I woudn't have it. I don't do those things * * *." On cross-examination by the district attorney, the following questions were asked and answers given:

"Mr. Bagshaw: Q. You say you don't have those things—you don't need them? A. I positively don't need them.

"Q. You refer to this instrument by that. * * * You never carry such things? A. I had never carried any such thing.

"Q. On Sunday, June 20th, you not only carried such an instrument, but stabbed one Watson in the back with a knife? A. It isn't true.

"Q. And went to solitary for it? A. Mr. Watson got stabbed in a fight, which he and I had. Another inmate came up behind him and stabbed him in the back. The matter was referred to the courts of Sacramento.

"Q. That was in Folsom? A. Yes, and the District Attorney there, after hearing what Mr. Watson had to say, and several others, said he couldn't take me into court, and I was let out immediately after his finding. It was never proven I cut anyone, or intended to."

It will be noted that there was no objection made to these questions. Therefore, even if it were error to ask the questions, which it was not, defendant cannot now complain. It is normally the rule that failure to object or failure to assign the asking of improper questions as misconduct, constitutes a waiver and precludes raising the point on appeal. People v. Routh, 182 Cal. 561, 567, 189 P. 436. But there was no error in the asking of the questions. The cross-examination was well within the scope of the direct testimony. In view of defendant's statement made on direct that he never had had a knife in his possession while an inmate, it was permissible for the district attorney to attempt to show that on at least one prior occasion the defendant had unlawfully carried a knife while in prison. Defendant's answers to the question demonstrate that the cross-examination had some basis and that the questions were asked in good faith. It is, of course "the settled rule that it is proper in a criminal case to cross-examine a defendant upon any relevant and material matter elicited on his direct examination, for the purpose of showing conduct or statements inconsistent with his direct testimony." People v. Westek, 31 Cal.2d 469, 476, 190 P.2d 9, 14. That rule is here applicable. See, also, People v. Hoffman, 199 Cal. 155, 161, 248 P. 504.

[8-11] The last contention of defendant is that section 4502 of the Penal Code is invalid because it does not define what constitutes a "sharp instrument" and is therefore indefinite, uncertain and ambiguous. The argument requires but scant attention. Criminal statutes are not to be strictly construed, but all the provisions of the Penal Code "are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." § 4, Penal Code. The Legislature was not required to list every type of sharp instrument in the statutory prohibition. All that is required is that the crime must be clearly defined so that any reasonable person will know what constitutes a violation. See cases collected 7 Cal.Jur. p. 843, § 7; 14 Am.Jur. p. 773, § 19. The present defendant obviously knew what the statute meant, and knew that he was violating it. His flight upon the request of the guard to produce the object in his pocket, amply demonstrates this. "Immediate flight, even in the absence of any accusation, may afford persuasive evidence of consciousness of guilt." People v. Cooper, 81 Cal.App.2d 110, 117, 183 P.2d 67, 71.

[12] The chisel was clearly a "sharp instrument" within the meaning of section

4502. It has already been described. This section of the Penal Code was passed "to protect inmates and officers of state prisons from the peril of assaults with dangerous weapons perpetrated by armed prisoners." People v. Wells, 68 Cal.App.2d 476, 481, 156 P.2d 979, 981. The statute should be reasonably construed to accomplish this beneficent purpose. See, also, People v. Crenshaw, 74 Cal.App.2d 26, 28, 167 P.2d 781.

The judgment of conviction and the order denying the motion for a new trial are affirmed.

BRAY and WOOD, JJ., concur.

RAINS v. CONTRA COSTA COUNTY et al.

Civ. 14414.

District Court of Appeal, First District, Division 2, California.

July 31, 1950.

Hearing Granted Sept. 29, 1950.*

Action by Floyd A. Rains against the County of Contra Costa and others, for injunctive relief. From a judgment of the Superior Court in and for the County of Contra Costa, Benjamin C. Jones, J., in favor of the defendants, the plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that under Const. art. 11, § 5, empowering a Board of Supervisors to regulate employment and compensation of deputies and employees, a Board of Supervisors may, without submission to the electors of the county, by ordinance amend an ordinance setting up a civil service system for the county, by excluding any classification of employees from such system.

Judgment affirmed.

1. Counties 🔑55

The validity of an amendment of civil service ordinance by board of supervisors did not depend upon wisdom or motives of its members and motives would not be inquired into, unless established by competent evidence as essentially fraudulent. Government Code, §§ 31100–31113; Political Code, §§ 4308, 4310.

2. Constitutional law 🔑36

The legislature may not legislate contrary to a provision of the Constitution, and where a power is granted to a board by the Constitution, the legislature may not limit that power. Const. art. 11, § 5.

3. Counties 🔑63, 65, 74(6)

Constitutional provision empowering boards of supervisors to regulate the employment and compensation of deputies and employees gives to boards of supervisors the unqualified power to regulate method of employment, terms of employment, and compensation, and power so granted vests directly in board of supervisors and is to be exercised regardless of any legislative enactment tending to qualify it. Const. art. 11, § 5.

4. Counties 🔑47, 55

Under constitutional provision empowering boards of supervisors to regulate the employment and compensation of deputies and employees, board of supervisors may, without submission to electors of the county, by ordinance, amend an ordinance setting up a civil service system for the county, by excluding any classification of employees from such system, and any provision in the original ordinance relating to its amendment can neither add to nor detract from that power. Government Code, §§ 31100–31113; Political Code, §§ 4308, 4310; Const. art. 4, § 1; art. 11, § 5.

5. Counties 🔑55

Power of board of supervisors under Constitution to amend civil service ordinance does not deprive electors of the right to exercise the initiative, or to invoke the referendum. Government Code, §§ 31100–31113; Political Code, §§ 4308, 4310; Const. art. 4, § 1; art. 11, § 5.

◆

Todd & Todd, San Francisco, for appellants.

Francis W. Collins, District Attorney, Martinez, for respondents.

---

* Subsequent opinion 231 P.2d 55.

NOURSE, Presiding Justice.

Plaintiff sued as a taxpayer for injunctive relief alleging that certain employees of the county had been illegally deprived of their rights by an ordinance of the Board of Supervisors removing their positions from the civil service list of county employments. Judgment went for defendants.

Appellant states that the question involved is whether an amending ordinance removing the positions from the list of civil service positions was a repeal or partial repeal of the original ordinance placing them under civil service. It is conceded that the positions of employment were originally included as civil service positions by the ordinance adopted by the supervisors and approved by the electors; that such ordinance provided that it "may be amended by a four-fifths vote of the Board of Supervisors without submitting the same to a vote of the People," and that such amendment was enacted in the manner therein provided. The only substantial question presented is the one of *power*—did the supervisors have power to amend without submission of the proposed amendment to the electors? All suggestions of fraud, misconduct and breach of discretion are beyond our review as they find no support in the record.

The matter was tried and fairly heard by the able judge of the superior court whose opinion on the controlling issues fully covers the rights of the parties and which we adopt as our reasons for our judgment of affirmance.

"On the 5th day of March, 1944, the Board of Supervisors of Contra Costa County passed and adopted Ordinance No. 325 in order to create a merit system for the employees of said county in accordance with the provisions of the County Civil Service Enabling Act now Sections 31100 to 31113, inclusive, of the Government Code of California. The enabling Act provides that such an ordinance shall not become effective until it is ratified by a majority vote of the qualified electors of the County voting at an election for that purpose. Such an election was held and the ordinance was duly ratified by the required majority vote.

"The offices and employments included in the system are enumerated in Section 4 of the ordinance, which provides that:

"'All regular county employees shall be included in the merit system hereby adopted except that the following officers and employees are exempt from the provisions of this Ordinance:

"'(a) All officers elected by the people.

"'(b) Casual patient and inmate employees at County Institutions.

"'(c) Members of the Civil Service Commission and members of all other Commissions of the County.

"'(d) All officers and other persons serving the County without compensation.

"'(e) All investigators, detectives, or other persons paid from the special funds furnished the District Attorney and the Sheriff under the provisions of Section 4308 and 4310 of the Political Code of the State of California.

"'(f) In the office of the District Attorney, special counsel and special detectives for temporary employment.'

"Section 16 of the ordinance provides that,

"'This Ordinance may be amended by a four-fifths vote of the Board of Supervisors without submitting the same to a vote of the People; but no amendment repealing this Ordinance shall be effective unless the proposition of its repeal shall first have been submitted to a vote of the qualified electors of the County at a general or special election, and shall have received the affirmative vote of a majority of the electors voting on the propositions.'

"On the 6th day of December, 1948, the Board of Supervisors of said county passed and adopted by a four-fifths vote Ordinance No. 471, amending Ordinance No. 325. This ordinance, No. 471, was not submitted to the electors of the County for ratification. By its terms a new subdivision was added to Section 4 of the original ordinance exempting an additional classification of employees from the provisions of the ordinance, which new subdivision entitled '(g)' reads:

" '(g) The Medical Director of the County Hospital, and all physicians and surgeons, serving the County of Contra Costa.' The obvious effect of the amendment is to remove from the system the Medical Director of the County Hospital and all physicians and surgeons serving the county.

"The plaintiff commenced this action on behalf of himself as a citizen and taxpayer and on behalf of all other taxpayers in the County of Contra Costa to have the amending ordinance declared illegal and void, and to enjoin the Board of Supervisors from proceeding to enforce or activate it. Injunctive relief is also sought by the action against the drawing and paying of warrants of any kind for the remuneration of the defendant, Degnan, as Medical Director of the County Hospital, who, it is alleged, is about to be appointed such Medical Director without having been placed on any county civil service eligible list as is provided in Ordinance No. 325.

"The issues presented go to the power of the Board of Supervisors to amend, without submitting to a vote of the people, a duly adopted ordinance setting up a civil service system for the county by exempting from the operation of the system a classification of employees already included in the system. Also involved is the present status of such employees if the amending ordinance is valid.

[1] "In the first place it may be said that the validity of the action of the Board of Supervisors in no wise depends upon the motives of its members. 7 Cal. Juris. p. 450, Sec. 41; Dodge v. Kings County, 150 Cal. 96, 88 P. 266. It is said in Nickerson v. San Bernardino, 179 Cal. 518, at page 522, 177 P. 465, at page 467, in dealing with a similar situation that, 'Whether, in the exercise of legislative powers, a board acts wisely or unwisely, is no concern of the courts.' That such is the law is also stated in City & County of San Francisco v. Boyle, 191 Cal. 172, 215 P. 549. Unless established by competent evidence as essentially fraudulent, the motives of the board will not be inquired into. In this case there is neither pleading nor proof that the Board of Supervisors acted in any manner other than as appeared to them to be in the best interests of the community.

[2] "The case resolves itself solely into a consideration of the powers granted to the Supervisors by the Constitution of the State and by legislative enactment. In so far as there may be any conflict between the two, the power granted by the Constitution must prevail. It is a fundamental principle of constitutional government that the legislature may not legislate contrary to or against a provision of the Constitution, and that where a power is delegated or granted to a board or body by the Constitution the legislature may not by enactment limit or qualify that power. The Constitution is in all cases supreme.

"Section 5 of Article XI of the Constitution provides that,

[3, 4] " 'The boards of supervisors in the respective counties shall regulate the compensation of all officers in said counties other than boards of supervisors, district attorneys, auditors, and judges of municipal courts, and shall regulate the number, method of appointment, terms of office or employment, and compensation of all deputies, assistants, and employees of the counties.'

"This provision of the Constitution gives to the Boards of Supervisors of the respective counties of the State the unqualified power to regulate *the method of employment, the terms of employment,* and *the compensation* of all assistants and employees of the counties. The power so granted vests directly in the Board of Supervisors and is to be exercised regardless of any legislative enactment tending to qualify it. In the exercise of the power so granted them by Section 5 of Article XI of the Constitution the Board of Supervisors may, without submission to the electors of the county, by ordinance amend an ordinance setting up a civil service system for the county by excluding any classification of employees from such system. Any provision in the original ordinance relating to its amendment can neither add to nor detract from this power.

[5] "But this does not mean that the electors of a county are in any way deprived of the right to exercise the initiative, or to

invoke the referendum pursuant to Section 1 of Article IV of the Constitution. In this case, however, no referendum was invoked, and neither is the original nor the amendatory ordinance an initiative measure.

"The removal of the excluded employments from the operation of the system renders them open to be filled by appointment in the manner otherwise provided by law."

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

99 Cal.App.2d 119

JEPSEN v. SHERRY et al.

Civ. 3982.

District Court of Appeal, Fourth District, California.

July 24, 1950.

On Rehearing Aug. 21, 1950.

Further Rehearing Denied Sept. 8, 1950.
Hearing Denied Oct. 19, 1950.

Action by Hans P. Jepsen against Dean Sherry and others to recover balance due on an oral building contract, and to foreclose a lien. From a judgment of the Superior Court of San Diego County, Franklin G. West, J., dismissing the action for failure to prosecute, the plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that under the record, dismissal was an abuse of discretion.

Judgment of dismissal reversed.

1. Appeal and error 🔑962
Dismissal and nonsuit 🔑60(1)

A court has an inherent and statutory power to dismiss an action for a failure to prosecute it with diligence, and its exercise of that power should not be disturbed unless an abuse of discretion clearly appears. Code Civ.Proc. §§ 583, 1190.

2. Dismissal and nonsuit 🔑60(2)

The two year statutory period within which to bring action to trial is not an arbitrary limit to be followed in all cases, but is a general guide in determining whether a want of prosecution appears and, if so, whether power to dismiss should be used in view of the entire situation. Code Civ.Proc. §§ 583, 1190.

3. Dismissal and nonsuit 🔑60(1)

Discretionary power of the court to dismiss for failure to prosecute is controlled by legal principles and is to be exercised in accordance with the spirit of the law and with a view to subserving, rather than defeating, the ends of substantial justice. Code Civ.Proc. §§ 583, 1190.

4. Dismissal and nonsuit 🔑60(1)

Each case involving question of dismissal for failure to prosecute must be decided on its own peculiar features and facts. Code Civ.Proc. §§ 583, 1190.

5. Compromise and settlement 🔑2

Policy of law favors avoidance of litigation by compromise.

6. Dismissal and nonsuit 🔑60(1)

Unreasonable delay in litigation should be avoided, but all the circumstances should be carefully considered before a plaintiff is denied relief without a hearing. Code Civ. Proc. §§ 583, 1190.

7. Dismissal and nonsuit 🔑60(2)

Where action to recover balance due on oral building contract and to foreclose a lien had not been brought to trial within two years, but pleading strongly indicated that a considerable amount was justly due, and, among other circumstances, a settlement was considered, four demurrers were filed, and the plaintiff moved, well within the two year period, to set the case for trial, dismissal for failure to prosecute was an abuse of discretion. Code Civ.Proc. §§ 583, 1190.

* * *

Hans P. Jepsen, in pro. per.

William H. Macomber, Martin & Mahedy, San Diego, for respondents.

MUSSELL, Justice.

Plaintiff commenced the instant action to recover on an alleged oral contract for labor and material furnished in connection with the construction and alteration of improvements on property owned by the defendants and to foreclose a mechanic's lien thereon. A cause of action on quantum meruit was included in the second amended complaint. The action was filed on September 14, 1946, and a judgment of dismissal for failure to prosecute was rendered by the trial court on May 26, 1949, about two years and six months after the filing of the complaint. The motion to dismiss was heard on affidavits and files and records in the action. No testimony was taken and there is no reporter's transcript. The clerk's transcript reflects the filing dates of various documents and pleadings involved, as follows:

September 14, 1946—Complaint filed.
October 11, 1946—Demurrer to complaint.
December 22, 1947—Amended complaint.
January 2, 1948—Demurrer to amended complaint.
January 23, 1948—Amended demurrer.
February 13, 1948—Amended demurrer sustained.
March 9, 1948—Second amended complaint.
March 18, 1948—Demurrer to second amended complaint.
April 7, 1948—Amended demurrer.
June 16, 1948—Answer.
July 6, 1948—Memorandum for setting case on civil active list.
July 8, 1948—Demand for jury filed by defendants.
May 20, 1949—Notice of motion to file amended answer and cross-complaint.
    Demand for bill of particulars.
    Notice of motion to dismiss for failure to prosecute.
May 26, 1949—Judgment of dismissal for failure to prosecute rendered.

The sole question for our determination is whether the trial court abused its discretion in dismissing the action when it had not been brought to trial for more than two years after the commencement thereof.

Two code sections are applicable:

Section 583, Code of Civil Procedure: "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial, * * * except where the parties have filed a stipulation in writing that the time may be extended * * *."

Section 1190, Code of Civil Procedure: "* * * and in case such proceedings be not prosecuted to trial within two years after the commencement thereof, the court may in its discretion dismiss the same for want of prosecution * * *."

The rule is well settled that the power of a trial court to dismiss an action for failure on the part of the plaintiff to prosecute it with diligence is an inherent power which exists without the aid of statutory authority and that the provisions of section 583 of the Code of Civil Procedure and of other related sections must be read in the light of the existence of such inherent power. Simonini v. Jay Dee Leather Products Co., 85 Cal.App.2d 265, 268, 193 P.2d 53; Steen v. The City of Los Angeles, 31 Cal.2d 542, 546, 190 P.2d 937. It is also well settled that the action of the trial court in dismissing an action for failure to prosecute diligently should not be disturbed except upon a showing of clear abuse of discretion, and it is immaterial whether the trial court was acting under its inherent power or under the provisions of section 583 of the Code of Civil Procedure. Hibernia Sav. & Loan Soc. v. Lauffer, 41 Cal. App.2d 725, 729, 107 P.2d 494.

It is conceded that the present action was not brought to trial within two years after the filing of the complaint. The only affidavit in opposition to the motion to dismiss is that of the attorney for the plaintiff. It is stated therein, among other things, that on the 12th of October, 1946, the affiant was served with a demurrer filed by the defendants and prior to the hearing thereof on November 2nd, the affiant advised the defendants' attorneys that one of the points of the demurrer was good and that, therefore, the plaintiff would file an amended complaint. It is further stated that from December, 1946, to February, 1947, affiant and one of defendants' attorneys attempted to arrange a conference between the principals to the action; that the conference occurred during the month of February, at which time defendants agreed to engage an independent architect, who would go over the details of the work and make a report thereon; that the report was received in the latter part of March, 1947; that from December, 1946, to May, 1947, affiant and defendants' attorneys were hopeful that a settlement might be reached and a compromise of the litigation affected. There is no suggestion in the affidavit or in the record before us that a continuance was agreed upon or that any of the rights of the defendants to have the matter brought to trial within the statutory period were waived. The affidavit further sets forth that the demurrers were argued before the court on or about February 13, 1948 and plaintiff was then advised of the court's decision sustaining the demurrers in part and granting plaintiff leave to file an amended complaint; that plaintiff then on March 9, 1948, filed his second amended complaint, to which the defendants demurred and also filed their answer on or about June 15, 1948; that immediately thereafter a notice of motion to set the cause for trial was served and filed; and that the defendants demanded a jury trial. On information and belief the affiant averred that due to the demand for a jury having been filed and the congested and crowded condition of the trial calendar, it was impossible for the court to set the case for trial prior to May 26, 1949. In this connection it should be noted that there is no suggestion in the affidavit or in the record that the plaintiff asked for a preferential setting or endeavored in any manner to advance the trial date of the action. The affidavit does not contain facts sufficient to show an abuse of discretion on the part of the trial court in concluding that plaintiff had not prosecuted the action to trial with due diligence.

The first amended complaint was not filed until December 22, 1947, one year and three months after the filing of the action. Plaintiff attempts to account for this delay with the statement that negotiations for settlement were being carried on. There is nothing in the record to indicate that defendants waived their rights to a dismissal of the action by efforts to obtain a settlement or that they agreed to any extension of the time within which the action should be tried. The statement in the affidavit that the attorneys for the parties "were hopeful" that a settlement could be affected is of no value as an excuse for plaintiff's failure to exercise due diligence.

In Hayward Lumber & Inv. Co. v. Greenwalt, 215 Cal. 655, 12 P.2d 445, in an action to foreclose a mechanic's lien, dismissed by the court, where two years and three months had elapsed after the institution of the action and the matter had not been brought to trial, the court held that it was the duty of the plaintiff to take measures to have demurrers determined and to use due diligence in this respect, the failure to do so being grounds for dismissal of the action.

In the instant case, the plaintiff's pleadings were subject to demurrer and the delay incident to the filing of the demurrers can in no wise be charged against the defendants. Such delays are not sufficient to stay the running of the two-year statutory period.

The motion herein was heard on the records and files in the action and on conflicting affidavits and it must be assumed that the court below found the facts to be as asserted by the moving and prevailing party. Lieb v. Lager, 9 Cal.App.2d 324, 326, 327, 49 P.2d 886.

The filing of the lien herein and the institution of foreclosure proceedings created a cloud on the title of defendants' property. They were entitled to have as speedy disposition of the action as was consistent with their own and the rights of the plaintiff.

Where, as here, the court found that plaintiff did not with reasonable promptness pursue all the steps necessary to bring the litigation to an end, he should suffer the penalty of his default. Bronger v. Polytechnic School, 60 Cal.App.2d 656, 658, 141 P.2d 480.

While we would have favored a trial on the merits, on the record before us, we are unable to hold as a matter of law that an abuse of discretion appears.

Judgment affirmed.

BARNARD, P. J., concur.

On Rehearing

BARNARD, Presiding Justice.

This action was brought on September 14, 1946, to recover a balance due on an oral building contract, and to foreclose a lien on defendants' property. A cause of action on *quantum meruit* was included by amendment. The record shows the following proceedings: A demurrer was filed on October 11, 1946, and an amended complaint December 22, 1947. A demurrer filed on January 2, 1948, was amended January 23, and sustained with leave to amend on February 13. A second amended complaint was filed on March 9, a demurrer March 18, and an amended demurrer on April 7. On June 16, 1948, an answer was filed. On July 6, the plaintiff filed a request to have the case set for trial, and on July 8 the defendants demanded a jury. The court set the case for trial on May 26, 1949.

On May 20, 1949, the defendants served and filed notice of a motion to dismiss the action for failure to prosecute, under sections 583 and 1190 of the Code of Civil Procedure, in that it had not been brought to trial within two years. At the same time they noticed a request for permission to file an attached amended answer and a cross-complaint. Both motions were noticed for May 26, the day the action was to be tried. The court granted the first motion and entered a judgment dismissing the action "but without prejudice to such other actions, if any there be, legally available to plaintiff." This appeal followed.

[1-5] It is well settled that a court has an inherent and statutory power to dismiss an action for a failure to prosecute it with diligence; and that its action should not be disturbed unless an abuse of discretion clearly appears. However, the two years mentioned in these statutes is not an arbitrary limit to be followed in all cases, but was intended as a general guide in determining whether or not a "want of prosecution" appears and, if so, whether this power should be used in view of the entire situation. This discretion is one controlled by legal principles and is to be exercised in accordance with the spirit of the law and with a view to subserving, rather than defeating, the ends of substantial justice. Raggio v. Southern Pacific Co., 181 Cal. 472, 185 P. 171. Each case must be decided on its own peculiar features and facts. First National Bank of San Diego v. Nason, 115 Cal. 626, 47 P. 595. It is a well established policy of law to favor the avoidance of litigation by compromise. Hamilton v. Oakland School Dist., 219 Cal. 322, 26 P.2d 296. While not always controlling, this sometimes has an important bearing. In Ferris v. Wood, 144 Cal. 426, 77 P. 1037, an order of dismissal was reversed, it appearing that the debt was owed, and that the delay occurred through the plaintiff's desire to effect a compromise. The court held that an excuse for the delay reasonably appeared and that in such a matter, unlike some others, a trial judge is in no better position than an appellate court in determining whether substantial justice has been done. The court then expressed the opinion that the dismissal there involved had tended to defeat, rather than to subserve, the ends of substantial justice.

It was stated at the oral argument, and not denied by their counsel, that during the negotiation the defendants had offered to pay the plaintiff $2,500. While this was not before the trial court, the pleadings in the record strongly indicate that a considerable amount was justly due. The complaint alleged an oral contract, in February, 1946, by which plaintiff was to furnish materials and do certain remodeling and construction work, as directed by defendants, on a cost plus basis; that he proceeded with the work and followed instructions until June 7 when he was directed to cease work; and that a balance of $9,066.42 is due. In their answers the defendants denied making any agreement, that the plaintiff had done any work, and that any material or labor had been furnished. In their cross-complaint they alleged the making of an oral contract by which the plaintiff agreed to do certain remodeling and construction work; that he commenced work on February 10 and abandoned it on June 6, when it was only partially completed; and that they caused the work to be completed at their own expense, it being necessary to correct "certain errors, defects and omissions." There is no allegation of any original contract price, or of any price for any particular part of the work. While it is alleged that "certain" corrections were made, nothing is said as to their cost. While it is alleged that additional work was done, there is nothing to indicate that the work done by the plaintiff during four months was of no value. Except for the corrections, which may have been slight, there is nothing to indicate that most of plaintiff's work should not be paid for, or that the defendants' total cost would then be more than it otherwise would have been. The pleading is somewhat evasive, and leaves a distinct impression that while a partial offset was claimed a large amount was justly due the plaintiff.

Aside from the pleadings, two affidavits only appear in the record. The one in support of the motion to dismiss is devoted entirely to the matter of prejudice in that two witnesses, who were employed on the job, had left town. It goes unduly into the merits of the case by reciting in great detail what these witnesses would testify. The other, by plaintiff's then attorney, alleged among other things that the parties were trying to settle the controversy and the defendants agreed to, and did, engage an architect to inspect and report on the work; that from December, 1946, to December, 1947, affiant and defendants' attorneys hoped and thought that a settlement could be effected and further litigation avoided; that when an answer was finally filed a request for setting was immediately made; that because of defendants' demand for a jury, and the congested calendar, "it was impossible for said court to set the case for trial prior to May 26th, 1949"; that a large number of workmen who were employed on this job are available to defendants as witnesses, if two others are not; and that affiant is willing to stipulate to the taking of a deposition. The facts thus stated were not disputed or otherwise contradicted.

[6] In most of the cases where such a dismissal has been sustained either nothing was done by the plaintiff or no valid excuse for the delay was shown, and no unusual circumstances appeared. Unreasonable delay in litigation should be avoided, but all the circumstances should be carefully considered before a plaintiff is denied relief without a hearing. While it appears here, technically, that more than two years had elapsed before the trial date and that some of the delay was probably unnecessary, the excuse for the delay is not entirely unreasonable and there are other considerations which should not be overlooked.

[7] One circumstance is that the main defendant is a judge of the same court. "Period." Most of the delay occurred before the first amended complaint was filed, and while both sides believed that a settlement could be reached. Much more was caused by the defendants and as a result of four demurrers filed, three of which were never heard. While this is not controlling it is one of the circumstances. When an answer was filed the plaintiff moved at once, and well within the two years, to set the case for trial. The defendants' demand for a jury, while rightful, naturally caused an additional delay. In response to the timely request thus made the court set the case for trial, the first available date being beyond the two-year period. Nothing was then done until, at the last minute, notice was given of a motion to dismiss. Moreover, this was accompanied by a desired cross-complaint which materially changed the picture. It thus appeared at the hearing that a large amount of work had admittedly been done, and that a substantial amount was probably due. The court clearly recognized this, by making the order of dismissal without prejudice to seeking other relief if this could possibly be done. The order appears to have resulted from a feeling that it was required by these statutes, rather than from an exercise of real discretion.

The circumstances here were unusual, all of them should be considered, and an unjust effect should not be given to this procedural rule, which is merely optional. The defendants may owe the plaintiff nothing, but under the circumstances substantial justice requires that this issue should be determined by a trial on the merits. The drastic order made is not sustained by the record before us, and an abuse of discretion clearly appears.

The judgment of dismissal is reversed.

GRIFFIN and MUSSELL, JJ., concur.

---

98 Cal.App.2d 628

MAHNKEY et al. v. BOLGER.

No. 14360.

District Court of Appeal, First District,
Division 1, California.
July 26, 1950.

Rehearing Denied Aug. 25, 1950.
Hearing Denied Sept. 21, 1950.

Action by William O. Mahnkey and Elsie C. Mahnkey against Phillip Bolger for personal injuries and for damages to automobile. The defendant filed a cross-complaint. The Superior Court, San Mateo County, A. R. Cotton, J., entered a judgment on a verdict for the plaintiffs, and the defendant appealed. The District Court of Appeal, Schottky, J. pro tem, held that in an action arising out of a collision between plaintiff motorist making left turn and defendant motorist approaching intersection from opposite direction, submission of last clear chance issue to jury was prejudicial error, where defendant could not know that plaintiff was in a position of danger until plaintiff turned into defendant's path and it was then too late for defendant to have a last clear chance to avoid the collision.

Judgment reversed.

1. Appeal and error 🔑930(1)

The reviewing court would consider evidence most favorable to plaintiffs in whose favor the verdict was returned.

2. Negligence 🔑65, 82

The mere proof of violation of statute does not of itself establish contributory negligence, but it must also be proved that breach of statutory duty was proximate cause of injury.

3. Automobiles 🔑245(80)

Plaintiff motorist's failure to continuously give signal of intention to turn left during last 50 feet traveled before turning as required by statute was not negligence as a matter of law, where defendant motorist approaching intersection from opposite direction would not have seen signal if plaintiff had given signal for required 50 feet and giving of signal for such distance would have made no difference in the result. Vehicle Code, § 544.

4. Appeal and error 🔑1066
Automobiles 🔑246(58)

In action arising out of collision between plaintiff motorist making left turn and defendant motorist approaching intersection from opposite direction, submission of last clear chance issue to jury was prejudicial error, where defendant could not know that plaintiff was in a position of danger until plaintiff turned left into defendant's path and it was then too late for defendant to have a last clear chance to avoid collision.

5. Trial 🔑127

In automobile accident case, question and answer having no other purpose except to bring out fact that defendant had insurance carrier was error.

Dana, Bledsoe & Smith, San Francisco, for appellant.

White & White, Margaret White, Arlington C. White, all of San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

The plaintiffs, Elsie C. and William O. Mahnkey, husband and wife, filed an action against Phillip Bolger to recover damages for personal injuries to Mr. Mahnkey and damages to the automobile of Mrs. Mahnkey resulting from a collision with the automobile of defendant Bolger. The latter denied any negligence on his part, set up the defense of contributory negligence on plaintiffs' part, and also filed a cross-complaint seeking damages. The jury returned a verdict against defendant and in favor of plaintiff William Mahnkey for $6,650, and in favor of Mrs. Mahnkey for $850, the value of the car; defendant to recover nothing on his cross-complaint. A motion for a new trial was denied by the court. This appeal is from the judgment entered in accordance with the verdict.

Defendant urges three grounds for reversal: (1) Plaintiff William Mahnkey was guilty of contributory negligence as a matter of law; (2) the court erred in giving an instruction on last clear chance, and also gave an incorrect instruction on that subject; (3) plaintiffs' counsel was guilty of prejudicial misconduct in bringing before the jury evidence that defendant was insured.

[1] Before discussing these contentions of defendant, we shall summarize briefly the factual situation as disclosed by the record, stating, as we must, the evidence most favorable to the plaintiffs.

On the evening of December 19, 1947, plaintiff William Mahnkey attended a company Christmas dinner party at a restaurant in South San Francisco. He testified that he had had two drinks before dinner and none afterward; that he left the restaurant alone and started for his home in San Francisco at about 2 o'clock in the morning of December 20. The defendant Phillip Bolger, on that evening, with his wife and another couple, had visited two taverns. He testified that he had had two drinks, and that he and his party were enroute to a drive-in on Junipero Serra Boulevard when the accident occurred. There was direct evidence that either driver was intoxicated. It was a rainy or drizzly night and the streets were wet. At about 2:25 a. m., Mr. Mahnkey was driving a 1938 grey Willys sedan belonging to his wife, Elsie C. Mahnkey, north on Mission Street in Colma. He was proceeding to his home, was alone, was driving about 25 miles an hour, and was in the left-hand lane of the three northbound lanes of Mission Street, along which street car tracks ran. When he was "a little more than" 25 feet south of School Street, which intersects Mission Street on the west side, he put his hand out signaling for a left turn, pulling it in only when he reached the intersection. He slowed his speed to about 15 miles an hour, proceeded north to the center of the intersection because he "thought the button was there," and made a sharp left turn, heading west into School Street. His brakes, lights and windshield wiper were in good condition, and the latter two were in operation, his lights on low city beam. Mission Street runs slightly uphill as one goes north, approaching the intersection of School Street. The 1947 Plymouth sedan driven by the defendant Bolger, according to his testimony, was traveling approximately 25 miles an hour south along Mission Street, and was in the center of the three southbound lanes. As the Mahnkey car reached the center of the southbound Mission Street lanes, heading into School Street, it was struck on the right-hand front fender and door by the Bolger car. Mr. Mahnkey was rendered unconscious and was in the hospital for about three weeks. The car was a "total wreck."

The plaintiff testified that he had entered Mission Street three or four blocks south of School Street and had remained in the lane nearest the center. This was corroborated by a bystander eyewitness, a Mrs. Hooper, who was outside a near-by barbecue stand, and by others. Plaintiff put his hand out in a left-hand turn signal approximately 30 to 35 feet before reaching the intersection, and kept it there until he reached the intersection with School Street. His testimony in that connection was as follows: "Q. And that you then brought your arm in when you reached the intersection of School Street, is that correct? A. Yes.

"Q. That would mean, then, that a distance of 25 or 30 feet south of this south curb line of School Street, if we extended it across, you put your arm out and kept it out until you got the front of your car, got to this south curb line, is that right? A. Yes.

"Q. Then you brought your arm in and, as I understand it, you proceeded half way across School Street to the center point of School Street and made a right angle turn to go west, turning left, toward the west, is that right? A. That's right.

"Q. You traversed that distance half way across School Street and then your left turn to the point marked in on the diagram, at a speed of about 15 miles an hour? A. Yes.

"Q. You continued without interruption during that period of time, is that right? A. Yes.

"Q. No stopping at all? A. No.

"Q. You were at right angles to the other car when the collision happened, in the manner in which you have drawn it therein? A. Yes, sir."

The plaintiff testified that when he was about 50 feet away from the intersection he judged that the defendant was approximately 300 feet away, and that at the time he was entering the intersection the defendant "probably was about 275" feet away; that as he was about to make the turn from the middle of the intersection he "figured" the defendant was 175 feet to 200 feet away; and that after he started the turn he was looking down School Street to see the traffic situation there, and was only aware of the defendant's headlights just before the impact. He began to judge the defendant's speed when he (the plaintiff) was about 40 feet from the intersection, and estimated it to be approximately 35 miles an hour.

Other facts appearing in the record will be referred to hereinafter.

Defendant's first contention is that plaintiff William Mahnkey was guilty of contributory negligence as a matter of law, which precludes plaintiffs' recovery of damages. Before discussing this contention, we quote the language of our Supreme Court in the recent case of Anthony v. Hobbie, 25 Cal.2d 814, at page 818, 155 P.2d 826, at page 829: "Turning to the question of contributory negligence on the part of the decedent, certain rules must be remembered. The burden of proving contributory negligence is upon the defendant. 19 Cal. Jur. 697–699. True, contributory negligence may be found by the trier of fact from the plaintiffs' own evidence. But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. [Citing cases.]"

The principal argument of defendant upon this point is that plaintiff William Mahnkey was negligent per se in not giving the required signal for the full distance of 50 feet before turning. Defendant quotes section 544 of the Vehicle Code, which provides: "(a) No person shall turn a vehicle [from a direct course or move right or left upon a roadway] unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein in the event any other vehicle may be affected by such movement. (b) Any signal of intention to turn right or left shall be given continuously during the last 50 feet traveled by the vehicle before turning."

[2] However, the mere proof of the violation of a statute does not of itself establish contributory negligence; it must also be proved that the breach of the statutory duty was the proximate cause of the injury. As stated in Reeves v. Lapinta, 25 Cal.App.2d 680, at page 681, 78 P.2d 465: "The law is settled that (1) the violation of a statute or ordinance constitutes negligence *per se*, and (2) it constitutes contributory negligence if the failure to comply with the statute or ordinance contributes directly to the plaintiff's injury. [Citing cases.]"

[3] We do not believe that under the evidence in the instant case it can be held as a matter of law that the failure of plaintiff to give the required signal was a proximate cause of the collision. Defendant testified that he saw plaintiff only a few seconds before the accident, when he (defendant) was only 20 feet from the intersection and plaintiff was about to cross over in front of him, headed west into School Street. It is ap-

parent that even if plaintiff had had his arm out for the full required 50 feet defendant would not have seen it, and it would have made no difference in the result.

As we view the record, the question of negligence was one for the jury, and it was fairly inferable from the evidence that defendant was not in such close proximity to the intersection as to constitute an immediate danger to one turning, but rather that the defendant was negligent in approaching the intersection at too rapid a speed on this drizzly night, and in failing to keep a proper lookout for others who might be using the intersection. Under such circumstances, the question as to whether plaintiff, in making a left turn at the intersection while defendant was approaching from the opposite direction, exercised the degree of care that should be exercised by a reasonably prudent person under similar circumstances, was one of fact for the jury. McDevitt v. Rogers, 58 Cal.App.2d 307, 136 P.2d 323; Paulos v. Market Street Ry. Co., 136 Cal.App. 163, 28 P.2d 94.

We conclude, therefore, that the implied finding of the jury that plaintiff was not guilty of contributory negligence as a matter of law finds support in the record.

Defendant next contends that the court erred in giving any instruction on the doctrine of last clear chance, arguing that there was no evidence to support it; and defendant also questions the correctness of the following two portions of the instructions on last clear chance: (1) "Or, if you find that one was free from negligence and the other was negligent but that the former, *although not negligent*, had an opportunity or the last clear chance to avoid the accident, then the latter is entitled [to] recover from the former compensation for his damages, the amount of which you will determine"; (2) "The rule of the last clear chance means just what the words imply, namely that if one has the opportunity of avoiding the injury, *he must at his peril exercise it.* The question is not whose negligence came first or last, but whose negligence was the proximate cause of the injury." (Italics emphasize main objections of defendant.)

The case of Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915, is a leading authority on the doctrine of last clear chance. It is there said, 216 Cal. at page 202, 13 P.2d at page 917: "Whether or not, therefore, negligence is the proximate or remote cause is, as above stated, a question of fact in each particular case. The doctrine of continuing negligence has no application unless the negligence is the proximate cause of the injury. On the other hand, if all the elements of the last clear chance doctrine are present and plaintiff's negligence becomes remote in causation, then this doctrine applies. If any one of the elements of the last clear chance doctrine is absent, then plaintiff's negligence remains the proximate cause and bars recovery. But the continuous negligence rule does not apply to a situation in which the last clear chance rule, by the presence of its own elements, is brought into operation. Where these necessary elements are lacking, courts have declared, and righfully so, that plaintiff's negligence being continuous and contributory with that of defendant bars a recovery. The necessary elements, as deduced from the well-considered cases, may be stated in substance as follows: That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure. It has been said that such failure by defendant to use ordinary care under such circumstances amounts to a degree of reckless conduct that may well be termed willful and wanton, and when an act is thus committed, contributory negligence upon the part of the person injured is not an element which will defeat a recovery. Esrey v. Southern

Pac. Co., supra, 103 Cal. 541, at page 545, 37 P. 500."

[4] Applying the language just quoted to the evidence in the instant case, we find no justification for the operation of the doctrine of last clear chance. The defendant testified that he was 20 feet from School Street when he first saw plaintiff's car start to turn; that he applied his brakes and his car started to skid on the wet pavement; that he tried to go around plaintiff's car by turning into School Street, but could not make it, so again applied his brakes though it was too late for them to become effective. There is no evidence that defendant saw plaintiff's car sooner, but even if it could be inferred from the evidence that he did see plaintiff's car sooner it is difficult to see how defendant could realize that plaintiff was in a position of danger until plaintiff made the left-hand turn; and it is difficult also to see how defendant could have a last clear chance to avoid the collision after plaintiff made the left-hand turn. In order to make the doctrine of last clear chance applicable, we must assume that plaintiff was, as a result of his negligence, in a position of danger, which would mean that he negligently made a left-hand turn into the path of defendant's oncoming automobile. Defendant's car must have been close to the intersection or there would have been no collision. Defendant could not know that plaintiff was in a position of danger until plaintiff turned into his path, and then it was too late for defendant to have a last clear chance to avoid the collision. We believe that the instant case was one in which the questions of negligence and of contributory negligence should have been left to the jury, but we are convinced that it was prejudicial error to submit the issue of last clear chance to the jury. As was said in the case of Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 28 P.2d 932, in which the court held that an instruction on the last clear chance doctrine was properly refused: "* * * it is not enough to relieve a plaintiff of his own negligence that the defendant may have had *a chance* to avoid the accident, but defendant must have had the *last chance* and also had a *clear chance* to do so by the exercise of *ordinary* care. That he should have had the *last chance* implies that his chance to avoid the accident must have come later in point of time than any similar chance on the part of the injured person. That he should have had a *clear chance* implies that he must have had more than a *bare possible chance* to avoid an unexpected peril created practically simultaneously with the happening of the accident by the negligence of the injured party." 136 Cal.App. at page 227, 28 P.2d at page 934. Also, in Gundry v. Atchison, T. & S. F. Ry. Co., 104 Cal.App. 753, at page 764, 286 P. 718, at page 722, the court quoted the following from Bagwill v. Pacific Electric R. Co., 90 Cal.App. 114, 265 P. 517: "'The words mean exactly as they indicate, namely, last *clear* chance, not possible chance.'" And in Sichterman v. R. M. Hollingshead Co., 94 Cal.App. 486, at page 491, 271 P. 372, at page 374, 1111, it was said: "* * * the evidence does not disclose any fact which showed to the driver of the truck that the Ford car was in a position of danger from which it could not extricate itself. Under the facts contained in the record, the defendant had as much right to claim that the Ford car should have stopped."

In all of the above-cited cases, judgments for the plaintiffs were reversed, the evidence not justifying the giving of the issue of last clear chance to the jury by instructions. A leading case justifying reversal on this ground is Wallis v. Southern Pacific Co., 184 Cal. 662, 195 P. 408, 15 A.L.R. 117, which stated: "This instruction may have governed the jury in arriving at a verdict for the plaintiff, and, in the absence of evidence to support it, must be held fatally prejudicial." 184 Cal. at page 672, 195 P. at page 412. See, also, Dalley v. Williams, 73 Cal.App.2d 427, 166 P.2d 595; Folger v. Richfield Oil Corp., 80 Cal.App.2d 655, 182 P.2d 337.

As to the contention of defendant that the instructions given on the doctrine of last clear chance did not correctly state the law, we have read said instructions carefully, and believe that, read together, they correctly state the law on the subject. However, in view of our conclusion that the issue of last clear chance should not have been submitted to the jury, we deem it unnecessary to discuss this contention in detail.

Defendant's final contention is that plaintiffs' counsel was guilty of prejudicial misconduct in bringing before the jury evidence that defendant was insured.

On redirect examination of plaintiff William Mahnkey by plaintiffs' counsel, the following occurred:

"Q. Now, in answer to a question by Mr. Bledsoe [defendant's counsel] concerning the doctors that you visited, you testified that you had consulted with Doctor Drees at the Junipero Serra Hospital? A. Yes.

"Q. And that he had called in Doctor Smith, who made an examination at the Junipero Serra Hospital in connection with * * * [urinalysis] and diabetes, is that correct? A. Yes.

"Q. Now, did you at any time visit any other doctor since the time of the accident? A. Yes, I did.

"Q. What doctor was that? A. Doctor Cline was the name, I believe.

"Q. How did you happen to go to Doctor Cline? A. *Well, I was requested by the insurance company.*

"Mr. Bledsoe: If Your Honor please, we assign that as misconduct, the asking of that question as misconduct and ask the Court to declare a mistrial.

"The Court: Motion is denied. You will disregard the remarks about insurance. There is no insurance company a party to this suit." (Italics added.)

We would be extremely naive and unrealistic if we did not believe that the question "How did you happen to go to Dr. Cline?" could have no other purpose except to bring out the fact that defendant had an insurance carrier. Certainly, how plaintiff happened to go to Dr. Cline could have no relevancy to any issue in the case.

As this court said in Freeman v. Nickerson, 77 Cal.App.2d 40, 174 P.2d 688:

"It is well settled in California that gratuitous references, either in the evidence or the argument, to the fact that a defendant carries liability insurance is prejudicial misconduct justifying a reversal. Squires v. Riffe, 211 Cal. 370, 295 P. 517; Rising v. Veatch, 117 Cal.App. 404, 3 P.2d 1023; Citti v. Bava, 204 Cal. 136, 266 P. 954; Sischo v. City of Los Banos, 26 Cal.App.2d 642, 80 P. 2d 116, [119], 1020; Nichols v. Smith, 136 Cal.App. 272, 28 P.2d 693; Schellenberg v. Southern California Music Co., 139 Cal.App. 777, 35 P.2d 156; 10 Cal.Jur. [10-Yr.] Supp. 664.

"The language of the Supreme Court in Citti v. Bava, supra, 204 Cal. at page 138, 266 P. 954, 955, is typical of the above cited cases. Referring to proof of a settlement disclosing 'the fact that the defendant was indemnified by a policy of insurance,' it is there said: 'The evidence of the settlement, alone, not connected up with any act or admission of the defendant, and concerning which he had nothing to do, was clearly inadmissible in evidence. The error in admitting it might not in and of itself require a reversal, but, coupled with the avowed purpose and successful attempt of plaintiff's counsel to get before the jury, not only the fact of the settlement, but also that the settlement was made by the insurance carrier of the defendant, puts the case in a position where section 4½ of article 6 of the Constitution will not save the judgment. The natural tendency of a line of examination that suggests to the jury that the defendant is indemnified against any judgment for damages against him is highly prejudicial to his rights, especially in a closely balanced case where the evidence otherwise would be easily sufficient on appeal to support a verdict either for the plaintiff or for the defendant. Such attempts on the part of counsel have frequently been held to be improper and prejudicial. * * * From an examination of the record in this case it is imposisble for us to state that the jury would not have found a different verdict had the objectionable examination not taken place and the evidence not been admitted.'

"In Sischo v. City of Los Banos, supra, the plaintiff testified to a conversation with the mayor of defendant city in a hospital shortly after the accident (26 Cal.App.2d at page 646, 80 P.2d at page 119): '"A. Well, the start of that conversation of course was about myself, how I was getting along, and how I felt, and how I was resting, and that he expressed his sympathy, the fact that I was so seriously injured, but the conversation led to the point where he said that the City of Los Banos in this matter was very lucky, due to his forethought in the matter; he said: 'We have taken out insurance, we only took out insurance only ten days before you had fallen.'"' The appellate court said, 26 Cal.App.2d at page 647, 80 P.2d at page 119: 'That the admission of this testimony was prejudicially erroneous is shown by the case of Squires v. Riffe, 211 Cal. 370, 295 P. 517. The opinion of Toscano had no relevancy whatever to the issues involved. * * * The statement as to the insurance was not involved in anything connected with the accident. * * * As stated in the case of Squires v. Riffe, supra, it must be presumed that counsel for the plaintiff knew the answer which his client would give, and that it would serve no purpose except to show that the city carried insurance.'" 77 Cal.App.2d, at pages 54–55, 174 P.2d at page 696.

"If the mention of defendants' insurance coverage is brought into the case gratuitously and is unrelated to a genuine issue in the case, it would, under the authorities, be misconduct justifying a reversal, but if the reference to insurance is connected up with an admission of negligence or of liability, or any other relevant admission, it will not be deemed misconduct, even though the law frowns upon references to defendants' insurance coverage. * * *". 77 Cal.App.2d at page 58, 174 P.2d at page 698.

In Rising v. Veatch, 117 Cal.App. 404, 3 P.2d 1023, the judgment was reversed because of misconduct similar to that complained of in the instant case. In that case the court said, 117 Cal.App. at page 406, 3 P.2d at page 1023: "In the course of the examination of respondent, Ethel Rising, she was asked by her counsel to relate a certain conversation with appellant. Over repeated objections of appellant's counsel, the following testimony was given: 'In regard to reimbursing us for the doctor bills— * * * Reimburse us for the expenses of the doctors; that it was out of his hands, and would have to be handled through his insurance.'

"Counsel for appellant immediately assigned the asking of the question and the answer as prejudicial misconduct that could not be cured by admonition, and asked the court to declare a mistrial. The court refused to declare a mistrial, but struck out the offending answer and admonished the jury to disregard it. * * *"

In holding that the admonition did not cure the error, the court there said: "The courts have so frequently, and in the strongest terms, condemned the eliciting of evidence concerning insurance against liability carried by defendants that no excuse can be conceived for counsel bringing it out, and the practice is so recurrent as to call for the sternest measures by both trial and appellate courts whenever it occurs."

[5] In view of the fact that the case must be reversed because of the error in giving the last clear chance instruction, we do not find it necessary to determine whether this reference to insurance would alone cause a reversal. It is sufficient to hold it was error.

In view of the foregoing, the judgment should be, and the same is, hereby reversed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.

CLEMENT v. STATE RECLAMATION BOARD, SACRAMENTO SAN JOAQUIN DRAINAGE DIST. et al.

Sac. 5962.

Supreme Court of California, in Bank.

Aug. 2, 1950.

Rehearing Denied Aug. 31, 1950.

Eldon W. Clement brought an action in inverse condemnation against the State Reclamation Board, Sacramento San Joaquin Drainage District, State of California, and others, for damages allegedly resulting to plaintiff's farm land as a result of construction and maintenance of a flood control project on the Sacramento River. The Superior Court, Colusa County, C. C. McDonald, J., rendered a judgment adverse to plaintiff and plaintiff appealed. The Supreme Court, Traynor, J., held that waters contained by levies constructed by farmers before completion of flood control project were the natural stream waters of the river which could not be diverted by State onto land of plaintiff without liability for damage thereby done to plaintiff's land.

Judgment reversed and cause remanded.

Prior opinion, 210 P.2d 50.

1. Waters and water courses 🔑116, 118, 119(1)

Flood waters of a natural water course are a common enemy against which owner of land subject to overflow may protect his land by erection of defensive barriers, and such owner is not liable for damage caused to lower and adjoining lands by exclusion of flood waters from his own land although damage to other lands is increased thereby, but if he obstructs natural channel of river or creates new artificial channel by which natural stream waters are carried on to lands of another that would have been protected therefrom but for creation of artificial channel, owner is liable for damage resulting therefrom.

2. Levees and flood control 🔑19
Waters and water courses 🔑116

Flood waters of the Sacramento River are a common enemy against which proper flood control measures may be taken without liability for damage caused thereby.

3. Eminent domain 🔑2(10)

Action that an individual landowner may take to protect his land from flood waters of a natural water course may be taken by the state for protection of all landowners in an area without liability under constitutional provision requiring payment of just compensation for private property taken or damaged for public use. Const. art. 1, § 14.

4. Levees and flood control 🔑19

Landowner could not assert right to recover from state for damage to land resulting from water overflow if the water would have overflowed natural banks of river even if flood control project had not been constructed.

5. Eminent domain 🔑2(10)

If construction of a flood control project diverts natural stream waters onto land of a private landowner and causes damage thereto, the land is as much taken or damaged for a public use, for which compensation must be paid by state, as if land were condemned for construction of a highway or school. Const. art. 1, § 14.

6. Waters and water courses 🔑118

The fact that a landowner availed himself of right to repel vagrant waters of a river by embankment does not, in absence of further circumstances, impose upon him any obligation to maintain such obstruction, or to refrain from restoring natural conditions.

7. Eminent domain 🔑2(10)

Where riparian owners in territory near river co-operated in construction of flood control levees for protection of their land, and such levees existed for 62 years before state flood control project was constructed, and substantial sums in farm investments were made in reliance upon levees, waters contained by levees before completion of state project were "natural stream waters" which could not be diverted by state onto lands of private landowner without liability for damage. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Natural Stream Waters".

8. Levees and flood control 🔑19
Waters and water courses 🔑116

A landowner is not deprived of protection of common enemy doctrine by his failure to maintain a faulty and insecure barrier in construction of protective levees.

9. Appeal and error 🔑1002

Resolution of conflicting evidence was required to be made by trier of fact and not by Supreme Court on appeal.

10. Eminent domain 🔑69

If private property is damaged by construction by state or by agency of state of a flood control project, the state or agency must compensate landowner therefore regardless of whether damage was intentional or result of negligence. Const. art. 1, § 14.

11. Appeal and error 🔑1001(1)

A judgment will not be reversed on appeal if there is substantial evidence to support verdict on any theory on which verdict might have been reached.

12. Appeal and error 🔑1001(1)

The rule that a judgment will not be reversed on appeal if there is substantial evidence to support verdict on any theory on which verdict might have been reached applies to cases in which one or more of possibilities upon which jury might have reached verdict is not supported by substantial evidence, but other theories supported by such evidence were presented, it then being presumed that jury reached its verdict on theory supported by evidence.

13. Appeal and error 🔑1001(1)

The rule that a judgment will not be reversed on appeal if there is substantial evidence to support verdict on any theory on which verdict might have been reached applies to case in which no other verdict is possible as a matter of law.

14. Appeal and error 🔑1064(1)

Rule that a judgment will not be reversed on appeal if there is substantial evidence to support verdict on any theory on which verdict might have been reached was not applicable where jury was precluded by erroneous instructions from considering a valid theory upon which a result different from that actually reached might have been supported, notwithstanding jury might have found for prevailing party on some other ground.

15. Limitation of actions 🔑55(7)

Where claim for damages resulting from water flowing on plaintiff's land as result of construction and maintenance of a flood control project, was filed with State Board of Control on May 7, 1942, and damage first became apparent about June 1, 1941, and complaint in action in inverse condemnation was filed on October 16, 1944, action was not barred by either two or three year statute of limitations. Pol.Code, § 688.1; Code Civ.Proc. § 338, subd. 2.

16. Eminent domain 🔑121

Where state and federal government each paid one-half cost of constructing flood control project, and state purchased land for right of way and flowage and participated with federal agencies in planning of project, and responsibility for its control was vested concurrently in state and federal government, and operation of completed project was sole responsibility of state, participation in project by federal government would not relieve state or state agency from liability for flooding land of private land owner. Water Code, § 8361 (i), Act. Cong. Aug. 26, 1937, 50 Stat. 844.

Earl D. Desmond, E. Vayne Miller, Sacramento, and Hudson Ford, Colusa, for appellant.

Fred N. Howser, Attorney General, Walter S. Rountree, Timothy W. O'Brien and Robert E. Reed, Deputy Attorneys General, C. C. Carleton and Henry Holsinger, Sacramento, for respondents.

TRAYNOR, Justice.

In an action in inverse condemnation under article I, section 14 of the California

Constitution,[1] plaintiff alleged that his farm land had been damaged by defendants' construction and maintenance of a flood control project on the east bank of the Sacramento River north of the city of Colusa. The complaint was in two counts. The first alleged a taking or damaging of private property for a public use. The second alleged that the damage to the property resulted from the negligent maintenance of the project. Motions for nonsuit were granted to the individual members of the State Reclamation Board, and the cause was tried against the State of California and the state agencies charged with the maintenance and control of the project. The jury returned a verdict for defendants, and plaintiff appeals from the judgment entered thereon.

Plaintiff's farm is located in the Butte Basin of the Sacramento Valley about a mile and a half northeast of Colusa, and a quarter of a mile east of the east bank of the Sacramento River. It is rectangular in shape, 998.7 feet wide and about a mile in length, and its longitudinal axis extends east and west. During the early settlement of Colusa County, riparian owners cooperated in the construction of flood control dikes and levees along the east bank of the Sacramento River. By 1870 a series of levees seventy-two feet high along the east bank protected the lands in the Butte Basin, including that now owned by plaintiff, from the waters of the Sacramento River at normal flood stage. During the first few years of their maintenance two major breaks occurred in the levees. One, the "DeJarnatt Break," was about three miles south of Colusa; the other, the "Moulton Break," was about twelve miles north of Colusa. Thereafter, several minor breaks occurred in the levees, some of them directly opposite the lands of plaintiff. At flood stage, the waters of the river passed through the several breaks in the levee and flowed into the Sutter and Butte Basins generally without overflowing the levees. Plaintiff's land was subject to inundation whenever water collected in the Butte Basin. He contends, however, that this inundation was caused by the over-all rise of water in the basin and not by the direct flow of flood water from the river and that he was able to farm his property until 1940.

Shortly after the construction of the farmer levees, the federal government took the first steps toward flood control and reclamation in the Sacramento Valley. In 1893 the California Debris Commission was created by an Act of Congress to accomplish flood control and restore navigation in the Sacramento River. 33 U.S.C.A. § 661 et seq. In 1913 the Legislature formed the State Reclamation Board and the Sacramento-San Joaquin Drainage District, defendants herein, vesting them with broad powers over all flood control matters relating to the Sacramento and San Joaquin Rivers and their tributaries. Further reclamation work was forbidden unless approved by these agencies. Pursuant to a comprehensive plan of flood control formulated by these agencies in co-operation with the California Debris Commission and the United States Engineers, the latter undertook construction of the project. The cost was shared equally by the federal government and the state. The state furnished the necessary rights of way, purchased flowage rights wherever necessary, and undertook the maintenance of each part of the project as it was completed.

By 1932 the project was completed from the northern boundary of Colusa County south to the confluence of the Sacramento River and San Francisco Bay. In that year the Moulton and DeJarnatt Breaks were closed by levees. The channel of the Sacramento River north of plaintiff's property was deepened and widened and its carrying capacity increased from an undetermined but substantially smaller capacity to 145,000 cubic feet of water per second. South of plaintiff's property, the narrower channel of the river had a maximum carrying capacity of 65,000 cubic feet of water per second. Under these circumstances no system of levees without relief openings could be constructed within the limits of reasonable engineering. To provide a relief opening to carry off 80,000 cubic feet of water per second before the flow of the Sacramento River reached its narrower channel to the south, the Colusa Weir was constructed by cutting the sixty-two year old farmer levee to a height of 61.8 to 64 feet leaving the levee north and south of the cut at 72 feet. The south end of the 1650-foot wide cut lay about 500 feet northwest of the northwest corner of plaintiff's farm. The cut was surfaced with concrete, and parallel levees known as training levees were built at its north and south ends, which extended eastward for about a mile and gradually widened out so that at their termini they were about half a mile apart. The north boundary of plaintiff's farm ran parallel to the south training levee, being separated therefrom by an 80-foot wide strip of land through which ran a ditch or borrow pit caused by the excavation of dirt to build the training levee. The northeast corner of plaintiff's land was directly opposite the east terminus of the south training levee. The training levees were designed to direct the water flowing over the surfaced cut into the Butte Basin to the east where it would fan out and thereby relieve the flow and pressure on the main river levees.

---

[1] "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * * ."

From the Colusa Weir to the end of the training levees, the downward gradient is about 9 feet per mile, abruptly levelling off at the mouth of the weir, thus decreasing the high velocity of the water flowing over the cut, caused by the deepened channel of the river to the north and the steep gradient between the training levees. As a result of the decreased velocity, the carrying capacity of the water was substantially reduced, and as the water began to fan out at the mouth of the weir it deposited silt and sand in the form of an alluvial fan or delta that by the winter of 1939–1940 had reached a sufficient height to impede and divert the flow of water pouring over the cut and through the weir to the east. The flow was no longer permitted to fan out into the basin but was diverted by the delta at the mouth of the weir so that it flowed between the delta and the termini of the training levees. The water that flowed between the delta and the end of the south training levee, instead of flowing out into the basin, backed up and overflowed the east end of plaintiff's farm. Plaintiff alleges that the water deposited sediment and debris at the east end of his farm, forming a delta thereon that made farming impossible on that part of his property after 1940. It is also alleged that the high velocity flow cut channels over the east part of the farm and filled the borrow pit between the farm and the training levee, turning back toward the river and spilling over onto the central portion of plaintiff's property, cutting new channels and depositing silt thereon. It is alleged that as a result of this diversion of the water onto his land, plaintiff's farm depreciated in value from $30,000 to $8,000.

Plaintiff assigns as error certain instructions[2] given by the trial court with respect

---

[2] "The phrase 'natural bank' as used by the Court in these instructions, means the elevation of the surface of the ground which confines the stream within its natural channel, and which was formed by action of the flowing water, exclusive of artificial embankments or levees."

"The Court instructs you that for the purposes of this case natural stream waters comprise those waters which are capable of being retained within the natural banks of the Sacramento River and not assisted by artificial levees upon or near the banks."

"The Court further instructs you that for the purpose of this case waters in excess of natural stream waters as defined by the Court, but retained within the leveed channel by means of artificial levees or embankments constitute flood waters."

"You are hereby instructed that there was no obligation on the part of the defendants or any of them to maintain levees on the Sacramento River for the protection of plaintiff."

"As to the levees along the Sacramento River in existence before the construction of the Colusa Weir, you are instructed that the plaintiff had no right to have the same maintained for his benefit, or maintained at all. The causto defendants' right under the "common enemy doctrine" to construct flood control projects without incurring liability to private landowners for damage to their land caused thereby.

By the challenged instructions, the jury was instructed that the natural banks of the Sacramento River were the walls of the river channel cut by the action of the flowing water without reference to artificial dikes or levees constructed thereon before 1870 by riparian owners; that the natural stream waters were only those waters that were contained by the natural banks of the river as defined by the court and did not include waters that would have been contained by the farmer levees; and that all waters that would have overflowed the natural banks of the river were flood waters. On the basis of these definitions, the court instructed the jury that if the water flowing over the Colusa Weir was flood water that would have overflowed the natural banks had the farmer levees never been constructed, damage caused thereby was not compensable; that defendants' liability under article I, section 14 was limited to damage caused by the river waters only if the cutting of the levee and the construction of the Colusa Weir cut away the natural banks of the river and allowed the natural stream waters to escape, and if the alleged damage was caused by the diversion of the natural stream waters. After the jury had retired, they requested a clarification of these instructions, which were then repeated and summarized by the trial court as follows: "If you don't understand that, in so many words it is this: If the defendants in this case caused the natural stream water of the river to flow onto the lands of the plaintiff they would be liable; if they didn't, they wouldn't."

Plaintiff contends that the challenged instructions in effect erroneously directed a verdict for defendants. He does not attack the instruction explaining the common enemy doctrine to the jury, but he objects to the definitions upon which the instruction was based. In his view, the construction of the farmer levees in 1870 and their continued maintenance until 1932 created a new natural condition, in effect making the channel between the farmer levees a new natural channel and the waters contained by those levees the natural stream waters of the Sacramento River. He contends that the jury should have been instructed that if the water causing the damage to his land was the natural stream water as he defines it, that damage is not covered by the common enemy doctrine and is compensable under article I, section 14. He asserts that the common enemy doctrine immunizes defendants from liability only for damage resulting from the inundation of his land by flood waters, i. e., waters that would not have been contained by the farmer levee before it was lowered in the construction of the Colusa Weir. We conclude that the trial court's instructions were based on an erroneous definition of terms as applied to the facts of the present case, and that they precluded the jury from determining whether plaintiff's land was damaged by waters against which he was entitled to the protection of the farmer levee.

[1] It is well established that the flood waters of a natural watercourse are a com-

---

ing of an opening to be made in such levees in connection with the construction of the Colusa Weir was no invasion of any right of the plaintiff if the effect thereof was merely to permit an outlet for the flow of flood water from the Sacramento River."

"If you find that waters flowing over the Colusa Weir were not waters which would have been confined to the channel of the Sacramento River by the natural banks thereof exclusive of any artificial levees, you are instructed that such waters were flood waters. Flood waters of the Sacramento River, as so defined, are a common enemy, as to which the law recognizes the right of every landowner to protect his lands by all reasonable means, even though damage may thereby be inflicted upon his neighbor."

"If in this case you find that the state did nothing more than a private landowner might have done on his own property without liability, as set forth in these instructions, you are instructed to find for the defendants."

mon enemy against which the owner of land subject to overflow by those waters may protect his land by the erection of defensive barriers, and that he is not liable for damage caused to lower and adjoining lands by the exclusion of the flood waters from his own property, even though the damage to other lands is increased thereby. If he obstructs the natural channel of the river, however, or creates a new artificial channel by which the natural stream waters of the river are carried onto the lands of another that would have been protected therefrom but for the creation of the artificial channel, he is liable for damage resulting therefrom. Weinberg Co. v. Bixby, 185 Cal. 87, 95, 196 P. 25; Everett v. Davis, 18 Cal.2d 389, 393, 115 P.2d 821; McDaniel v. Cummings, 83 Cal. 515, 520, 23 P. 795, 8 L.R.A. 575; Seufert v. Cook, 74 Cal.App. 528, 537, 241 P. 418; Jones v. California Development Co., 173 Cal. 565, 575, 160 P. 823, L.R.A.1917C, 1021; LeBrun v. Richards, 210 Cal. 308, 314, 291 P. 825, 72 A.L.R. 336; McCarthy v. Standish, 63 Cal.App. 457, 462, 218 P. 1025.

[2] It is settled that the flood waters of the Sacramento River are a common enemy against which proper flood control measures may be taken without liability for damage caused thereby. Gray v. Reclamation District No. 1500, 174 Cal. 622, 637, 163 P. 1024; Lamb v. Reclamation District, 73 Cal. 125, 133, 14 P. 625, 2 Am.St. Rep. 775; Perkins v. Blauth, 163 Cal. 782, 790–792, 127 P. 50; Seufert v. Cook, 74 Cal.App. 528, 537, 241 P. 418.

[3, 4] Action that may be taken for his own protection without liability by an individual landowner may be taken by the state for the protection of all the landowners in an area without liability under article I, section 14 for damage caused thereby. Archer v. City of Los Angeles, 19 Cal.2d 19, 24, 119 P.2d 1; O'Hara v. Los Angeles County Flood Control District, 19 Cal.2d 61, 63, 119 P.2d 23; House v. Los Angeles County Flood Control District, 25 Cal.2d 384, 388, 153 P.2d 950; Gray v. Reclamation District, 174 Cal. 622, 638, 163 P. 1024; San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 406, 188 P. 554, 9 A.L.R. 1200. "The liability of the state under article I, section 14 of the California Constitution arises when the taking or damaging of private property is not so essential to the general welfare as to be sanctioned under the 'police power' [citations], and the injury is one that would give rise to a cause of action on the part of the owner independently of the constitutional provision. [Citations]. The provision permits an action against the state, which cannot be sued without its consent. It is designed, not to create new causes of action, but to give a remedy for a cause of action that would otherwise exist. The state is therefore not liable under this provision for an injury that is *damnum absque injuria*. If the property owner would have no cause of action were a private person to inflict the damage, he can have no claim for compensation from the state. [Citations]. In the present case, therefore, plaintiffs have no right to compensation under article 1, section 14 if the injury is one that a private party would have the right to inflict without incurring liability." Archer v. City of Los Angeles, supra, 19 Cal.2d at page 24, 119 P.2d at page 4; United States v. Sponenbarger, 308 U.S. 256, 266, 60 S.Ct. 225, 84 L.Ed. 230; Jacobs v. United States, 290 U.S. 13, 16, 54 S.Ct. 26, 78 L.Ed. 142, 96 A.L.R. 1; Weck v. Los Angeles County Flood Control District, 80 Cal.App.2d 182, 193, 181 P.2d 935; Stone v. Los Angeles County Flood Control District, 81 Cal.App.2d 902, 912, 185 P.2d 396; Lamb v. Reclamation District, 73 Cal. 125, 133, 14 P. 625, 2 Am.St.Rep. 775. Since the common enemy doctrine protects defendants from liability only to the extent that the waters carried onto plaintiff's land were flood waters, the propriety of the challenged instructions depends upon the correctness of the definitions of "flood water" and "natural stream water" upon which those instructions were based. Plaintiff can assert no right to recovery for damage caused by water that would have overflowed the natural banks of the river even if the Colusa Weir had not been constructed. Injury caused thereby is *damnum absque injuria* even though

it results in part from the increased velocity of the waters caused by the deepening of the channel in the construction of the project, Archer v. City of Los Angeles, supra, 19 Cal.2d 19, 25, 119 P.2d 1, and cases cited therein, since plaintiff must protect his own land from vagrant flood waters excluded from the lands of others by the construction of protective barriers, and he can assert no right to recovery of damages when the injury has resulted from his failure to take proper measures therefor. Archer v. City of Los Angeles, 19 Cal.2d 19, 25–26, 119 P.2d 1; Weinberg Co. v. Bixby, 185 Cal. 87, 108, 196 P. 25.

[5] If, however, the construction of a flood control project diverts natural stream waters onto the land of a private owner and causes damage thereto, that property is as much taken or damaged for a public use for which compensation must be paid as if it were condemned for the construction of a highway or a school. The propriety of the challenged instructions therefore turns upon whether the trial court correctly defined the "natural banks" and "natural stream waters" of the Sacramento River.

[6, 7] It is true, as defendants assert, that the farmer levees are not the original banks of the Sacramento River. It is also true that the "fact that a landowner avails himself of the right to repel vagrant waters of a river by embankment does not, *in the absence of some further circumstances or set of circumstances,* impose upon him any obligation to maintain such obstruction, or to refrain from restoring natural conditions." Weinberg Co. v. Bixby, 185 Cal. 87, 101, 196 P. 25, 31. (Italics added.) It does not follow, however, that the state may without liability tear out a protection that has existed for sixty-two years to the lands of plaintiff upon which substantial sums have been expended in reliance upon the continuance of the protection. House v. Los Angeles County Flood Control District, 25 Cal.2d 384, 153 P.2d 950. In view of the long continued maintenance of the levees, together with the expenditure of substantial sums in farm investments in reliance thereon, the levees came to be the natural banks. The waters they contained before the whole project was completed and the Moulton and DeJarnatt Breaks closed must be regarded as natural stream waters that cannot be diverted onto the lands of another to his detriment without liability therefor. "Where the creator of the artificial condition intended it to be *permanent,* and a community of landowners or water users has been allowed to adjust itself to the presence and existence of the artificial watercourse or other artificial condition, acting upon the supposition of its continuance, and this has proceeded for a long time beyond the prescriptive period, the new condition will be regarded as though it were a natural one, its artificial origin being then disregarded by the law as it has been by the community." 1 Wiel, Water Rights in the Western States, 3d Ed., 1911, § 60, p. 59. "A change in the flow of a stream that appears to be permanent usually leads to costly adjustments by those interested, as they come to regard the artificial condition as permanent. It is therefore reasonable that they should receive as much protection as if the condition were natural." Natural Soda Products Co. v. City of Los Angeles, 23 Cal.2d 193, 197, 143 P.2d 12, 16; People v. City of Los Angeles, 34 Cal.2d 695, 214 P.2d 1; Chowchilla Farms Inc. v. Martin, 219 Cal. 1, 18, 25 P.2d 435; Matheson v. Ward, 24 Wash. 407, 411, 64 P. 520, 85 Am.St.Rep. 955; Kray v. Muggli, 84 Minn. 90, 96, 86 N.W. 882, 54 L.R.A. 473, 87 Am.St.Rep. 332; Shepardson v. Perkins, 58 N.H. 354, 356; Popham v. Holloron, 84 Mont. 442, 451, 275 P. 1099; Smith v. Youmans, 96 Wis. 103, 109–110, 70 N.W. 1115, 37 L.R.A. 285, 65 Am.St.Rep. 30; Hammond v. Antwerp Light & Power Co., 132 Misc. 786, 230 N.Y.S. 621, 635. If the rule were otherwise, landowners in the area would have no recourse for damage caused by the complete destruction of the farmer levees.

[8] The present case is distinguishable from Weinberg Co. v. Bixby, 185 Cal. 87, 196 P. 25, on which defendants rely. The damage there considered was caused by flood waters and the defendants were held free from liability because they had done nothing more than to repel those waters

from their own land, action protected by the common enemy doctrine. In protecting their own land from inundation, they cut a dike that had been constructed only ten years before. The dike had afforded insubstantial protection during the years of its maintenance and had been periodically washed out by heavy rains. Its existence was more a hazard to the lands in the area than a useful barrier. There was neither allegation nor proof that any expenditures or investments had been made in reliance on this insecure barrier during the short period of its maintenance, nor was there any evidence from which it could be inferred that the damage complained of would not have occurred had the dike not been cut. Under those circumstances, it was properly held that defendants were under no duty to maintain the dike and that the reopening of the old outlet was not actionable. It is clear that a landowner is not deprived of the protection of the common enemy doctrine by his failure to maintain a faulty and insecure barrier in the construction of protective levees. It does not follow, however, that there is no duty not to destroy the barrier when it has proved substantially secure, has been maintained for more than sixty years, and substantial sums have been expended in reliance upon its continued maintenance.

[9] The construction of the Colusa Weir was not an independent project by which a continuous flood control barrier was cut. The construction of the weir was coincident with the closing of the Moulton and DeJarnatt Breaks to provide a relief opening for the protection of the levees. Damage caused thereby is therefore not actionable unless the cutting of the weir caused more water to flow into the Butte Basin than would have flowed through the Moulton and DeJarnatt Breaks before they were closed. There was ample evidence to support defendants' contention that, even if it is assumed that plaintiff's land was damaged by the inundation, the damage is not attributable to defendants' construction of the Colusa Weir but to the flood action of the Sacramento River that would have caused the damage if the Moulton and De Jarnatt Breaks had not been closed and the Colusa Weir had not been constructed. Before the construction of the flood control project, the Sacramento River during flood season periodically overflowed the banks of its channel and poured through the Moulton and De Jarnatt Breaks at an elevation substantially lower than that of the Colusa Weir. The result was that all the lands in the Butte Basin, including that of plaintiff, were only partially protected by the farmer levees and were periodically inundated by the flood waters of the river flowing through the breaks. The owners of the lands in the basin could have closed the breaks but, had they done so, the river would inevitably have forced breaks at other points along the levees, and, as the evidence showed, there was a strong possibility that such a break would have occurred at a point opposite plaintiff's property because of the occurrence of previous breaks in that location. The rear part of plaintiff's property was classified as swamp and overflowed land in the original government survey of the area. It is not disputed that it would have been poor engineering practice to close the Moulton and De Jarnatt Breaks and not to provide another relief opening such as the Colusa Weir. There was evidence that, rather than diverting water onto plaintiff's land by which it would otherwise not have been reached, the construction of the Colusa Weir and the closing of the other breaks actually diminished the flow of water into the Butte Basin, limited the occasions upon which it was flooded, and raised the level at which the river would overflow. There was evidence that the construction of the Colusa Weir did not increase the frequency of inundation of plaintiff's land and that plaintiff's land was not flooded to any greater extent than it had been by water flowing through the Moulton and De Jarnatt Breaks before the weir was constructed. The jury could have inferred that the large expenditures of the state and of the federal government for greater flood protection than that afforded by the farmer levees actually bene-

fited plaintiff as well as the other landowners, and that the damage caused by waters flowing over the Colusa Weir was less than would have been caused by the flood waters of the river had the project not been constructed. This evidence, however, does not as a matter of law require a verdict for defendants. They did in fact cut the bank of the river from eight to ten feet below its normal elevation opposite plaintiff's land and caused the flow of water over the weir to be dumped on plaintiff's land. The water that would have flowed through the Moulton and De Jarnatt Breaks before they were closed is flood water because it was not contained by the banks of the river. The water that was prevented from going through these breaks after they were closed remained flood water, and if it is that water that went over the Colusa Weir defendants are not liable. Thus defendants are liable only if the water flowing over the Colusa Weir is water that would have been contained by the banks of the river had the Moulton and De Jarnatt Breaks not been closed. Plaintiff's witnesses disputed the evidence of the state and asserted that water was thereby dumped on plaintiff's land to a substantially greater extent than would have been the case had it been carried out the old breaks. The jury could have inferred from this evidence that plaintiff's land was damaged by the diversion of water over the Colusa Weir whereas it would not have been so damaged by the retention of the Moulton and De Jarnatt Breaks. We cannot say that such an inference finds no support in the evidence. The resolution of the conflict must be made by the trier of fact and not by this court on appeal. De Baker v. Southern Cal. Ry. Co., 106 Cal. 257, 285, 39 P. 610, 46 Am.St.Rep. 237; Perkins v. Blauth, 163 Cal. 782, 790-792, 127 P. 50.

[10] Since there is no question of the power of the state to construct the Colusa Weir, cases such as Gray v. Reclamation District, 174 Cal. 622, 653, 163 P. 1024, in which an injunction against the construction of a flood control system was sought, are not in point. The construction of the public improvement is a deliberate action of the state or its agency in furtherance of public purposes. If private property is damaged thereby the state or its agency must compensate the owner therefor, Cal. Const. Art. I, § 14; Perkins v. Blauth, 163 Cal. 782, 789, 127 P. 50; Kaufman v. Tomich, 208 Cal. 19, 25, 280 P. 130, whether the damage was intentional or the result of negligence on the part of the governmental agency. Reardon v. City & County of San Francisco, 66 Cal. 492, 505, 6 P. 317, 56 Am.Rep. 109; Mitchell v. City of Santa Barbara, 48 Cal.App.2d 568, 572, 120 P.2d 131; Hooker v. Farmers' Irr. Dist., 8 Cir., 272 F. 600; see cases collected in 69 A.L.R. 1231. The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking. Rose v. State of California, 19 Cal.2d 713, 737, 123 P.2d 505; City of Stockton v. Vote, 76 Cal.App. 369, 404, 244 P. 609; City of Redding v. Diestelhorst, 15 Cal.App.2d 184, 193, 59 P.2d 177; City of Pasadena v. Union Trust Co., 138 Cal.App. 21, 25, 31 P.2d 463; Temescal Water Co. v. Marvin, 121 Cal.App. 512, 521, 9 P.2d 335.

The applicability of the common enemy doctrine as a defense available to defendants on a retrial of this cause is set forth in Archer v. City of Los Angeles, 19 Cal. 2d 19, 119 P.2d 1. In that case, defendant city had constructed certain improvements to facilitate the drainage of a watershed area near Venice. Flood waters caused by an unusually heavy rainfall were drained off the lands of upper owners in the area and carried by the drainage system into a lagoon below that was inadequate to contain the greatly increased flow. As a result, the flood waters spilled over onto the lands of the plaintiffs, inundating them for several days. It was not contended that the water causing the damage was natural stream water or that it had been diverted by the drainage system out of its natural channel. The court recognized that "If the water is diverted out of its natural channel and discharged into a different channel or upon neighboring land, the diverter is liable to the owner whose land is injured by such discharge. [Citations]. In the present case, however, there is no evidence of diversion. Straightening, widening, or deepening the channel of a stream to improve the drainage entails no diversion of the waters therein." Archer v. City of Los Angeles, supra, 19 Cal.2d at page 26, 119 P.2d at page 5. Since, in that case, the damage was caused solely by flood waters that would have inundated plaintiffs' land even though the drainage system had not been constructed, it was held that the injury was *damnum absque injuria,* and that it was not made actionable merely because the construction of the drainage system had increased the velocity of the flood waters or the extent to which they covered plaintiffs' land. By the same reasoning, plaintiff in the present case is entitled to recover for whatever damage to his land is attributable to defendants' lowering of the levee and diversion of the natural stream waters into an artificial channel, but cannot recover for any damage caused by flood waters against which he had the duty of self-protection, even though the velocity of those waters and their carrying capacity was increased by the construction of the flood control project.

There is no merit in plaintiff's contention that the trial court erroneously instructed the jury on the allegations of the second count of his complaint, by which recovery was sought on the basis of defendants' allegedly negligent maintenance of the Colusa Weir. The transcript discloses that adequate instructions on negligence were given the jury, and that plaintiff requested no instructions thereon that were not given. The effect of the instructions was to submit properly to the jury the issue whether defendants were negligent in the maintenance of the Colusa Weir and whether plaintiff was damaged thereby. See House v. Los Angeles County Flood Control District, 25 Cal.2d 384, 153 P.2d 950.

[11–14] Defendants contend, however, that any error in the instructions was not prejudicial for the reason that the jury might have based its verdict on the absence of damage to plaintiff's land or the applicability of the statute of limitations, issues not affected by the challenged instructions. They rely on the rule that a judgment will not be reversed on appeal if there is substantial evidence to support the verdict on any theory on which it might have been reached. That rule applies to cases in which one or more of the possible theories on which a jury might have reached a verdict is not supported by substantial evidence, but other theories supported by such evidence were presented; it is then presumed that the jury reached its verdict on a theory that is supported by the evidence. The rule also applies to cases in which no other verdict is possible as a matter of law. It is not applicable, however, to a case such as this, in which the jury has been precluded by erroneous instructions from considering a valid theory upon which a result different from that actually reached might have been supported. The error in such a case is not cancelled by the fact that the jury might have found for the prevailing party on some other ground. " 'It is true that in determining whether or not a verdict is supported by the evidence, we must assume that the jury accepted the view most favorable to the respondent. However, in determining whether or not the instructions given are correct, we must assume that the jury might have believed the evidence upon which the [cause of action or defense of] the losing party was predicated, and that if the correct instruction had been given upon that subject the jury might have rendered a verdict in favor of the losing party.' " Oettinger v. Stewart, 24 Cal.2d 133, 140, 148 P.2d 19, 23, 156 A.L.R. 1221; O'Meara v. Swortfiguer, 191 Cal. 12, 15, 214 P. 975. Where, as here, the error consisted in instructing the jury as a matter of law on a question that is one of fact on conflicting evidence, and a determination favorable to the losing party might have been made if the error had not been committed, that error is prejudicial. Edwards v. Freeman, 34 Cal.2d 589, 212 P.2d 883; Huebotter v. Follett, 27 Cal.2d 765, 770–771, 167 P.2d 193.

Neither of the alternative grounds upon which it is urged that the jury could have reached its verdict is established by the evidence as a matter of law. On both grounds, there was conflicting evidence by which either of two verdicts could be supported.

There was ample evidence to support defendants' contention that plaintiff's land was not damaged by the water. Defendants' expert witnesses testified that the deposit of soil on plaintiff's land was of a fine fertile quality, superior to that of the natural soil beneath it, but that plaintiff made no attempt to clear and cultivate the land after 1941, even though he might easily have done so. There was evidence that the swales allegedly cut on plaintiff's land were in fact cut by flood waters pouring through the breaks in the farmer levees before the construction of the Colusa Weir. There was testimony that the value of plaintiff's land had not been decreased by its inundation but that it had in fact been increased by the soil deposited thereon. We cannot say, however, that plaintiff's evidence would be insufficient to support a verdict in his favor. He testified that his land had depreciated $22,000 in value because of the inundation, and that it could not be farmed along the easterly third because of the sedimentary deposit. His testimony was corroborated by expert witnesses. Plaintiff was competent to testify to the value of his own property, Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 14–16, 151 P. 286, and his testimony, if believed, would support an implied finding that he suffered damage to his land by the construction of the Colusa Weir.

[15] The defense that the Statute of Limitations had run on plaintiff's cause of action is not established by evidence that is without conflict. Plaintiff testified that the damage to his land first became apparent on or about June 1, 1941. He filed a claim therefor with the State Board of Control on May 7, 1942. That claim was not rejected by the Board until September 22, 1944, and the complaint in this action was filed on October 16, 1944. It is clear, therefore, that if plaintiff's testimony were believed by the jury, neither the two-year limitation period prescribed by Political Code section 688.1 nor the three-year limitation period prescribed by Code of Civil Procedure section 338(2) had run at the time this litigation began. Natural Soda Products Co. v. City of Los Angeles, 23 Cal.2d 193, 202, 143 P.2d 12.

[16] Defendants also contend that the participation in the project by the federal government relieves them from liability for damage caused thereby. They rely on Cory v. City of Stockton, 90 Cal.App. 634, 266 P. 552, and Brandenburg v. Los Angeles County Flood Control District, 45 Cal.App.2d 306, 114 P.2d 14. In the Cory case, defendant's only participation in the project was the purchase of land for a right of way. In the present case, the state paid half the construction costs, purchased lands for rights of way and flowage, and participated with the federal agencies in the planning of the project. Responsibility for its control is vested concurrently in state and federal governments. U. S. River and Harbor Act of August 26, 1937, 50 Stat. 844; Water Code § 8530. The operation of the completed project is the sole responsibility of the state. Water Code § 8361(i); 11 Ops. Atty.Gen. 93–94. The Brandenburg case decided that plaintiff's minor son, for whose death recovery was sought, was not "property" of which there was a taking within the meaning of article I, section 14, and that the state had therefore not consented to being sued for the negligence of its agents therein. The dictum that the state was relieved from liability by the participation of the federal government in the project was unnecessary to the decision therein and is inconsistent with later cases involving the same defendant in which its liability has been recognized. House v. Los Angeles County Flood Control District, 25 Cal.2d 384, 392, 153 P.2d 950; Stone v. Los Angeles County Flood Control District, 81 Cal.App.2d 902, 185 P.2d 396; Weck v. Los Angeles County Flood Control District, 80 Cal.App.2d 182, 181 P.2d 935.

The judgment is reversed and the cause remanded for retrial in accordance with the views expressed herein.

GIBSON, C. J., and SHENK, EDMONDS and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the judgment of reversal, but do not agree with the reasons on which it is based. The majority opinion cites and apparently relies upon, the cases of Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1 and O'Hara v. Los Angeles Flood Control District, 19 Cal.2d 61, 119 P.2d 23. These cases are in direct conflict with the basic theory upon which the majority opinion in this case is based. I dissented in both of the last-mentioned cases and the views expressed in those dissents constitute the only basis upon which plaintiff may prevail in the case at bar. What the defendants did in the Archer and O'Hara cases is the same as what the defendants did in the case at bar, namely, they constructed a flood control system which was inadequate to protect plaintiff's property from damage by flood waters which would not have caused such damage had the system not been constructed. In those cases, the majority of this court held that defendants were not liable for the damage thus caused to plaintiff's property. In the case at bar the majority opinion holds that if plaintiff's property was damaged as the result of the changes made by defendants in the flood control system in the vicinity of plaintiff's property, he may recover. It should be clear to any one that the basic legal theory of the Archer and O'Hara cases is diametrically opposed to the theory upon which the majority opinion in the case at bar is based. Yet the former cases are relied upon as authority for the conclusion reached in the case at bar. I commend the majority, and particularly the author of the present opinion, for their and his change of view, but I feel constrained to suggest that much confusion would be avoided in the law in this field if the Archer and O'Hara cases were overruled and a forthright declaration made by this court to the effect that defendant's liability in cases such as this is predicated upon section 14 of article I of the Constitution of California and that the police power doctrine cannot be invoked to deny compensation or damages to owners of property which has been destroyed or damaged as the result of the construction or operation of flood control projects. The Archer and O'Hara cases deny recovery upon the theory that the damages suffered were *damnum absque injuria* in that they resulted from the construction and operation of a flood control project by a public agency in the exercise of the police power. The present case holds that plaintiff may recover under section 14 of article I of the Constitution of California for any damages suffered as the result of the natural flow of the waters of the Sacramento River discharging onto his property by reason of the changed conditions in the levees along the river brought about by the flood control project constructed by defendants. The two theories are inconsistent and no amount of distinguishing can reconcile them.

I agree with the holding in the majority opinion that "* * * the construction of the farmer levees in 1870 and their continued maintenance until 1932 created a new natural condition, in effect making the channel between the farmer levees a new natural channel and the waters contained by those levees the natural stream waters of the Sacramento River." But, I do not agree that under the so-called common enemy doctrine defendants are not liable for damage to plaintiff's land from flood waters which were caused to flow with destructive force upon plaintiff's land as the result of the lowering of the levee in the construction of the Colusa Weir, which admittedly lowered the east bank of the river to a depth of between 8 and 10 feet opposite plaintiff's land, without providing adequate safeguards against flood waters discharging through this Weir with destructive force upon plaintiff's land. While this court has held in many cases that an owner of property has the right to protect his property against so-called flood waters by the construction of levees, dams, etc., on his property and that other property owners have no right of action for damages against him because such levees or dams cause the flood waters to discharge onto their property with destructive force, this does not mean, and no case except the Archer and O'Hara cases has ever held, that an owner of property may not complain and recover damages for injury to his property as a result of the construction of a flood control project where protective barriers are deliberately removed and flood waters are deliberately collected and discharged onto his property with such destructive force as to damage or destroy the same. The very fact that a project is undertaken by a public agency for the purpose of controlling flood waters should afford a sound basis for the contention that such a project when completed should protect property adjacent thereto from damage by flood waters regardless of their volume or velocity. To say that the common enemy doctrine should apply to a public agency charged with the duty and responsibility of constructing and maintaining a flood control project the same as to a private individual owning land adjacent to a stream, is to my mind, unsound, if not absurd. Yet, the majority opinion states: "Action that may be taken for his own protection without liability by an individual landowner may be taken by the state for the protection of all the landowners in an area without liability under article I, section 14 for damage caused thereby." The opinion then cites and quotes from the Archer case as authority for this statement. As heretofore stated, a complete answer to this statement is found in my dissenting opinion in the Archer case.

It is apparent that the majority opinion limits the right of a private owner of land to recover damages in a case such as this, to such damages as may be caused from a diversion of natural stream waters onto his land. In this respect the majority opinion states: "If, however, the construction of a flood control project diverts natural stream waters onto the land of a private owner and causes damage thereto, that property is as much taken or damaged for a public use for which compensation must be paid as if it were condemned for the construction of a highway or a school." The majority opinion does not define what constitutes "natural stream waters". Such waters have, however, been defined by this court in Herminghaus v. Southern California Edison Co., 200 Cal. 81, at pages 90 and 91, 252 P. 607, 610, as being the usual and ordinary flow of the stream through the various seasons of the year, and *"that annually recurring floods, even though the flow of their waters made the stream wider during the period thereof so as to include adjoining lands, are yet to be deemed a part of the ordinary flow of the stream."* While the discussion in the Herminghaus case related to the right of a riparian owner to have the full natural flow of a stream to flow past his land, it correctly defines what constitutes the usual and ordinary flow of a stream in its relation to the common enemy or extraordinary flood waters doctrine. In other words, what constitutes the usual and ordinary flow of the Sacramento River are the waters which customarily flow in said river throughout the various seasons of the year, the fall, winter, and spring flows being greatly in excess of the summertime flow. It is a matter of common knowledge, and one of which we can take judicial notice, that at various times in the past, flows which greatly exceeded the usual and ordinary flow during the fall, winter, and spring seasons have occurred, some of them amounting to what may be termed floods which caused great damage to lands, improvements, and livestock adjacent to the lower reaches of the Sacramento River. It was to prevent the damage caused by these recurring floods that the various flood control projects were undertaken and prosecuted to completion. If the project here involved was so constructed that the property of plaintiff and other property owners would suffer greater damage from these recurring floods than they would have suffered before the project was constructed, such landowners should be entitled to the damages suffered, and the so-called common enemy doctrine should not be invoked by the Reclamation Board or other public agency responsible for the inadequacy of the project to accomplish the objective of the flood control project.

I am unable to follow the reasoning in the following excerpts from the majority opinion:

"The construction of the Colusa Weir was not an independent project by which a continuous flood control barrier was cut.

The construction of the weir was coincident with the closing of the Moulton and De Jarnatt Breaks to provide a relief opening for the protection of the levees. Damage caused thereby is therefore not actionable unless the cutting of the weir caused more water to flow into the Butte Basin than would have flowed through the Moulton and De Jarnatt Breaks before they were closed."

"The water that would have flowed through the Moulton and De Jarnatt Breaks before they were closed is flood water because it was not contained by the banks of the river. The water that was prevented from going through these breaks after they were closed remained flood water, and if it is that water that went over the Colusa Weir defendants are not liable. Thus defendants are liable only if the water flowing over the Colusa Weir is water that would have been contained by the banks of the river had the Moulton and De Jarnatt Breaks not been closed."

As I interpret the foregoing excerpts from the majority opinion, the thought intended to be expressed is that although plaintiff had suffered no damage from flood waters which were discharged through the Moulton and De Jarnatt Breaks, and would not have suffered any damage from the flood here in question had said breaks been left open, and that the damage to his property was caused by the closing of the breaks and the construction of the Colusa Weir, yet he may not now recover for any damage to his land if the waters causing said damage were flood waters which would have discharged through the Moulton and De Jarnatt Breaks, but which were forced through the Colusa Weir because said breaks were closed. To my mind this is a strange and unsound rule of law. In effect, it places in the hands of a public agency charged with the duty and responsibility of constructing and maintaining flood control projects, the power to so construct and operate such projects as to damage or destroy such private property as such agency may see fit, without being liable to the owner of such private property for the loss suffered by him. If there is any basis in reason, logic, common sense, or law for such a holding it has not been advanced in a majority opinion, and I have never read a decision of any court announcing such a rule, except the Archer and O'Hara cases.

The majority opinion attempts to distinguish this case from the Archer case by the following statement: "Since, in that case [Archer], the damage was caused solely by flood waters that would have inundated plaintiffs' land even though the drainage system had not been constructed, it was held that the injury was *damnum absque injuria,* and that it was not made actionable merely because the construction of the drainage system had increased the velocity of the flood waters or the extent to which they covered plaintiffs' land. By the same reasoning, plaintiff in the present case is entitled to recover for whatever damage to his land is attributable to defendants' lowering of the levee and diversion of the natural stream waters into an artificial channel, but cannot recover for any damage caused by flood waters against which he had the duty of self-protection, even though the velocity of those waters and their carrying capacity was increased by the construction of the flood control project." The purported distinction between this case and the Archer case attempted in the foregoing excerpt is not borne out by the record in the Archer case. This is shown by the following excerpt from my dissenting opinion in that case, Archer v. City of Los Angeles, 19 Cal.2d 19, 35, 119 P.2d 1, 10: "It is manifest that the foregoing facts are sufficient to make a prima facie case in accordance with plaintiffs' allegations and to establish what the District Court of Appeal declared to be the gist of the Archer action, that is, that 'The gist of [the] * * * complaint * * * is that respondent constructed and built an artificial drainage system so defectively, carelessly, and negligently that it would not carry the storm waters to the Pacific Ocean as designed and intended' and 'that the injury * * * occurred by reason of the fact that respondent negligently turned the storm waters into La Ballona Lagoon, which was too small to conduct the water turned into it by and through the drainage system constructed, operated, and maintained by respondent * * *' Archer v. City of Los Angeles, supra. On the doctrine of the law of the case, as to the Archer case, and stare decisis, as to the Allison case, it must be held that plaintiffs have established the liability of defendants.

"The attempted answer to that incontrovertible proposition advanced by the majority opinion is that: 'According to the allegations of the complaint, the damage resulted because defendants negligently diverted water out of its natural channel, and obstructed the channel of the creek. Plaintiffs' evidence, however, fails to substantiate such allegations.' That statement is palpably incorrect. The gist of the action as stated by the District Court of Appeal was not that water had been 'diverted out of its natural channel', rather it was that the defendants negligently 'turned the storm waters into La Ballona Lagoon', that is, collected surface waters and discharged them into the lagoon. The evidence without contradiction shows that that occurred. The storm waters were collected into drains and turned into the lagoon and creek, the outlet of which was too small to carry them, with the result that plaintiffs' lands were flooded when the lagoon overflowed. The prior decision is therefore the law of the case and controlling here."

Also, the following excerpt from that opinion which appears, 19 Cal.2d on page 60, 119 P.2d on page 22: "Summing up, we have cases where public agencies, with no proprietary right so to do, have collected surface waters by the installation of drains, have discharged those waters into a natural watercourse, and have failed to provide adequate means of escape for those waters into the ocean, well knowing that their conduct would cause the flooding of plaintiffs' premises. As a result of that conduct, the waters discharged in the watercourse exceeded its capacity and could not escape through the inadequate outlet, and plaintiffs' land and the improvements thereon, not riparian to the stream, being three miles away, and not having theretofore been subject to overflow by any of the waters, is flooded and damaged. The majority decision is contrary to the firmly established law in California and the weight of authority in other jurisdictions. It will not only result in a grievous miscarriage of justice in the cases now under consideration, but will cause great confusion in the law on the subject here involved."

In the last-quoted excerpt from the majority opinion in the case at bar, the statement is made that plaintiff "* * * cannot recover for any damage caused by flood waters against which he had the duty of self-protection, even though the velocity of those waters and their carrying capacity was increased by the construction of the flood control project." It is difficult for me to understand how any one could have the temerity to even suggest that a person situated as plaintiff in this case could protect himself against flood waters of the destructive volume which was debouched on his land as the result of the operation of the flood control project here involved. Such suggestion transcends the height of absurdity and cannot be said to have for its foundation a shred of reason, logic, or common sense.

While it is probable that the advent of the great Central Valley project, which invisions the construction of numerous dams to impound the flood waters of the great Sacramento and San Joaquin Rivers at or near their sources so as to prevent the recurrence of the great floods which have in the past at various times inundated the valleys through which these rivers flow with consequent damage and destruction of property, may relieve posterity from the arduous burden of attempting to bring lucidity and order out of the confusion and chaos which now exists in the decisions of this court involving the control and use of water, I have grave doubt that any student of water law, should he so desire, will be able to reconcile the decisions of this court with any pattern which may be said to reflect judicial erudition or craftsmanship in the development of this body of our law.

SCHAUER, Justice.

I concur in the judgment and in the discussion by Mr. Justice Traynor except insofar as such discussion appears to support the police power—*damnum absque injuria* doctrine enunciated in Archer v. City of Los Angeles (1941), 19 Cal.2d 19, 119 P.2d 1 and in O'Hara v. Los Angeles County Flood Control Dist. (1941), 19 Cal.2d 61, 119 P.2d 23. I would prefer, with Mr. Justice Carter, to overrule the holdings of the Archer and O'Hara cases in respect to the mentioned doctrine.

---

35 Cal.2d 596

CASE et al. v. KADOTA FIG ASS'N OF PRODUCERS et al.

S. F. 17753.

Supreme Court of California, in Bank.

July 27, 1950.

Rehearing Denied Aug. 24, 1950.

Paul W. Case and another, copartners, doing business as the Case-Swayne Company, brought action against Kadota Fig Association of Producers, a growers' co-operative association, for breach of contract, and against Yosemite Growers Co-Op. Association, a growers' co-operative association, for assertedly conspiring in inducing a breach of contract, wherein each of the defendants filed an affirmative pleading designated as a cross-complaint. A judgment adverse to plaintiffs on their complaint and awarding damages to each of the defendants on its cross-complaint was entered by the Superior Court, City and County of San Francisco, Elmer E. Robinson, J., and the plaintiffs appealed. The Supreme Court, Edmonds, J., held that evidence supported finding that plaintiffs had willfully violated their duties under contract with first named defendant by terms of which plaintiffs were to perform services in operating first named defendant's cannery, with right in plaintiffs to can their own products independently at cannery, before any breach had been committed by first named defendant, so that plaintiffs had no right of action based on breach of the contract by first named defendant, or against other defendant for assertedly conspiring and inducing breach of the contract by the first named defendant.

Judgment affirmed.

Prior opinion, 207 P.2d 86.

1. Landlord and tenant 🔑39
Master and servant 🔑1

Evidence supported finding that contract entered into by growers' association with partnership under terms of which members of partnership were to perform services in operating association's cannery, with right in partnership to can its own products independently at cannery, created relationship of employer and employee between the parties, and that contract was not a lease of the cannery.

2. Conspiracy 🔑19
Contracts 🔑322(3)
Torts 🔑27

Evidence supported finding that members of partnership willfully violated their duties under contract with unincorporated growers' association by terms of which members of partnership were to perform services in operating association's cannery, with right in partnership to can its own products independently at cannery, before any breach had been committed by association, so that partnership had no right of action for damages based on breach by association or against a third party for allegedly conspiring and inducing a breach of the contract by the association.

3. Associations 🔑20(1)

In California, persons associated in business under a common name may be sued under that name, but such statutory relaxation of a common law applies only to associated defendants and associated plaintiffs still must sue in their individual names. Code Civ.Proc. § 388.

4. Pleading 🔑147

A "cross-complaint" is a pleading separate and apart from the answer, and is required to be complete and sufficient in itself and cannot be aided by averments of the answer.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Cross-complaint".

5. Pleading ⚷138

A "counterclaim" is not an independent pleading, and may stand or fall in conjunction with the answer. Code Civ. Proc. §§ 438, 439.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Counterclaim".

6. Pleading ⚷138

As between a counterclaim and cross-complaint the nature of a pleading will be determined from its allegations regardless of its designation. Code Civ.Proc. §§ 438, 439.

7. Agriculture ⚷6

Where affirmative pleading of unincorporated growers' association in action in which it was sued under its business name, though designated a cross-complaint was in fact a counterclaim as well as a cross-complaint, omission of names of individual members of the association in the affirmative pleading was not fatal. Code Civ.Proc. §§ 388, 438, 439.

8. Contracts ⚷285(1)

Provision in contract between partnership and an unincorporated growers' association for processing of peaches of association as joint venture which provided for selection of an accountant to make a determination in event parties should be unable to agree upon any matter involving computation or allocation of costs under agreement did not constitute as irrevocable requirement for arbitration of any dispute arising under the contract, in absence of any agreement by the parties to abide by the determination of accountant selected by them. Code Civ.Proc. § 1280.

9. Contracts ⚷290

Even if contract between partnership and unincorporated growers' association for processing of peaches of association as a joint venture required arbitration of any dispute arising under the contract, partnership, by resorting to litigation in which association's cause of action under the contract was inextricably linked, waived its right to require arbitration. Code Civ.Proc. § 1280.

◆

Johnson, Harmon, Stirrat & Henderson, San Francisco, Adams & Griswold, Merced, and W. G. Harmon, San Francisco, for appellants.

Pillsbury, Madison & Sutro, Eugene D. Bennett, Samuel L. Wright, all of San Francisco, Preston, Braucht & George, V. G. Preston, C. Ray Robinson and Margaret A. Flynn, all of Merced, for respondents.

EDMONDS, Justice.

At the time this litigation commenced, Case and Swayne were copartners doing business as the Case-Swayne Company, Kadota Fig Association, an unincorporated association of fig growers and Yosemite Growers, a similar organization of peach growers. Case-Swayne sued the fig growers for breach of contract, and the peach growers for assertedly conspiring and inducing a breach of contract by the fig growers. The appeal is from a judgment adverse to Case-Swayne on their complaint and awarding damages to each association on its cross-complaint. The judgment has been fully satisfied by execution.

The appeal from the judgment presents for decision the following questions upon the merits: (1) Whether there was substantial evidence to support the trial court's conclusion that Case-Swayne, rather than the association, first breached the contract; (2) Whether Kadota's affirmative pleading designated "cross-complaint" was fatally defective because it failed to name as cross-complainants any of its members or trustees; (3) Whether the Yosemite Growers were obligated to resort to arbitration under their contract as a condition precedent to any right to cross-complain; and (4) Whether, in the event the judgment for Kadota upon its cross-complaint is reversed, an order of restitution should be directed against certain of its "withdrawing members" as well as against those who were members of the association at the time execution was levied.

Case-Swayne contracted to supervise, repair, and operate a cannery built and provided by Kadota and also to market the figs grown by the association's members. The contract further provided that the operators were free to pack other fruit and vegetables during seasons not normally devoted to fig packing, and even during fig packing when the canning of the association's product would not be hampered by the independent operations. Kadota retained the right to use the cannery under specified conditions. The association was to receive a percentage of the gross profit realized by plaintiffs in the packing of fruit other than figs. The term of the contract was at least three years.

Case and Swayne undertook to maintain certain standards of cleanliness. They also agreed to repair and maintain the canning machinery owned by the association. Although there is some conflict, the evidence supports the conclusion that they were to install new machinery.

Subsequently, Case-Swayne entered into a contract with Yosemite Growers for the packing of its 1944 peach crop under what was, in effect, a profit sharing arrangement. Both contracts called for accountings and for prompt payments by Case-Swayne to the respective growers' groups of amounts collected in the marketing of the products. The Yosemite contract provided that "Should the parties be unable to agree upon any matter involving the computation or allocation of the costs under this agreement, then they should select an accountant to make such determination."

Large scale freezing, packing and canning activities were undertaken by Case-Swayne under both contracts. Production continued under gradually deteriorating business relations for approximately one year. Toward the end of this period, the fig growers complained several times of conditions in the packing plant, and demanded that certain repairs and new machinery installations be effected by Case-Swayne. It appears that Case-Swayne canned extensively for other producers, as was provided in the contract, and also processed all of the fig growers' fruit. Substantially all of the frozen and packed figs met government specifications and conformed to the grades intended by the fig growers.

After about one year under their contract, representatives of the fig growers suddenly removed some machinery from the plant, and otherwise interfered with the operation of the property. Finally, they shut off the steam which propelled the machinery and locked the engine room. Figs were not then in season, and Case-Swayne were packing asparagus.

The complaint of Case-Swayne charged the fig growers with breach of contract, and Yosemite Growers with conspiring and inducing the breach of contract by the fig growers. Both of the defendants filed cross-complaints. That of the fig association was filed simply in the name of the Kadota Fig Association of Producers. It alleged misconduct on the part of Case-Swayne, including failure to repair and replace machinery, which constituted a breach of its contract. The cross-complaint of Yosemite asked for an accounting and was based upon a conflict as to the amount of money due under its contract with Case-Swayne.

Upon substantial evidence, the trial court found that the association contract was one of employment, and Case-Swayne were guilty of certain misconduct. Aside from isolated instances, such as permitting a conveyor belt to stick at one time, the misconduct consisted of failure to repair and replace machinery. The evidence also tends to show that the plant gutters were permitted to become fouled, the fig jam line was in disrepair and would not function; three coolers were so run down that they could not be operated continuously, and general repairs and replacements after Case-Swayne left required 40 days to complete.

As conclusions of law drawn from these facts, the court decided that the fig association was entitled to treat the contract as breached, and was justified in taking possession of its plant. Furthermore, since Case-Swayne first violated the fig contract, no cause of action was established against Yosemite for allegedly inducing breach of contract.

Judgment was rendered for both defendants upon the complaint. The sum of $73,600 plus interest was awarded the fig growers under their cross-complaint and $20,500 plus interest to Yosemite. Under writ of execution, Kadota and Yosemite have collected $80,550 and $24,333, respectively.

Case-Swayne, in urging this court to reverse the judgment against them upon their complaint, challenge the evidence as being insufficient to justify the trial court's conclusion that they first breached the fig packing contract, and assert that they should have been given an opportunity to rectify any claimed breaches by them. They also maintain that the contract was a lease of the plant. As grounds for a reversal of the judgment for Kadota upon its cross-complaint, Case-Swayne declare that Kadota, an unincorporated association, is not a legal entity competent to sue, and the failure to enumerate the individual members as cross-complainants is a fatal defect in the pleading. Another attack is made upon the judgment because, it is said, the court was not justified in awarding Kadota certain special damages, including the equivalent of Swayne's salary; damage to plant and machinery; and a balance due on account. These special items are questioned upon the ground that the evidence does not sustain either award.

Other points are relied upon in demanding relief against the judgment for Yosemite upon its cross-complaint. It is argued that Yosemite failed to submit the dispute to arbitration, as required by the contract, prior to initiating its action, and that the court erred in construing the contract to include certain costs as being chargeable to Case-Swayne. An order of restitution from both Kadota and Yosemite is also sought.

The two associations declare that none of Case-Swayne's points is well taken. According to them, the evidence justifies the conclusion that Case-Swayne were guilty of flagrant misconduct, culpable negligence and wilful disregard for the terms of the fig-packing contract. The record also supports the conclusion, they declare, that Case-Swayne breached the terms of the peach-packing contract with Yosemite Growers by wrongfully withholding money due under that contract.

In regard to the asserted deficiency in pleading, Kadota says it was justified in filing its counteraction under its business name because it was entitled to defend under that name, and was obliged to set up its claim or else waive it. Its compliance with the fictitious name statute entitled it to sue under its business name; and Case-Swayne are estopped to question capacity. Finally, says Kadota, its "cross-complaint" was also a counterclaim, and, as such, not a separate action. Yosemite answers the charge of an obligation to submit its claim to arbitration by saying that the contract provided for arbitration, if at all, only as to accounting matters, and this controversy concerns only the allocation of costs.

The complaint:

[1, 2] According to the findings of the trial court, Case and Swayne were employed by Kadota in a confidential relation and the contract gave Case-Swayne Company a license to process fruit in the cannery. The record shows that Case-Swayne did not have exclusive possession of the plant, and Case testified that he followed all directions or instructions of Kadota. The contract provided for the "* * * services of an experienced production man and a Western sales manager * * *" and stated, "The rendering by each of said individuals of their personal services shall be deemed to be a material consideration. * * *" The agreement also contained a provision that "* * * said Amos Swayne shall also direct and supervise the current maintenance and repair of the Association machinery and equipment and annual general overhauling". This with other similar evidence substantially supports the finding that the relationship was that of employer and employee.

Case-Swayne argues that they fulfilled all of the obligations of their contract, whether it be one of lease or employment. But there is abundant evidence tending to show that they failed to maintain or repair the canning machinery and the plant. Upon this evidence the court found that the operators breached the contract before the plant was forcibly closed by Kadota. Under these circumstances, there is no basis whatever for the claim that Yosemite induced a breach of contract by the fig growers.

The cross-complaint of Kadota:

[3] In California, persons associated in business under a common name may be sued under that name. Sec. 388, Code Civ.Proc.; Jardine v. Superior Court, 213 Cal. 301, 2 P.2d 756, 79 A.L.R. 291. However, this statutory relaxation of the common law applies only to associated defendants. Associated plaintiffs still must sue in their individual names. Holden v. Mensinger, 175 Cal. 300, 305, 165 P. 950. One question presented, therefore, is whether cross-complainants must be regarded as plaintiffs.

[4] "A cross-complaint is a pleading separate and apart from the answer, and is required to be complete and sufficient in itself. It cannot be aided by averments of the answer." Luse v. Peters, 219 Cal. 625, 630, 28 P.2d 357, 359. "These cross-actions, however, are still distinct and independent causes of action, so that when properly interposed and stated the defendant becomes in respect to the matters pleaded by him, an actor, and there are two simultaneous actions pending between the same parties wherein each is at the same time both a plaintiff and a defendant." Pacific Finance Corp. v. Superior Court, 219 Cal. 179, 182, 25 P.2d 983, 984, 90 A.L.R. 384.

The requirement for stating the names of members of unincorporated associations is not purely technical or historical. The defendant is entitled to know which individuals will be responsible for costs or restitution in the event that he defeats a recovery by the plaintiff. Another factor is the rule that a cross-complainant can name a cross-defendant other than the person who brought the action. If persons doing business under a fictitious name were permitted to cross-complain against a stranger to the action, without naming the members of the association, the cross-defendant would be under the same disadvantage as one who is sued by a group using a fictitious name which does not disclose the identity of the individaul members.

However, if the pleading filed by Kadota is a counterclaim rather than a cross-complaint, the objection as to legal capacity is of no consequence. This pleading is designated: "Cross-Complaint", and opens with the words, "Comes Now the cross-complainant Kadota Fig Association of Producers * * * and by way of cross-complaint alleges: * * *." It does not enumerate the individual members of Kadota and, for that reason, as a cross-complaint by an unincorporated association, it would be fatally defective.

[5] A counterclaim is not an independent pleading, and may stand or fall in conjunction with the answer. Section 438 of the Code of Civil Procedure provides that the counterclaim "* * * must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action * * *." Also, by statute: "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor." Code Civ. Proc. sec. 439.

[6, 7] "* * * [U]nder our system of procedure, there is a very shadowy line of distinction between a crosscomplaint and a counterclaim and a considerable area in which they overlap." Schrader v. Neville, 34 Cal.2d at page 112, 207 P.2d 1057, 1058. Moreover, "* * * it is well established that as between a counterclaim and a cross-complaint the nature of the pleading will be determined from its allegations regardless of its designation. Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474; Cornblith v. Valentine, 211 Cal. 243, 294 P. 1065; Robertson v. Maroevich, 42 Cal.

App.2d 610, 109 P.2d 708." Schrader v. Neville, supra, 34 Cal.2d at page 112, 207 P.2d at page 1058. Therefore, regardless of the caption and introduction of Kadota's pleading, it may be treated as a counterclaim if it satisfies the statutory requirements for a pleading of that kind.

In Elevator Operators and Starters Union Local 117, of San Francisco v. Newman, 30 Cal.2d 799, 808, 186 P.2d 1, 6, the sole requisites of a counterclaim were said to be that it "* * * 'must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action.' Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474, 477; Luse v. Peters, [ante], 219 Cal. [at page] 625, 28 P.2d 357." Kadota's claim for damages resulting from breach of contract by Case-Swayne tended to diminish or defeat the similar claim by Case-Swayne against the association. It was a claim in favor of a defendant and against a plaintiff between whom a several judgment might be, and in fact was, rendered. Had Kadota not presented its claim in the action, the right to recover damages against Case-Swayne would have been waived. Sec. 439, Code Civ.Proc.

For these reasons, Kadota's pleading was a counterclaim as well as a cross-complaint, and the omission of the names of the individual members was not fatal. And upon the merits of the cause of action stated by the fig growers, the record shows substantial evidence to support the judgment.

The Cross-Complaint of Yosemite:

[8] Paragraph 8 of the Yosemite contract provided, among other things: "Should the parties be unable to agree upon any matter involving computation or allocation of costs under this agreement, they shall select an accountant to make such determination." Case-Swayne insist that the quoted words constitute an irrevocable requirement for the arbitration of any dispute arising under the contract. From this premise they reason that, as there has been no submission to arbitration, the judgment in favor of Yosemite upon its cross-complaint should be reversed.

By section 1280 of the Code of Civil Procedure, the parties to the written contract may agree "to settle by arbitration a controversy thereafter arising out of [it]." Such a provision "shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract * * *." The terms of the Yosemite contract are not as specific as those ordinarily found in an agreement based upon this statute. An essential element of a provision for arbitration is agreement of the parties "to settle by arbitration" a controversy which may arise between them. Here there was no agreement to abide by the "determination" of an accountant selected by them.

[9] But assuming that the contract might be construed as being one contemplated by the code section, the asserted right of Case-Swayne to arbitration as a condition precedent to the maintenance by Yosemite of the cause of action stated in its cross-complaint must be considered in connection with the procedural basis of the litigation as a whole.

Case-Swayne sued Yosemite alleging that it had wrongfully induced Kadota to breach its contract. One defense available to Yosemite under its general denial was that there had been no such breach. Obviously, if no breach had occurred, Yosemite could not have committed the wrong charged against it.

To establish its defense on that ground, evidence concerning performance by Kadota was relevant and material. The contract made by Kadota for the use of its plant expressly authorized Case-Swayne to pack fruit and vegetables other than figs. There were provisions relating to the proration of costs. The claims of Case-Swayne as to the amount of and liability for those costs, which include charges for fuel, power, and water, warehouse labor and similar expenses, in addition to its asserted mismanagement of the packing plant, were relied upon by Kadota as justification for taking possession of its property.

In suing for inducement of breach of contract, Case-Swayne was chargeable with the knowledge that Yosemite would not be liable for damages if Kadota was justified in ousting Case-Swayne from the property. The issue presented by Case-Swayne in the action against Yosemite, therefore, inevitably included the question of performance by Kadota, and it could not be completely determined without ascertaining the amounts chargeable to Yosemite. The Kadota contract, by authorizing Case-Swayne to pack fruit other than figs, expressly contemplated contracts such as the Yosemite agreement, and the Yosemite contract referred to the Kadota agreement by stating that Case-Swayne had the right to use the plant facilities. The expenses of Case-Swayne in packing fruit other than figs, and for which it was required to account to Kadota, necessarily depended upon the results of its peach packing operations. Evidence tending to prove that it was Case-Swayne and not Kadota which had breached the contract, at least in part, also fixed the rights of Case-Swayne and Yosemite as to certain costs. Otherwise stated, the cause of action pleaded by Yosemite against Case-Swayne was inextricably linked with, and an essential part of, its defense upon the charge of inducing a breach of contract.

Moreover, although Yosemite's pleading was designated a cross-complaint, the cause of action stated in it tended to diminish or defeat the Case-Swayne recovery and existed in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action. Code Civ.Proc. sec. 438. Like that of Kadota, it was also a counterclaim. It presented "A cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim", and one which Yosemite was obliged to raise. Code Civ. Proc. sec. 439. For these reasons, by resorting to litigation, Case-Swayne waived any right it might have had to require the selection of an accountant to make a determination of any matter involving the "computation or allocation of the costs" under its agreement with Yosemite. Jones v. Pollock, 34 Cal.2d 863, 215 P.2d 733.

These conclusions make it unnecessary to consider the question as to the liability of the growers who withdrew from the Kadota Fig Association after the action was commenced. The petitions for permission to introduce additional evidence are therefore denied.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

Rehearing denied; TRAYNOR, J., dissenting.

---

98 Cal.App.2d 510

MOORE et ux. v. WHITE.

Civ. 14357.

District Court of Appeal, First District,
Division 2, California.
July 21, 1950.

Charles William Moore and Harriet M. Moore brought an action against Wilber White for money had and received by defendant for plaintiffs' use and benefit. The Superior Court, Alameda County, S. Victor Wagler, J., entered judgment for the plaintiffs and the defendant appealed. The District Court of Appeal, Goodell, J., held that the evidence sustained the trial court's findings that no contract of sale had ever been made and that defendant was holding the $2,000 paid by plaintiffs on account for the use and benefit of the plaintiffs.

Affirmed.

1. Vendor and purchaser 🔑**1, 334(1,**

Where purchasers paid $2,000 on account to vendor, with understanding that balance of purchase price for vendor's property was to be paid and sale consummated when purchasers sold their own property, but written contract of sale was never entered into because of vendor's refusal to change requirement in proffered written contract that balance be paid within 90 days, transaction never ripened into contract and vendor held $2,000 for use and benefit of purchasers.

2. Contracts ⚷9(1)

Contracts must be definite enough for court to be able to ascertain what is stipulated performance.

◆

W. R. Dunn and Raymond W. White, San Francisco, for appellant.

Wood & Proffitt, Oakland, for respondents.

GOODELL, Justice.

This is an appeal from a judgment for $2,000 and interest, based on a complaint for money had and received by appellant for respondents' use and benefit.

Respondents owned a home in San Leandro which they desired to sell, and appellant owned a multiple dwelling in Oakland which was for sale. Respondents' purpose in selling was to reinvest the proceeds in flats. They were satisfied with appellant's property and orally agreed on the price of $17,000 therefor. Appellant required a down payment of $2,000 but would not agree to the escrowing of the money since he had need for it in connection with another piece of property of his, and respondents agreed to pay the money without an escrow.

Respondents told appellant that the time of their payment of the remaining $15,000 would necessarily be indefinite because they first had to sell their San Leandro property (which was already on the market) and did not know when its sale would be accomplished. They said it might be a matter of months or weeks but expressed the hope that it would be soon. Appellant expressed himself as fully understanding respondents' problem and said it would be all right with him, but that the time could not be left altogether indefinite.

Respondents' down payment of $2,000 was made at once, and they were given a receipt reading as follows:

"Oakland Calif. Oct. 18, 1947.

Contract agreement to be made as per oral arrangement.

Total purchase price $17,000.00.

Received of Mr. & Mrs. Charles W. Moore the sum of two thousand Dollars $2,000.00 as payment on Property at 166-164 Athol.

Amount of Account $2,000.00 paid by cash.

Wilber White."

On November 18 a formal written contract of sale, prepared by appellant (who was a real estate broker), was presented by him to respondents for execution, dated back, as of October 18, the date of the receipt. It recited the total price of $17,000, acknowledged receipt of the $2,000, and provided *inter alia* that the balance of $15,000 was "to be paid in cash on or before ninety (90) days from the date hereinbefore written, namely by January 18th, 1948."

Respondents refused to sign for the reason that it was not in accordance with their oral agreement. Appellant refused to change the 90-day provision and respondents on December 11, 1947 notified him in writing that they would not go forward with the purchase, and demanded the return of the $2,000, which he refused to pay.

The court found that "In all of their negotiations with defendant, plaintiffs informed defendant and understood that the balance of the purchase price for defendant's property was to be paid and the sale consummated when plaintiffs had sold their home property. * * * Said proposed written agreement of defendant was contrary to the terms and conditions of said oral agreement as understood and agreed by plaintiffs. * * * There was a lack of mutuality between the parties * * in that the minds of the plaintiffs and the defendant failed to meet on an essential element of the transaction, namely, the time of payment of the balance of the purchase price of defendant's property." A conclusion of law was drawn in the same language with the addition that "The transaction did not ripen into a contract and defendant is holding" $2,000 "for the use and benefit of the plaintiffs."

[1] The amended complaint tendered a very simple issue. The first count was for money had and received, while the second alleged the facts in some detail. The undisputed evidence shows the original receipt for $2,000 paid on account, containing the provision for "Contract agreement to be made as per oral arrangement." The evidence shows, further, that no such contract was ever signed for the simple reason that the proffered writing attempted to pin the respondents down to a $15,000 payment within two months (one month having already run by) whereas it was known that such payment could not be made until respondents had sold their San Leandro property. It was not necessary for the trial court to fix any blame on any one for the failure of a meeting of the minds in this case. Such failure could arise as well from a mere misunderstanding as from design. However, no findings other than those made could have been made. That being so, the case falls squarely within the rule of the two cases upon which respondents chiefly rely, neither of which has been distinguished by appellant.

The first is Schreyer v. Foster, 98 Cal. App. 706, 277 P. 506, which involved the sale of two automobile agencies where a down payment of $1,500 was made, but the minds of the parties never met on the terms or conditions of the sale. The judgment that the buyer was entitled to recover back his $1,500 was affirmed.

The second is Blake v. Mosher, 11 Cal. App.2d 532, 54 P.2d 492, 493, which involved the sale by defendant to plaintiff of "stock and equipment at Clarksburg" for $4,000. As in the instant case, the buyer made a down payment ($1,500) and was given a receipt, which provided for $2,000 down "and two thousand dollars ($2000) in a note well secured." The action was for money had and received, to recover back the $1,500, after the parties had reached an impasse in their negotiations. The trial court gave the defendant judgment for costs which was reversed on appeal, the court holding that there had been no meeting of the minds. The basis for the decision was simply *unjust enrichment* arising from such failure. The court pointed out that the receipt left the questions wide open as to the time of payment of the $2,000 note and the manner in which it was to be "well secured".

Blake v. Mosher, supra, is followed in Goehring v. Stockton Morris Plan Co., 93 Cal.App.2d 417, 420, 209 P.2d 41, where other leading cases on the subject are cited, including Talmadge v. Arrowhead Reservoir Co., 101 Cal. 367, 371, 35 P. 1000, Reymond v. Laboudigue, 148 Cal. 691, 694, 84 P. 189 and Wineburgh v. Gay, 27 Cal.App. 603, 604, 150 P. 1003. Also cited in the Goehring case are 6 Cal.Jur. 43 and 6 Cal.Jur. p. 216.

[2] In Mason v. Rose, 2 Cir., 1949, 176 F.2d 486, 489, Blake v. Mosher is cited as a representative authority in the following statement: "If * * * it be assumed that an English court would look to the law of California, we find nothing in the California decisions which would lead to a different result. In that state, as in every other, a contract must be definite enough for a court to be able to ascertain what is the stipulated performance. Van Slyke v. Broadway Ins. Co., 115 Cal. 644, 47 P. 689, 690, 928; Wineburgh v. Gay, 27 Cal. App. 603, 150 P. 1003; Blake v. Mosher, 11 Cal.App.2d 532, 54 P.2d 492, 494."

We would not attempt to state appellant's contentions otherwise than in counsel's own language. They say: "The parties having agreed in their pleadings and evidence that there was a completed contract *certain in its terms and the sole issue being as to one of the terms,* the court should have determined that issue if it was material in the light of the fact that respondents breached their contract, *whatever it was.*" (Emphasis added.)

This and their argument that "the pleadings and the evidence show an executory contract enforceable against appellant" and that "where parties present an issue as to a term or terms of an oral agreement, the duty of the courts is to determine the issues so presented—not to strike down the contract itself" show a refusal on appellant's part to face the realities of this case. On evidence which for the most part was uncontradicted, the court found that no contract was made, and in the face of that finding appellant's various arguments, based, as they are, on premises which are at war with the case made by the pleadings, the evidence and the findings, are wholly untenable. To discuss them or to review the cases cited would serve no useful purpose.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

---

98 Cal.App.2d 794

LENCHNER et al. v. CHASE et al.
Civ. 14253.

District Court of Appeal, First District,
Division 2, California.
Aug. 8, 1950.

Ruth Lenchner and Isadore Miller brought an action against L. F. Chase and others, to recover a sum deposited in escrow as part payment for the purchase of a tavern. The Superior Court, City and County of San Francisco, Preston Devine, J., entered judgment for the plaintiffs and the defendants appealed. The District Court of Appeal, Goodell, J., held that the evidence sustained the trial court's finding that the deposit had been payable to the seller only upon condition of the transfer of a license to operate the tavern, and that since the State Board of Equalization had refused to permit the transfer, the plaintiffs were entitled to recover, after certain deductions, the sum escrowed.

Affirmed.

1. Sales 🔑391(9)

Where sale of tavern was conditional upon transfer of license to operate tavern from seller to buyer and permission for transfer was denied by State Board of Equalization, failure to go ahead with purchase was not voluntary failure by buyer within rule providing that vendor may retain any deposit made where buyer wrongfully refuses to go ahead with contract of purchase. Gen.Laws, Act 3796.

2. Sales 🔑393

Where it was conceded that profits of business during term it was operated by buyers should be deducted from deposit made by buyers on purchase price of tavern, buyers were not entitled to allowance for their personal services in and about tavern, since there was no express agreement calling for payment of such wages and it was probable that if seller had known of buyer's police record, she would not have agreed to pay wages.

3. Contracts 🔑4

Promise can be implied only to enforce manifest equity or to reach result which unequivocal acts of parties indicate that they intended to effect.

4. Sales 🔑393

In action by buyer to recover deposit made on purchase price of tavern, where there was no express, binding provision relating to consequential damages, seller was not entitled to set off depreciation in market value of tavern during period of its operation by buyer.

5. Escrows 🔑14(1)

Where business opportunity brokers undertook to act as escrow holders of deposit made by buyer on purchase price of tavern, brokers were liable for damages caused by their payment of moneys belonging to buyers, notwithstanding that they had not asked or obtained signature of buyers to escrow instructions. Civ.Code, § 2219.

6. Trial 🔑404(2)

Conclusion of law does not lose its characteristic as such because placed among findings of fact.

7. Sales 🔑87(3)

In action by buyer to recover deposit made on purchase price of tavern, evidence sustained finding of trial court that sale of tavern was conditional upon transfer of license to operate tavern. Gen.Laws, Act 3796.

8. Sales 🔑391(1)

Where sale of tavern was conditional upon transfer of license to operate and

Board of Equalization denied application for transfer of license, buyer was entitled to recover deposit under doctrine of unjust enrichment, notwithstanding fact that there was no agreement for return of deposit in event that application to transfer license was denied. Gen.Laws, Act 3796.

9. Escrows ⚿8(1)

Holder of escrow is agent for all parties up to time that escrow is closed. Civ. Code, § 2219.

◆

John F. O'Sullivan, Frank J. Perry, San Francisco, for appellant Nona Harwick.

H. Ward Dawson, Jr., San Francisco, for appellants L. F. Chase, Roy C. Czerny, L. F. Chase Co. (a copartnership).

Raymond H. Shone, Harold B. Lerner, San Francisco, for respondents.

GOODELL, Justice.

This is an appeal from a judgment against two sets of defendants, namely, Nona Harwick and Chase and Czerny, a copartnership known as L. F. Chase Company.

The trial judge, Hon. Preston Devine, filed an opinion wherein the facts are fairly and fully stated. With a few deletions and additions it reads as follows:

"This is an action for money had and received in the sum of Fifteen Thousand Dollars ($15,000.00) plus interest. Plaintiffs, Ruth Lenchner and Isadore Miller, were prospective purchasers of a tavern in the Mission District of San Francisco, known as 'The Armory'. The owner and licensee of said tavern was Nona Harwick, one of the defendants herein. On July 22nd, 1946, plaintiffs deposited with L. F. Chase and L. F. Chase Company, copartnership, $15,000.00; said Chase Company is a licensed business opportunity broker. At the time of making the deposit, plaintiffs signed an agreement to purchase the 'Armory Tavern' for the sum of $22,000.00; the balance of $7,000.00 to be supplied by a loan from the Bank of America. The Morris Plan Company was later substituted as the lender, apparently with everyone's consent, and it agreed to make the loan. It was stated in the agreement that the Chase Company should act as escrow agent under the supervision of Bank of America, but later the Chase Company alone acted as such escrow agent, with the express oral consent of the seller, at least. The agreement signed by plaintiff provided, in respect of failure on the part of plaintiffs, as follows:

"'Said sum of $15,000.00 deposited as above is to be applied to the settlement of all damages sustained by reason of said breach if I do not complete the purchase, and L. F. Chase Company may retain from said sum the amount of any commission or compensation which would be due it upon sale of said property at above price under the terms of said owner's contract, as if it had made said sale to me at said price. The above sale is subject to the approval of the owner.'

"Although a space for the acceptance of the seller was provided on the document, there was no signature of the owner.

"However, the owner, Nona Harwick, had signed a listing with the Chase Company on July 22nd, 1946, in which she had agreed to sell 'Armory Tavern' for the sum of $20,000.00; anything above that amount to be retained by Chase Company. It was provided that any sale would be contingent on the purchase of 'The Dungeon', a tavern in the Marina District, in which Mrs. Harwick preferred to be located, for her home was in that district. On July 26th, the owner of 'The Dungeon' signed an agreement to sell that tavern for $10,000.00; an amount satisfactory to Mrs. Harwick. The fact that 'The Dungeon' transaction was tied in with that of 'The Armory' so far as Mrs. Harwick was concerned, was not communicated to Lenchner or Miller.

"A partnership agreement was executed between Ruth Lenchner and Isadore Miller on July 31st, 1946, which was witnessed by Mr. Czerny of the Chase Company; and although it was not legal for Miller to have any interest in a liquor establishment, he being an alien, that fact had no bearing upon the later events.

"On August 7th, 1946, Nona Harwick and Ruth Lenchner applied for transfer of the Harwick license to Lenchner. The application, signed by both parties, called attention to that part of Rules and Regulations issued in pursuance of the Alcoholic Beverage Control Act, Gen.Laws, Act 3796, which requires that the transferor shall be responsible for the conduct of the business until a new certificate is issued, and that 'the transfer of the licensed business shall coincide with the transfer of the license'."

On August 9 the Chief of Police protested the granting of the application on grounds which arose in the years from 1938 to 1941. However in 1945 respondent Lenchner was granted a liquor license to operate the "Montana Club", another tavern in San Francisco, under the name Ruth Davis, and her operation of that tavern seems to have been unobjectionable. Testimony was given by an agent of the State Board of Equalization that he had recommended that her application for the transfer of "The Armory" license be granted. That application was denied by the Board on November 1, following a recommendation to that effect made by the Board's hearing officer on October 21.

An agent of the Board informed appellant Harwick of the denial and warned her that she must resume operation of "The Armory" personally or her license would be in jeopardy. She promptly went there on November 13, discussed with respondent Lenchner the Board's action, and repossessed the place. Appellant Harwick had known for some time of the matters of 1938–1941 but had been informed by a responsible agent of the Board that there was likelihood the application for the transfer of "The Armory" license would be granted probably because of the satisfactory operation of the "Montana Club" in the intervening years. Appellant Harwick had not known of the 1938-1941 matters at the outset of the negotiations.

To resume the quotation from the opinion:

"Chase Company meanwhile, and on August 12th, 1946, had paid to itself and to its salesman, Edward Riley, commissions on the sales of the 'Armory' and the 'Dungeon' taverns, amounting to some $3,800.00, on the theory, as testified by Chase's agent, Mr. Czerny, that buyers had been produced for both places. On November 7th, 1946, Chase Company requested Mrs. Harwick to make a written demand upon Chase (an agent of Chase prepared the demand) to pay Emile Hennette, seller of the 'Armory' [should be "Dungeon"], $10,000.00 from the escrow fund, and Mrs. Harwick did so demand. Thereupon, and on November 7th, 1946, Chase Company paid from the escrow fund $10,000.00 to Mr. Hennette.

"Lenchner and Miller made demand upon defendants for return of the $15,000.00 deposited, and this was refused, whereupon the present action was brought. Plaintiffs contend that no contract of purchase of the 'Armory' was completed; that if there was a contract to purchase (they do not admit this because there existed no single document or set of identical documents signed by all parties), it was a contract to pay only if the license could be transferred; that assuming that were not so, there was a mutual rescission when Mrs. Harwick repossessed the tavern.

[1] "I am of the opinion that by all the papers signed by the parties and by their conduct, it was contemplated that the $15,000.00 would be payable only if the license could be transferred; that the failure to go ahead with the purchase on the part of the prospective buyers was not a voluntary failure, and this distinguishes the case from the cases cited in defendant Harwick's brief, * * * and that the deception practiced by plaintiff Lenchner in attempting to get the license does not justify the forfeiture of the $15,000.00 deposit.

"Defendant Harwick contends that plaintiffs 'undertook to have the license transfered to them' * * *. No such undertaking is contained in their agreement to purchase. There is no provision for forfeiture in event of failure to receive a license. There was no express warranty in the agreement to purchase that plaintiffs had no police record. In the only paper signed by Mrs. Lenchner and Mrs. Harwick (the affidavit required by the Board of Equalization) it was expressly provided that title must remain with the vendor until a transfer would be approved. And in the agreement to purchase, the sentence relating to applying the $15,000.00 to damages sustained by failure to complete the purchase does not state whose damages are referred to, the owner's, the agent's or both.

"These being the facts, I believe the case does not come under the rule of those decisions which permit a vendor, when the vendee wrongfully refuses to go ahead with a contract of purchase, to retain any deposit made, regardless of the amount of damage, cases such as Glock v. Howard, etc. Co., 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am.St. Rep. 17; Tomboy Gold etc. Co. v. Marks, 185 Cal. 336, 197 P. 94; Rayfield v. Van Meter, 120 Cal. 416, 52 P. 666; Arkelian v. National Bank, 103 Cal.App. 764, 284 P. 933.

"I believe the cause comes under the rule of such cases as Green v. Frahm, 176 Cal. 259, 168 P. 114; Thomas v. Anthony, 30 Cal.App. 217, 157 P. 823, namely, that the penalty provision in the last paragraph of plaintiffs' Exhibit One is void. Even if it were not so, said provision would not be contractual between the vendor and vendees, but between prospective vendees and the Chase Company.

[2, 3] "The next question is: How much are plaintiffs entitled to recover; Plaintiffs concede that the profits of the business during the term they operated it should be deducted from the $15,000.00 but they contend that in ascertaining the amount of profit, allowance should be made to them for their personal services in and about the tavern. I believe they are not entitled to charge for such services. There was no express contract calling for payment of wages to them, and a promise can be implied only to enforce a manifest equity or to reach a result which the unequivocal acts of the parties indicate that they intended to effect. Taylor v. National Supply Co., 12 Cal.App.2d 557, at 563, 56 P.2d 263. Had the police record of Mrs. Lenchner been brought to the attention of Mrs. Harwick, it is probable the latter would not have agreed to pay wages to her and her partner, if, indeed, she would have consented to any part of the negotiations with them. I do not believe there is a 'manifest equity' that warrants their crediting themselves with wages.

[4] "The next question is: Are defendants permitted to set off, against plaintiffs' demand, depreciation in the market value of the 'Armory' (if such depreciation can be proved), between August and November, 1946? I think they are not. The very loose manner of handling the whole transaction, with its absence of any single writing embracing the complete terms of a contract, and the absence of any express binding provision relating to such consequential damages seem to preclude such damages to be allowed the vendor in any event. But as stated above, it is my opinion that the whole contract was contingent upon the approval of the Board of Equalization.

[5] "Finally, there is the subject of the liability of L. F. Chase and Roy C. Czerny who, it is alleged and not denied, are partners as business opportunity brokers. These defendants undertook to act as escrow holders, and although they did not ask nor obtain the signature of the vendees to escrow instructions, they are bound as trustees, Civil Code, Sec. 2219, and are bound to the utmost good faith to the vendees. French v. Orange County Investment Co., 125 Cal. App. 587 at 592, 13 P.2d 1046. Having failed to obtain escrow instructions from plaintiffs, these defendants will be held to the damages caused by their payment of moneys belonging to plaintiffs. Gallagher v. Cal. Pac. Title & Trust Co., 13 Cal.App. 2d 482 at 488, 57 P.2d 195; Jones v. Title Guarantee & Trust Co., 178 Cal. 375, 173 P. 586.

"My conclusion, therefore, is:

"Plaintiffs are entitled to judgment against all defendants, according to the following formula:

"$15,000.00 minus profits taken by them, not deducting from said profits, wages for plaintiffs. On the net amount, interest shall be allowed from November 13th, 1946. There are minor inventory allowances to be made. The subjects of profits and inventory adjustments, if not agreed upon by the parties on or before April 30th, 1948 (and communication thereof made to me), will be determined by a referee to be appointed by the Court."

After the opinion was filed findings were made including one that the profits derived from the operation of the tavern between July 30, 1946, and November 12, 1946, were $4,546.74, and that the parties agreed on that figure. Accordingly, judgment was entered for $10,453.26, the difference between the $15,000 and the $4,546.74 profits.

This action was brought on the theory that there was a total failure of consideration as a result of the denial by the State Board of Equalization of the application to transfer the license, which action killed the sale.

There can be no question that a tavern cannot operate without a license, or that such license is transferable only with the approval of the Board, or that respondent Lenchner knew this (she having had a license for the "Montana Club"), or that appellant Harwick knew it (she having held several licenses). Appellant Chase Company had handled between 450 and 500 sales of taverns in and about San Francisco. It is agreed by both sides that the contract was entered into in the light of existing state law.

Rule 60(d) of the Board provides that "The transferor shall be reponsible for the conduct of the licensed business until the license is transferred by the issuance of a license certificate to the transferee. *The transfer of title to the licensed business shall coincide with the transfer of the license.*" (Emphasis added.) This case turns largely on the meaning and effect of the last sentence. On August 7, 1946, respondent Lenchner and appellant Harwick joined in making an application for the transfer of the license which application contained the exact language of rule 60(d). Both sides agree that such language became a part of the contract of sale. Respondents contend that that language made the sale conditional upon the granting of the application; appellants contend that it "determines the time at which the transfer of title is to take place and nothing more." Whatever may have been the purpose and intent of the Board in writing this rule, the court was concerned with the language only as a part of the contract, and it found that the intent of the parties was "that said $15,000.00 was payable to the seller * * * only upon condition of the transfer of said on-sale general license to plaintiffs, or one of them, and that title to said Armory Tavern should pass to plaintiffs only upon condition of said transfer of the * * * license; * * *." As we view it, the sentence "The transfer of title to the licensed business shall coincide with the transfer of the license" is susceptible of no interpretation other than that found. True it fixes the event (and the time) when title to the business should pass but it means also that without a transfer of the license there could be no transfer of title to the *licensed* business. It can mean nothing else. The transfer of title to the business (plus license and lease) was the consideration for the payment of the $15,000 and it follows, of course, that if the business could not be transferred there would be a total failure of consideration.

[6, 7] Appellants complain that the "finding" is not one of fact but a conclusion of law, attempting to interpret the agreement. Even so, that is of no consequence since "A conclusion of law does not lose its characteristic as such because placed among the findings of fact. * * *" 24 Cal.Jur. p. 961. The real question is whether such conclusion, misplaced or not, is supported by the facts. It certainly is, in our opinion, by the sentence already quoted.

As appears from the trial court's opinion, appellant Harwick was in negotiation with Chase Company for the purchase of "The Dungeon" and apparently was to use part of the money received from "The Armory" sale to buy the other place, since the purchase of the one was contingent on the sale of the other. This was a matter between the appellants, and the existence of that other transaction was not communicated to respondents. The court found such lack of knowledge by them. Appellants complain that this separate transaction formed no part of the contract between respondents and appellant Harwick for which reason the finding respecting it is immaterial. It may be conceded that it was no part of The Armory contract but we do not agree that it was immaterial since it bears directly on the actions of all the appellants after November 1, 1946, when it had become known that the sale of "The Armory" could not go through. Even if immaterial it did not conflict with the other findings.

Appellants contend that respondents breached their contract and therefore cannot recover the $15,000. The court found that the "failure to complete the purchase of said Armory Tavern was not voluntary on the part of plaintiffs." The contract of sale was made in July-August, 1946. Thereafter respondents did the following things to bring about the consummation of the sale: (1) they immediately parted with $15,000; (2) they arranged to borrow the remaining $7,000; (3) they went into possession of "The Armory" on July 30, anticipating favorable Board action; (4) respondent Lenchner joined with appellant Harwick on August 7, in the application to transfer the license, after the 7-day notice of intended sale (§ 7.2 of the A.B.C.Act) had been given; (5) they even remained in "The Armory" almost two weeks after the transfer had been denied. On this evidence the court could not have found otherwise than that the failure to complete the purchase "was not voluntary on the part of plaintiffs."

Appellants argue that "respondents, by their own acts, made performance by them impossible. This", they say, "has the same effect as though they had voluntarily refused to proceed with performance." In support of this they cite a number of cases on refusal and prevention of performance. Their position is based on the fact that respondent Miller was an alien and that in 1938–1941 the behavior of respondent Lenchner had been such as to warrant the Board in refusing its approval of her as a licensee in 1946. The fact, as already appears, is that in 1945, four years after the 1938–1941 episodes, she had been granted a license for "The Montana Club" which shows her *bona fides* in expecting favorable action in 1946. But be that as it may, a course of conduct in 1938–1941 can hardly be relied on in dealing with the performance of a contract made in July-August, 1946. What respondents did after so contracting in 1946 is the only inquiry, and we have specified at least five distinct, affirmative actions in furtherance of performance of that contract. Appellants point to nothing indicating the contrary. The facts in this record bring the case outside the rule of the refusal and prevention cases cited by appellants, hence it is unnecessary to review or discuss them.

Appellants next contend that respondents "unqualifiedly agreed to purchase The Armory Tavern" and "undertook to have the on-sale general license transferred to them." This is tantamount to saying that their contract was in the nature of a warranty.

The court found that respondents made no representation "as to the nature of their citizenship, moral character, or any representation that the transfer of said * * * license would be obtained" and it is not claimed that this finding is unsupported.

There is no language in any of the several disconnected writings to lend any support whatever to appellants' contention, and certainly no such warranty could be implied in view of the provisions of the Alcoholic Beverage Control Act and the Board's rules respecting the transfer of liquor licenses. As already noted, everybody concerned knew the broad powers of the Board in such matters, see Hansen v. State Board of Equalization, 43 Cal.App.2d 176, 110 P.2d 453, and nobody would be so naive as to place any reliance on such a warranty even if an intending purchaser were presumptuous enough to make it.

[8] Appellants, in challenging the action of the court in awarding a recovery, say "There is not one scintilla of evidence that respondents and appellants agreed that the former would have their money returned in the event that the application to transfer the license was denied." There was no need for such an agreement in view of the settled law on the subject. Riff v. Mayhew, 90 Cal.App.2d 712, 203 P.2d 812, 815, has several points in common with this

case. There a contract for the sale of a cocktail lounge (and of course its license) failed of performance because the Board refused to approve the transfer of the license. The reason for such refusal was that the applicant was not the real party in interest and his application had contained misrepresentations. It appeared also that a zoning law barred such places from the neighborhood. The buyer had paid $25,000 into escrow and when the Board refused to approve the transfer, sued to recover the $25,000. The court said "* * * it would be contrary to both law and equity to permit defendants to retain the $25,000.-00 deposited in escrow by the plaintiff." No authority was cited in support of that statement, presumably because none was needed. The case presented was a simple one of unjust enrichment.

There is no essential difference between a case such as that and this, on the one hand, where a contract was entered into and a failure of consideration eventuated, and a case, on the other, where the negotiations for a contract were abortive and the minds of the parties failed to meet, but money had been paid by the intending vendee. This court had occasion to consider a case of the latter type in Moore v. White, Cal.App., 220 P.2d 918, where we held that the doctrine of unjust enrichment was controlling, citing Schreyer v. Foster, 98 Cal. App. 706, 277 P. 506, and Blake v. Mosher, 11 Cal.App.2d 532, 54 P.2d 492.

With respect to the position of the Chase Company the court found that that appellant took the $3,800 from the escrowed $15,000 "with full knowledge that said transfer [of the license] was not certain to take place * * * in disregard of the escrow instructions, and without the knowledge or consent of plaintiffs or of defendant Nona Harwick * * * for its own use and benefit" and that on November 7, 1946, which was after the transfer had been disapproved, "without the knowledge or consent of plaintiffs and contrary to the terms of the agreement of sale, defendant L. F. Chase Company paid, out of said escrow funds previously deposited by plaintiffs, the sum of $10,000.00 to one Emile Hennette, seller of The Dungeon, for the account, use and benefit of defendant Nona Harwick; said payment was made upon the written demand of said defendant Nona Harwick, said demand having been solicited by defendant L. F. Chase Company."

[9] The facts supporting these findings are uncontradicted and appear in the trial judge's opinion which we have adopted. The "holder of an escrow is agent for all parties up to the time that the escrow is closed", Early v. Owens, 109 C.A. 489, 494, 293 P. 136, 138, citing *inter alia* Shreeves v. Pearson, 194 Cal. 699, 230 P. 448.

For the reasons given in the trial judge's opinion and those added by us respecting the findings (which were made thereafter) the judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

98 Cal.App.2d 617

REMILLARD BRICK CO. v. DANDINI et al.

Civ. 14281.

District Court of Appeal, First District, Division 1, California.

July 26, 1950.

Rehearing Denied Aug. 25, 1950.

Hearing Denied Sept. 21, 1950.

Creditor's action brought by Remillard Brick Company, a corporation, individually, and in the name and in behalf of Remillard-Dandini Company, a corporation, against A. O. Dandini and others and Remillard-Dandini Company, a corporation, to enforce collection of a judgment against A. O. Dandini, president and manager of the defendant corporation, such judgment having been rendered in derivative suit filed previously by plaintiff to set aside certain stock issued to defendant Dandini and for alleged misappropriation of funds of the corporation. Before trial of the action the board of directors of the corporation passed a resolu tion offsetting the judgment indebtedness of Dandini against the credits on the books of the corporation in Dandini's favor and such resolution was entered as a satisfaction of the judgment rendered against Dandini in the previous action. The Superior Court, Alameda County, Charles Wade Snook, J., denied plaintiff's motion to strike the satisfaction of judgment and the plaintiff appealed. The District Court of Appeal, Schottky, J. pro tem, held that since the agreement upon the satisfaction did not injure or jeopardize the financial condition of the corporation but was advantageous to it and was not fraudulent nor without consideration the plaintiff's motion to set aside the satisfaction was properly denied.

Order affirmed.

1. Judgment ⚿898(2)

A satisfaction of judgment which has been filed and entered may be set aside by appropriate proceedings and for proper cause, fraud, undue influence and mistake being the generally recognized grounds for vacating a satisfaction of judgment.

2. Appeal and error ⚿996, 1010(1)

Unless the evidence and all the inferences which may be reasonably deduced therefrom fail to support the conclusion of the trial court, the District Court of Appeal must affirm the order.

3. Judgment ⚿898(2)

Where creditor's suit was instituted by plaintiff stockholder against defendant directors of corporation and corporation to enforce collection of judgment against president and manager of corporation in derivative suit filed previously by plaintiff to set aside certain stock issued to president and manager of corporation and for alleged misappropriation of funds, but before trial, directors of corporation passed resolution by which judgment indebtedness of president and manager was offset against credits on books of corporation in his favor and entered a resolution as satisfaction of such judgment and such satisfaction did not injure or jeopardize financial condition of corporation but was advantageous to it, and was not fraudulent nor without consideration, plaintiff stockholder's motion to set aside satisfaction was properly denied. Corporations Code, § 820; Code Civ.Proc. § 337.

◆

Johnson, Harmon, Stirrat & Henderson, San Francisco, for appellant.

Leo R. Friedman, San Francisco, for respondents.

Eugene K. Sturgis, Oakland, for respondent Remillard-Dandini Co.

SCHOTTKY, Justice pro tem.

This is an appeal from an order of the superior court denying the motion of plaintiff and appellant to set aside a satisfaction of judgment. The judgment was entered on October 14, 1943, an amendment thereto was entered on November 2, 1943, and the satisfaction of judgment was filed on February 3, 1948, pursuant to a resolution of the board of directors authorizing its entry. The action in which the judgment had been entered was a derivative suit filed by plaintiff Remillard Brick Company, a stockholder in the Remillard-Dandini Company, and the judgment was given in favor of the Remillard-Dandini Company against its president and manager, A. O. Dandini.

Appellant has also filed under Rule 23 (b) an application for leave to produce additional evidence before this court, which application was argued concurrently with the hearing on the merits and ordered submitted at the same time. We have considered said application and have concluded that the instant case is not one in which such an application should be granted, and that said application for leave to produce additional testimony is therefore denied.

The motion to set aside the satisfaction of judgment was made on the grounds that the satisfaction was obtained by fraud and collusion, was without consideration, was voluntary, was against the interests of the defendant Remillard-Dandini Company, and was being sought for the purpose of abandoning the rights and interests of the company in the creditors' suit for collection of the judgment then pending in action No. 196,654.

On appeal it is contended by the appellant that the order of the lower court refusing to set aside the satisfaction of judgment should be reversed on the grounds that it was a fraud upon the company perpetrated by the majority directors in that: (1) It was an attempted dismissal of the creditors' (minority shareholder's) suit to collect the judgment in the company's favor, and was against the best interests of the company; that A. O. Dandini's right to credits under the 1935 contract was not adjudicated in the earlier fraud action; that that question is not now res judicata; and (2) the satisfaction was without consideration.

Before discussing the points raised on this appeal we shall summarize briefly the factual situation as disclosed by the record. Other background facts are set forth in Dandini v. Dandini, 82 Cal.App.2d 263, 186 P.2d 41, involving some of the same parties, and, to some extent, the same basic transactions here involved. In that action this court affirmed a judgment in favor of defendant A. O. Dandini in a suit to annul an assignment by him of 253 shares of Remillard-Dandini Company stock.

Originally the Remillard Brick Company (Lillian Remillard Dandini) owned one-half, or 150 shares, of the stock of the Remillard-Dandini Company (hereinafter referred to as the "company"). The defendant A. O. Dandini was given the other one-half of the stock at the time the company was organized. A contract was also executed at that time (1935) whereby A. O. Dandini was to be the president and manager of the company for five years, at a compensation of $300 per month, plus a commission. The contract provided:

"(1) The company will employ the manager to manage generally its business, subject only to the control of the Board of Directors, for the period beginning July 1, 1935, and ending June 30, 1939, and will pay to the said manager the sum of Three Hundred Dollars ($300.00) per month and will credit to the account of the manager each month an amount equal to seventy-five cents per thousand of brick sold, such payment and credit being in full compensation for services to be rendered consequent upon such employment.

"(2) The manager accepts such employment and will well and faithfully serve the company in the capacity of general manager during the period and for the compensation hereinbefore specified. * * *

"(5) The compensation hereinbefore provided of seventy-five cents per thousand is to be credited to the account of the manager on the books of the company but no such credits shall be payable to the manager, nor shall there be any payments on account of such credits, at any time that the company is in arrears in payments to its creditors or if the making of payments on account of such credits shall reasonably jeopardize the ability of the company to meet its debts and obligations as they fall due."

A similar contract was entered into on July 1, 1939, with the amounts changed to $400 and fifty cents respectively, and to run for five years.

On August 18, 1939, a complaint was filed by the plaintiff as a shareholder in the company against A. O. Dandini, Tobin, Caneli, and Costa, the then directors of the company, and against the company, to recover certain sums of money from the defendants based (1) upon the alleged misappropriations of funds by A. O. Dandini, and (2) to set aside as fraudulent, certain stock issued to Dandini. The fourth amended complaint, on which the case was tried, alleged misappropriations by Dandini from 1935 through August, 1939; that such misappropriations were continuing; and that the defendant directors were grossly negligent in their duties in not ascertaining or preventing the misappropriations and in voting for the 1939 contract. The third cause of action alleged that the defendants issued to Dandini 100 shares of the capital stock of the company without consideration, and that such was a fraud upon the company in that the stock was issued to Dandini in payment of amounts claimed due him under the contract and it was represented to the Corporation Commissioner that there "was due and owing" by the company to Dandini such sums, and that the issuance of the stock to him would be a convenient way of discharging such obligation, when actually the defendants knew that the company was in arrears in payments to its creditors and that such sums were therefore not then payable, and that the company was thereby damaged in the sum of $10,000.

The court at the trial of this fraud action found and concluded the contracts to be as alleged; that Dandini served as general manager of the company from July 1, 1934, to August 1, 1942; "That commencing on or about September 9, 1935, while said A. O. Dandini was acting as manager of Remillard-Dandini Company under the contract dated September 12, 1935, as hereinabove set out in full, and while he was serving as a director, president and manager of the Remillard-Dandini Company, said A. O. Dandini, in violation of his duties as manager, president and director of said company misappropriated and converted to his own use the funds and assets of the Remillard-Dandini Company in the sum of $51,404.04; that $8,004.89 of said $51,404.04 was so misappropriated and converted by said A. O. Dandini prior to August 18, 1936, and is barred by Section 338, Subdivision 4 of the Code of Civil Procedure [statute of limitations]; that the remainder of said sum, to wit, $43,399.55 was so misappropriated and converted by A. O. Dandini after August 18, 1936; that of said $51,404.04 so misappropriated by A. O. Dandini $37,781.31 thereof was so misappropriated prior to August 1, 1939, and $13,619.73 misappropriated from August 1, 1939 to July 8, 1942."

The trial court in the fraud action found that the 1939 contract had been entered into by the directors after a warning by Lillian R. Dandini of the misappropriations, that the directors knew or should have known of them, that entering into the contract was gross and wilful negligence and a fraud on the company, and that Dandini was entitled only to the reasonable value of his services ($400 per month) after August 1, 1939. As to the third count of the complaint the court found that under the 1935 contract and up to December 31, 1938, the credits of Dandini amounted to $38,399, and that by contract of February 14, 1939, Dandini was given and accepted 100 shares of the value of $10,000 in satisfaction of such claim. The contract was entered into by the company at a board of directors meeting at which Lillian Dandini was not present, and was voted on by Caneli, Costa and Tobin. After receiving the authorization of the Division of Corporations the 100 shares were issued for a purported claim of $43,099 ($4,700 interest) when actually "none of said $38,399.00 was due or payable to A. O. Dandini and it was not at said time ascertained if it would ever be due or payable to him, that none of said alleged interest was due or payable either on a contingent basis or otherwise."

The court also found that "* * * the issuance of said shares of stock to A. O. Dandini was a fraud upon said Remillard Dandini Company and should be annulled * * * and the said compromise being ordered to be annulled, said credits are ordered to be replaced on said books, said credits being in the sum of $38,399.11 * * *."

The court then found that such stock had been transferred by A. O. Dandini to third persons who were not represented in that suit and therefore the *bona fides* of the transfer was not adjudicated in that suit. The court directed that $10,000 for attorneys' fees and $1,800 expended for an audit of the Remillard-Dandini Company books by the brick company were to be paid out of the money recovered from A. O. Dandini.

Thus under the judgment of October 14, 1943, and the amendments thereto of November 2, 1943, Dandini was to pay to the company $43,399.55 and return the 100 shares of stock or pay $10,000 additional, their reasonable value. Interest of seven per cent was to run from the date of judgment and the contingent credits of $38,399.11 which arose under the 1935 contract were to be set up again on the books in favor of A. O. Dandini, "* * * but whenever the conditions specified in the contract of September 12, 1935, have arisen making the payment of said credits due and payable to the said A. O. Dandini the Remillard Dandini Company shall not be required to pay said credits to the said A. O. Dandini so long as any portion of the judgment herein in favor of the Remillard Dandini Company and against A. O. Dandini remains unpaid and in such event the Remillard Dandini Company shall have the right to retain as part or full payment of said judgment the amount of credits equal to the unpaid portion of said judgment."

A creditors' suit was instituted by the plaintiff in August, 1946, to enforce the collection of the judgment against Dandini. This action was to be set for trial on February 9, 1948. However, at a special meeting of the board of directors of the company held on January 29, 1948, a resolution was passed by which the judgment indebtedness of Dandini was offset against the credits on the books of the company in Dandini's favor. This resolution was entered February 2, 1948, as a satisfaction of judgment. Notice of motion to strike such satisfaction of judgment was filed by plaintiff February 6, 1948, and was submitted without argument. The motion was denied, and plaintiff appeals.

[1] It is, of course, the law that a satisfaction of judgment which has been filed and entered may be set aside by appropriate proceedings and for proper cause. 15 Cal.Jur. 273; Knaak v. Brown, 115 Neb. 260, 212 N.W. 431, 51 A.L.R. 243; Brochier v. Brochier, 17 Cal.2d 822, 112 P.2d 602. Fraud, undue influence and mistake are the generally recognized grounds for vacating a satisfaction of judgment.

Appellant contends that it should be vacated because it was an attempt by the directors to dismiss a creditors' (minority shareholder's) suit (Action No. 196,654) in which the appealing plaintiff seeks to subject the majority shares of stock in the company to satisfaction of the judgment in the fraud action, and that the majority directors are thus seeking to eliminate the creditors' suit and oust the court of jurisdiction to hear and determine the claim and right of Dandini. It alleges that "If their action is sustained, it would amount to the scrapping of all the well-settled law which entitled a minority stockholder to sue on behalf of the corporation when the majority directors are hostile to the corporation and refuse to act." Respondents in reply argue that the creditors' suit depended upon whether Dandini was indebted to the company, and that if a satisfaction of judgment was properly entered it is immaterial whether or not it defeated the creditors' suit. We do not believe that the pendency of the creditors' suit would affect the question of whether or not the satisfaction of judgment was properly entered.

Appellant contends also that, under section 820 of the Corporations Code, which provides that "Directors and officers shall exercise their powers in good faith, and with a view to the interests of the corporation," the trustee relationship was violated by action of respondents, in causing the satisfaction to be entered.

Appellant contends further that the satisfaction of judgment was entered without consideration. Lack of consideration may be ground for vacating a satisfaction of judgment in some jurisdictions, Knaak v. Brown, 115 Neb. 260, 212 N.W. 431, 51 A.L.R. 243, but in California it would seem that more must appear than lack of consideration alone. In Dern v. Dein, 57 Cal. App. 611, 613, 207 P. 914, 915, the court said: "* * * but, even if it were true that the satisfaction was entered without consideration, we do not understand that that fact alone requires the court on motion to set the satisfaction aside. The law does not invite litigation or encourage it to be continued, and a judgment creditor may terminate it by filing a satisfaction in the manner prescribed in section 675, Code of Civil Procedure."

[2] However, it would appear to us that the chief question to be answered in the instant case is whether or not there is sufficient evidence to sustain the order of the trial court denying the motion to set aside the satisfaction of judgment. The trial court in denying said motion impliedly found that the action of the ma-

jority directors was neither fraudulent nor without consideration. The trial court placed a construction upon the actions and motives of respondents contrary to that appellant seeks to have us place upon them. Under well-established appellate procedure, unless the evidence and all inferences which may reasonably be deduced therefrom fail to support the conclusion of the trial court, we must affirm the order.

In the January 29, 1948, resolution of the board of directors of the company is set forth the items cancelled against each other to arrive at the satisfaction of the judgment rendered against Dandini. Briefly, the amounts are as follow:

	Dandini owed to the company
$43,399.55	The amount of the judgment in the fraud action against Dandini for misappropriations.
10,000.00	The amount to be returned to the company by Dandini in lieu of the 100 shares of stock wrongfully issued to him.
14,331.08	Interest on the judgment.
151.95	Costs allowed in the judgment.
45.20	Interest on the allowed costs.
2,178.33	Owed by Dandini to the company on open account receivable (Personal advances made in Dandini's behalf by the company). Note: No interest was charged Dandini by the company on this amount.
$70,106.11	Total owed company by Dandini.
* *	* * * * * * * * * * *
	Amounts set off by the company in arriving at satisfaction.
$ 100.00	Value of one share of stock returned (in addition to the 100 improperly issued).
550.00	Paid by respondent Costa.
11,000.00	Result of levy on San Jose property of Dandini.
2,000.00	Result of levy on Berkeley property of Dandini.
38,399.11	Amount of credit restored to Dandini on the books under the fraud action judgment.
4,756.16	Additional credits alleged due to Dandini under the 1935 contract and accruing after January 1, 1939.
10,995.72	Interest on the credits due Dandini, from November 2, 1943, to February 1, 1948.
126.78	Cash paid by Dandini as balance due on judgment.
2,178.33	Cash paid as due on the open account receivable.
$70,106.10	Total received in alleged satisfaction of judgment.

Appellant contends that there was no consideration because if the amount of the credits was due on November 2, 1943 (the date of the judgment) then it was barred by the four year statute of limitations, Code Civ.Proc. § 337, at the time of the filing of the satisfaction of judgment. This contention is unsound because the judgment of the court in the prior action ordered that the said credit of $38,399.11 be placed upon the books of the company to the credit of A. O. Dandini, and since the amount of said credit could not properly be paid until the affairs of the company were in condition to pay it in accordance with the 1935 contract, it is obvious that the right to said credits was not barred by the statute of limitations.

Appellant contends also that there was no consideration because the company had a good defense to the claim of credits under the 1935 contract in that Dandini had violated the 1935 contract by his appropriation, and appellant claims that the right to the credits was not decided in the fraud action and is therefore not res judicata.

We are unable to agree with appellant's contention that A. O. Dandini's right to the credits was not determined in the fraud action. The findings hereinbefore set forth indicate clearly that the court intended to find and did find that Dandini was entitled to said credits, and appellant did not appeal from said judgment. Indeed, this court in Dandini v. Dandini, supra, 82 Cal. App.2d 263, at page 266, 186 P.2d 41, at page 42, in construing the judgment in the fraud action, said: "The court found the transaction to be fraudulent; that respondent Dandini was, on account of the financial condition of the Dandini Company, not then entitled to receive payment although his accrued commission actually amounted to $38,000."

Furthermore it would appear, as contended by respondents, that by stipulation of counsel the right of Dandini to the credits was passed upon by the trial court.

At the trial the question arose as to the financial relationship between Dandini and the company, whether Dandini put money in "with one hand and took it out with the other." An audit was arranged for, one where the auditors "won't necessarily take the books, the statements in the books as the fact, but they will go into whatever is necessary to verify that which is not on the books."

"The Court: Doesn't that involve his credit against the company?

"Mr. Friedman [counsel for defendants]: Both ways. In other words, we want to find out under either your theory or my theory when we get through depending on which way the figures are construed, how much of the company's money Dandini got, how much he was entitled to, how much he was not entitled to and how much he paid back if anything. That is really the crux of the matter.

"Mr. Johnson [counsel for plaintiff]: If it is necessary to go back with regard to some of the items, back over the time this suit was started in order to clear up some of these items that will appear.

"Mr. Friedman: There will be no objection to that.

"Mr. Johnson: And that will include everything. * * *

"The Court: When they report we simply have to pass upon the condition of Dandini and the company in relation to each other.

"Mr. Friedman: We are only concerned with Dandini's handling of the money of the company, how much he is accountable for *and how much credit he is entitled to,* so far as this audit is concerned.

"Mr. Johnson: *I believe so.*" (Italics added.)

We conclude, therefore, that the right of A. O. Dandini to the credit of $38,399.11 was adjudicated in the fraud action, even though it was also determined that because of the provisions of the 1935 contract it was not then payable.

Appellant next contends that there was no consideration because, even if Dandini were entitled to the credits, the conditions under which they were to become payable had not occurred. Appellant refers to the hereinbefore quoted provision of the 1935 agreement which provides that there shall be no "payments on account of such credits, at any time that the company is in arrears in payments to its creditors or if the making of payments on account of such credits shall reasonably jeopardize the ability of the company to meet its debts and obligations as they fall due."

Mr. Sturgis testified at the hearing of the motion that the company was not in arrears in payments to its creditors; that at the end of each year from 1943 the company had a cash balance on hand ranging from $4,000 to $17,000; and that from the month of March, 1943, the company had been current in the payment of its bills.

The resolution attached to the satisfaction of judgment recites that the directors found and resolved that the company had "ceased to be in arrears in payment to its creditors during the month of March, 1943, and never since said March, 1943, has it been in arrears in its payments to its creditors." The resolution of the board of directors further found and resolved that "the payment of said credits would not in any way jeopardize the ability of the Remillard-Dandini Company to meet its obligations and debts as they fall due, because such payment would be an offset transaction on the books and not any payment of moneys to said A. O. Dandini."

The joint affidavit of directors Stanley, Sturgis and Gatzert and the individual affidavit of Mr. Sturgis recite the full proceedings had from and after the time of the entry of judgment, the amounts paid to the company on account of said judgment, the levies upon property in partial satisfaction of the judgment, the payment to attorneys for appellant of $10,000 attorneys' fees, the payment of costs, etc., the bringing of an action for declaratory relief to determine the question of whether the conditions had arisen making the payment of the credits due, etc. The affidavit of Mr. Sturgis sets forth the demands made by Dandini on the company, that his credits be offset against the judgment and that these demands started on November 11, 1943, etc.

[3] We are satisfied that the record supports the implied finding of the trial court that the provisions of the 1935 contract did not preclude the directors from agreeing upon the satisfaction of said judgment. We believe also that the record amply supports the conclusion that the agreeing upon the satisfaction did not in any way injure or jeopardize the financial condition of the company, but rather that it was an advantage to the company to have the matter finally closed. If we were compelled by the record to accept the construction which appellant places upon the evidence, we might agree with appellant's contentions, but, as we have hereinbefore pointed out, the record supports the implied finding of the learned trial judge that the action of the directors in agreeing upon and entering the satisfaction of judgment was neither fraudulent nor without consideration.

No other points raised in the briefs require discussion.

In view of the foregoing, the application to take additional evidence is denied, and the order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

---

98 Cal.App.2d 545

PEOPLE v. FINKELSTIN.

Cr. 4427.

District Court of Appeal, Second District,
Division 2, California.
July 24, 1950.

Hearing Denied Aug. 17, 1950.

Charles S. Finkelstin, also known as Charles S. King, was convicted in the Superior Court, Ventura County, Charles F. Blackstock, J., of bribery, and he appealed from a judgment of conviction and from an order denying his motion for a new trial. The District Court of Appeal, Moore, P. J., held that defendant was not entrapped.

Judgment and order affirmed.

1. Criminal law 🔑37

Where pawnbroker suggested to police officer that he would pay money to officials if they would permit him to open gambling houses and houses of prostitution, and chief of police and other officers thereafter encouraged him in belief that they would accept, and led him to unfold his plans and to increase amount of offer for protection and permitted him to give them money and then arrested him for bribery, pawnbroker was not entrapped. Pen.Code, § 67.

2. Criminal law 🔑37

"Entrapment" exists only where officer has conceived and planned crime for one who would not have done it but for allurement, deception or persuasion of officer.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Entrapment".

3. Criminal law 🔑37

If doing of act is a crime, and criminal intent originated in mind of accused, and offense is completed, fact that officer appeared to cooperate by furnishing opportunity or otherwise aiding offender in order to facilitate consummation of act is not a defense.

4. Criminal law 🔑37, 739(1)

One who commits a crime induced thereto by an officer can escape punishment only when criminal intent was first conceived by officer, and it is a question of fact whether such officer was author of criminal scheme or merely encouraged criminal's boldness.

5. Bribery 🔑1(1)

Under the statute making it punishable to give or offer any bribe to any executive officer of the state with intent to influence him with respect to any act, every person who merely offers a bribe to an executive officer with intent to influence his decision is guilty. Pen.Code, § 67.

6. Criminal law 🔑37

Where pawnbroker made it known that he would be willing to bribe public officials if they would permit him to operate gambling houses and houses of prostitution, chief of police was justified in resorting to reasonable stratagems to bring pawnbroker to justice and to apprehend others in league with him, and could, properly have his men cooperate with the pawnbroker without being guilty of entrapment. Pen.Code, § 67.

7. Criminal law 🔑37

Where pawnbroker let it be known that he would pay bribes if chief of police would permit him to operate gambling houses and houses of prostitution, chief could properly have his men cooperate with pawnbroker to elicit admissions and to gain such other information of intended crimes and of other criminals as pawnbroker might have possessed without permitting him to escape prosecution for bribery through defense of entrapment. Pen.Code, § 67.

8. Criminal law 🔑1144(13)

On appeal from conviction for bribery, appellate court was concerned only with question whether under all evidence defendant could not have been guilty, and favorable proof, reasonable inferences and all intendments would be invoked in support of judgment. Pen.Code, § 67.

9. Criminal law 🔑507(3)

In prosecution for offering bribe to police chief, where officers who conversed with defendant and obtained information were feigned accomplices, corroboration of their testimony was not required. Pen. Code, § 653f.

10. Bribery 🔑1(2)

Pawnbroker who offered to pay $3000 to chief of police for privilege of operating gambling houses and houses of prostitution was guilty of bribery. Pen.Code, § 67.

11. Criminal law 🔑1032(1)

Where indictment accused defendant of giving bribe to named individual who was then a ministerial officer of the city and Chief of Police, and prosecution was permitted on motion to amend indictment by substituting word "executive" for word "ministerial", and accused made no claim of prejudice in trial court, amendment did not charge a different crime from that found by grand jury so as to deprive court of jurisdiction, and hence accused could not complain on appeal. Pen.Code, §§ 67, 67½, 68, 1008.

12. Municipal corporations 🔑182

Under ordinance of City of Oxnard establishing city manager as chief executive and administrative officer without declaring that there shall be but one executive officer, chief of police is an executive rather than a ministerial officer.

13. Bribery 🔑10

In prosecution for offering bribe to police chief to permit opening of gambling houses, evidence regarding gambling activities of subordinate officer to whom defendant's intentions were originally communicated was not material to show whether defendant gave chief of police bribe for purpose of influencing him, and hence was properly excluded. Pen.Code, § 67.

14. Criminal law 🔑363

Only those declarations which formed part of transaction in dispute are admissible as part of the res gestae, and they must be incidental to and explanatory of the main fact and so closely connected with it as to be a part of it, and it must be shown that without them main fact might not be properly understood. Code Civ.Proc. § 1850.

15. Criminal law 🔑368(1)

In prosecution for offering bribe to police chief to permit defendant to open gambling houses and houses of prostitution, evidence that defendant approached operator of burlesque show and told him that police would let him open if he paid a bribe and that operator replied he would not give police anything was not admissible as part of the res gestae. Code Civ.Proc. § 1850.

16. Criminal law 🔑782(10)

In bribery prosecution, giving of instruction that direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason, was not error. Code Civ.Proc. § 1844.

17. Criminal law 🔑507(4), 562

One who under direction of officer of law or other person, or on his own initiative, and without criminal intent, feigns complicity in commission of crime merely to detect perpetrator with view to prosecution, is not an accomplice in law, and his testimony need not be corroborated, but to support conviction, such testimony and all other evidence tending to prove guilt must carry convincing force required by law.

18. Criminal law 🔑814(15)

In bribery prosecution, where defendant raised defense of entrapment and no accomplice was named either as accessory before or after the fact, and police officers were feigned accomplices only, court properly refused to define accomplices. Pen. Code, § 67.

19. Criminal law 🔑1144(15)

In criminal prosecution, jury are presumed to have understood and obeyed all instructions.

20. Criminal law 🔑823(5)

In bribery prosecution, instruction that intent is manifested by circumstances connected with offense was not prejudicial in view of other instructions. Pen.Code, § 67.

21. Criminal law 🔑829(17, 18)

In bribery prosecution, where court gave approved instructions with reference to weighing testimony of witnesses, reasonable doubt, and insufficiency of preponderance of proof, and instructed that jury were exclusive judges of value of evidence, defendant could not complain of refusal to give instructions that reasonable doubt might be created by defendant's testimony and that rules regarding testimony of other witnesses applied to defendant. Pen.Code, § 67.

22. Criminal law 🔑785(4)

In bribery prosecution, court properly charged that testimony of police officer was to be judged by standard applied to all other witnesses. Pen.Code, § 67.

23. Bribery 🔑14

In bribery prosecution, where defense of entrapment was raised and evidence showed that police were not accomplices, court properly charged that essential element of bribery is that subject matter upon which bribe is to operate actually exists and has been or can be brought before officer in question in his official capacity. Pen.Code, § 67.

24. Criminal law 🔑829(1)

Proposed instructions effectually included in given instructions were properly refused.

25. Criminal law 🔑829(1)

In prosecution for offering bribe to police chief, refusal to charge that every defendant, whatever his race, color or condition, stands equal before the law and should be tried with perfect impartiality was properly refused in view of court's charge, and in absence of anything in the evidence indicating prejudice against defendant's race, color or creed. Pen.Code, § 67.

26. Criminal law 🔑865(1)

Where jury is divided, court must recommend that jury arrive at verdict.

27. Criminal law ⚷865(1)

Where jury returned at 10:25 P.M. and stated that they stood 11 to 1 but that there was a chance of agreement, and court stated that there ought to be a chance of agreement in view of the standing and ordered retirement of jury with consent of counsel and brought them in again at 11:00 to state that court had made arrangements at a hotel, remarks of court were not objectionable as an attempt to force the jury or as favoring verdict of conviction.

* * *

Morris Lavine, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., William E. James, Dep. Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appeal from a conviction of bribery. Since appellant demands a reversal on the ground that he was the victim of an entrapment, a detailed statement of the evidence is essential to a full understanding of all contentions.

At the time of the occurrences mentioned herein appellant was a citizen of Oxnard where he had resided for ten years and had operated a pawnship. William P. Clark was the chief of police of that city; Alfred Jewell was sergeant of police and Edward L. Stanton was a police detective. On June 30, 1949, appellant inquired of Stanton concerning one Macius who had been arrested on that day for an illegal sale of fireworks and promised the officer to make it worth his while if the latter would "get the boy out and get the fireworks back." July 2 the fireworks were returned to appellant when Stanton called to check the pawnshop books. While Stanton was in pursuit of such task, appellant walked by, inserted his hand in the detective's coat pocket, saying, "thanks." When Stanton protested that he did not "want that," the reply was, "Oh, take it, there is more where that came from." The gift was two ten-dollar bills which Stanton initialed, enclosed in an envelope and gave to the chief. While the detective was in the pawnshop on July 4 appellant asked him whether he had any idea how much money might be made in Oxnard if the police department would "play ball." On receiving a negative answer appellant said, "About $4,000 for the chief, and he doesn't have to share that with anyone. * * * We could open four houses in Oxnard." These, said appellant, would pay $500 apiece; could run "with very little pressure, because 13 or 15 houses ran there in the old days." Also, appellant said he would pay $750 a month to run a crap game and there were other angles where money could be made. When in answer to appellant's inquiry as to how the chief would regard the opening of such houses, the detective said he had no idea. Thereupon the shopkeeper said, "Feel him out. * * * There is lots of money to be made and we are losing money by losing time."

On July 5 the officer was again at the pawnshop. When appellant asked whether he had felt out the chief about opening up the town, Stanton stated that he had made some mention of the matter to his superior but was very doubtful whether he would allow houses of prostitution and as to the crap game he did not believe the chief would let his reputation go for $750 a month. "Well," said appellant, "I can raise that ante to a thousand with the extra bonus when I have a good month and am making money. He is to have some of it too." Appellant then expanded upon his plan to be willing to suffer an arrest occasionally to make it appear that the police department was performing its duty. "Just * * * take me out; I won't mind * * I will go over and pay a small fine; it is all a part of the overhead." He knew he would not get a jail sentence; he could take care of the judge.

When Stanton called at appellant's home on July 6, appellant was eager to discuss matters with the chief to make final arrangements on the game inasmuch as he desired to go to New York to make arrangements for first class crap game handlers. Also, he said he had connections with a syndicate which would supply prostitutes for his houses to be opened in Oxnard; he had made a lot of money in the great metropolis where he had paid off all the officers; everybody got a little bit from $2 a day for the patrolman who walked the beat to $10 a day for the sergeant and everybody was happy; if the police had let him alone he could have made $10,000 on fireworks; he had made some money but not much because of police pressure; when Oxnard was running open all policemen ate steaks, but apparently not now. At appellant's request the officer drove him to the pawnshop where he was taken to the rear to see a supply of punchboards valued at $8000 which appellant had purchased and which would justify a tidy payoff if allowed to operate.

When Stanton was at the pawnshop on July 7 appellant asked him for permission to install a punchboard in a specified cafe, and Stanton told him he would have to see the chief. In a conversation later on the same day Stanton told appellant that chief Clark had refused to assent to the installation of punchboards. It was at that time appellant telephoned to Judge Nelson at the city hall as follows: "Hello, this is Charley; I would like to see you on some business; Okay, I will see you then." He then told the detective that he would make more definite arrangements with the judge since Stanton seemed to be worried about it and then would advise the latter of the outcome.

When on July 11 Sergeant Jewell accompanied Stanton to the pawnshop, appellant approached the automobile of the officers and in referring to a visit of Jewell to Nevada said to the sergeant, "Why didn't you wire me for some money if you needed some; you should have taken my Cadillac to start with to make the trip." Stanton told appellant it was all right to speak in front of Jewell. After the officers had been invited into the pawnshop, appellant, addressing the sergeant said, "Now that you are back we ought to get going because we are losing money by losing time; the business men of Oxnard would like to see the town opened up; I am not worried about anybody but Bill Clark and Whitey [Stanton] is working on him." In answer to Jewell's inquiry appellant said there was $5000 a month to be made for the police department. As to City Manager Shannon, Judge Nelson would take care of him all right. "I would like to talk with the Chief so we can make some final arrangements."

Thereafter on the same day Stanton arranged with the chief to meet appellant and advised the latter that they would meet him about 9:00 o'clock p. m. After the two officers had called for appellant, they drove to the home of the chief. After the latter had seated himself beside Jewell, they cruised about the city. As they proceeded Clark said to appellant, "Charlie, I understand you have something on your mind you would like to talk to me about." Appellant replied, "Well, I am ready to go," and when asked for his meaning, continued, "This is the way I believe it should be, that we start out easy by opening one house of prostitution and I am ready to lay $500 on the line for that opening. * * * The Juanita will be the first one to open and we can put the five hundred on the line right now." When the chief replied that he would not open up for $500, appellant stated, "Well, I can make it more." Chief Clark answered, "Give me some exact figure," to which appellant replied, "Well, there are three more houses at five hundred a piece, which will make it two thousand. My crap game should start in a week or ten days. It will take a little time to make arrangements and get handlers, but that will pay a thousand. There are the carnivals when they come to town will make extra money and the punchboards and burlesque shows." To Clark's inquiry as to what all this would amount to for him, appellant's reply was, "About five thousand a month when we get going." When the chief stated, "I don't think we can talk any business; I am not interested in your $500 proposition" appellant said, "Maybe I can put $3000 on the line but I will have to have some time to think it over." After Clark replied, "I don't think we can do any business" he directed Jewell to deposit their guest at his place. Later the same evening Stanton and Jewell met appellant as he emerged from the poolroom adjoining his pawnshop; they told him they believed they could not reach an agreement; they were sorry that the negotiations had started; appellant said, "Well, I am not sorry. I am going to offer three thousand to him. I think the Chief will do business then."

On July 12th appellant by telephone requested Stanton to call at his home. There he told Stanton and Jewell that he was "ready to lay three thousand on the line" and desired another meeting with the chief. They told him to call their superior and make the engagement. That same evening there was a meeting in Chief Clark's office. The sergeant and the detective were both there accompanied by Jack Anderson, the desk operator. Ernest Arnold, a court reporter was in the closet of Clark's office as appellant entered. After waiting about 15 minutes appellant said, "See you later" and departed. On July 13 in compliance with a message from appellant to Stanton the latter and Sergeant Jewell called at the pawnshop. Appellant said, "I have the money; where can I locate the Chief?" Pursuant to Stanton's suggestion, he talked with Clark after which he announced, "I have a meeting with him in ten minutes." The two officers proceeded at once to the office of the chief where they found him and Captain Hinostro who was concealed in the locker. As appellant entered he said, "I have got it,—three Gees." Addressing him the chief said, "Charlie, so that we understand each other, what is that for?" "That," said the pawnbroker, "is for the houses and my crap game we talked about." Thereupon Chief Clark took the money and said, "Well, Charlie, you play your game and I will play mine. You are under arrest for bribery." Stanton then enclosed the thirty $100 bills which were introduced at the trial along with the two ten-dollar bills given to him on July 2.

The foregoing recitals are a synopsis of the testimony of officer Stanton. It was corroborated in all essentials by Clark, Jewell and Hinostro. In addition, Judge Nelson testified that on July 7 appellant called him by telephone for an appointment. He was called again the following day after which, accompanied by Henry Blatt, he paid a visit to the pawnshop. Appellant then told him they were arranging to open up the town and wished to know how the judge felt about it. The latter's reply was that appellant could not have a deal like that without the cooperation of the chief of police. On July 12 appellant telephoned the judge again asking for an interview on something important. Accompanied by Bob Nelson, the judge drove again to the pawnshop. On entering he was informed by appellant that they were going to open the town. When he asked appellant if the chief was a party to the deal, appellant said, "The chief needs money. He is ready to go along." The judge then asked what appellant would do with Mr. Shannon, the city manager. Appellant's reply was that Mayor Carty will take care of him. The judge told him that he would cooperate with the chief.

[1] Cashier Hanson of the Levy Bank testified that appellant had had him cash a check at about 11:00 o'clock a. m. for $3,000 and requested thirty $100 bills.

Appellant Was Not Entrapped.

Appellant wholly misconceives the doctrine of entrapment. He asserts that the conduct of the officers was against public policy in that they led him on to unfold his plans and to increase the amount of his offer for protection against laws that inhibit gambling and prostitution and actually to pay the money. On the contrary such behavior was designed to uphold the public policy of the state as expressed in its statutes and court decisions. Had the officers gone in search of a bribe giver, placed decoys to attract corruptionists and led the tempted one to commit the final act, they would thereby have lowered the standards of honorable and decent official conduct, would have violated the ethics of good citizenship and would have lost the prey they aimed to conquer. But they did no such thing. Appellant conceived the crime in his own brain, opened the negotiations without the slightest inducement and took the initiative at every meeting. To seduce the constabulary of his adopted city was with him a passion. To effect the nullification of laws and ordinances against the most loathsome social vices was the prelude to the realization of his dream of vast riches. He set about the achieve-ment of his purpose without hesitancy or timidity. He seized an opportunity when he had been graciously served by a subordinate official and undertook to penetrate the latter's moral epidermis by a gift of $20. Stirred by the knowledge that his largess reposed in a pocket of the amiable detective he lost no time in proposing his plan for enriching the police if they would only "play ball." Four thousand a month for the chief for his very own! This was a definite offer to one he deemed an agent for the head of the police department. Nor did he pause to await developments: "Feel him out; there is lots of money to be made and we are losing money by losing time." At his next meeting with the same officer he was the first to raise the subject for discussion and when it was suggested that $750 monthly for a protected crap game was too little for a stain upon the chief's reputation he promptly countered with an offer of $1000 per month with an extra bonus for every "good month" and proposed that he should pay a fine occasionally. He knew he would not be jailed, he "could take care of the judge." They met again, this time with the sergeant present. Increased boldness has seized the impresario. With the sergeant back, "we ought to get going. * * * I would like to talk with the chief so we can make some final arrangements." After a bribe-giver has told a patrolman the amount he will pay to the head of the police department and asks for the privilege of communicating directly with the chief it would be injurious to the public welfare for either official to "fade out," leaving the rascal at large. To meet with him and obtain indisputable evidence of his offer was a duty the chief owed the State. That he did so is a stimulus to honesty in public service and an unforgettable lesson to lurking corruptionists.

[2-4] Entrapment exists only where the official has conceived and planned the crime for one who would not have done it but for the allurement, deception or persuasion of the officer. People v. Makovsky, 3 Cal.2d 366, 369, 44 P.2d 536; People v. Lindsey, 91 Cal.App.2d 914, 916, 205 P.2d 1114. If the doing of an act is a crime and the criminal intent originated in the mind of the accused and the offense is completed, the fact that an officer appeared to cooperate by furnishing opportunity or otherwise aiding the offender in order to facilitate the consummation of the act is not a defense. People v. Cherry, 39 Cal.App.2d 149, 151–154, 102 P.2d 546; In re Moore, 70 Cal.App. 483, 488, 233 P. 805; United States v. Wray, D.C., 8 F.2d 429, 430. When police officers are informed that a person intends to offer a bribe to an official of the state they may afford opportunities for him to negotiate, to bargain and pay the money and may act with the offender, and if after originating the criminal intent, he takes such steps as are necessary to complete the offense he is nonetheless guilty of the crime because the officers had encouraged him to divulge his plans and to enlarge his offers and were present at the final scene. See People v. Grijalya, 48 Cal.App.2d 690, 694, 121 P.2d 32; People v. Hall, 133 Cal.App. 40, 45, 23 P.2d 783; People v. Caiazza, 61 Cal.App. 505, 507, 215 P. 80. One who commits a crime induced thereto by an officer can escape punishment only when the criminal intent was first conceived by the minions of the law, and it is a question of fact whether they were the authors of the criminal scheme or merely encouraged his boldness. See People v. Lagomarsino, 97 Cal.App.2d 92, 217 P.2d 124; People v. Grosofsky, 73 Cal.App.2d 15, 18, 165 P.2d 757; People v. Malone, 117 Cal.App. 629, 633, 4 P.2d 287.

Appellant emphasizes the holding of People v. Werner, 16 Cal.2d 216, 105 P.2d 927. It is not pertinent. The court made it clear, 16 Cal.2d at page 225, 105 P.2d at page 933; that when the complaining witness concluded that the defendants were not sincere or honest in their motives, for the purpose of securing their conviction he went "far beyond the passive assistance that is permitted under the authorities to apprehend a potential offender, going to the extent of actively delivering or handing over his property * * * thereby depriving the offense, if any, of the essential element of lack of consent of the owner."

[5-7] Under section 67 of the Penal Code[1] every person who merely offers a bribe to an executive officer with intent to influence his decision is guilty. People v. Skaggs, 80 Cal.App.2d 83, 94, 181 P.2d 390; People v. Brigham, 72 Cal.App.2d 1, 6, 163 P.2d 891. The law punishes an offer which is calculated to debase, People v. Ah Fook, 62 Cal. 493, 495, as well as the actual delivery of the thing of value to the official. Hence, appellant violated the statute when he first met Chief Clark and proposed the payment of sums of money if the latter would desist from enforcing the laws against prostitution and gambling. Was he entrapped to make that offer and to particularize the procedure by which brothels would be opened and his crap game started? Was he entrapped to chide Sergeant Jewell for not wiring him from Nevada for money? Was he entrapped to tell Stanton on July 2 that if the police would "play ball," $4000 a month could be made for the chief, that each bawdy house could pay $500 monthly and his crap game $750? Verily, was he entrapped when he put $20 into Stanton's pocket? The chief exercised only the cunning of a law enforcement agent when he commenced a campaign to ascertain whether others were directing the movements of appellant. It was his apparent purpose not only to bring the pawnbroker to justice but to apprehend such as might have been in league with him in his vicious enterprise. To achieve that purpose he was justified in resorting to reasonable stratagems. People v. Seely, 66 Cal.App.2d 408, 412, 152 P.2d 454. His remaining passive and not attempting to prevent the crime, People v. Werner, supra, 16 Cal.2d 216, 105 P.2d 927, encouraged appellant to request the detective to "feel out the chief"; to admonish Stanton and Jewell how they were all losing money by losing time; to boast of his experience in bribing officers in an eastern city; to expose his possession of $8000 worth of punchboards; to offer Sergeant Jewell the free use of his Cadillac; to tell of his gifts of whiskey to policemen; to tell his offer of a home for Chief Clark —the chief could live for "nothing"; to claim he could control the city's judge, the city manager and the mayor; to declare to Jewell and Stanton that he was not sorry the conversations had started and he was going to offer the $3000 to the chief. In order to elicit such admissions and to gain such other information of intended crimes and of other criminals as appellant might have possessed, Chief Clark was warranted in having his men cooperate with appellant. People v. Seely, 66 Cal.App.2d 408, 412, 152 P.2d 454.

[8] The attempt to impress this court by presenting such evidence as he deems proof of appellant's innocence is vain. The only concern here is whether under all the evidence appellant could not have been guilty. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. Favorable proof, reasonable inferences and all intendments are invoked in support of the judgment.

In order to protect the accused against undue zeal of the officers and to give him the benefit of his theory of entrapment, the court instructed the jury in the language of Caljic instructions 851 and 854[2] which in effect directed a verdict of not guilty

---

[1] "Every person who gives or offers any bribe to any executive officer of this state, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer is punishable by imprisonment in the state prison not less than one nor more than fourteen years, and is disqualified from holding any office in this state."

[2] California Jury Instructions, Criminal. Instruction No. 851

The law does not tolerate a person, particularly a law enforcement officer, generating in the mind of a person who is innocent of any criminal purpose, the original intent to commit a crime thus entrapping such person into the commission of a crime which he would not have committed or even contemplated but for such inducement; and where a crime is committed as a consequence of such entrapment, no conviction may be had of the person so entrapped as his acts do not constitute a crime.

If the intent to commit the crime did not originate with the defendant and he was not carrying out his own criminal purpose, but the crime was suggested by another person acting with the purpose of entrapping and causing the arrest of if the officers generated in an innocent mind the original intent to commit the crime and whether the acts constituting the offense resulted from the defendant's attempt to carry out his own intent. The instructions appear on the margin hereof and the law is given above.

[9] The contention that the rule of corroboration as required by Penal Code section 653f was applicable on the trial of appellant is without support. None of the officers who conversed with appellant was his accomplice. Both Stanton and Jewell were feigned accomplices and as such did not require corroboration. People v. Bolanger, 71 Cal. 17, 19, 11 P. 799; People v. Kennedy, 66 Cal.App.2d 522, 524, 152 P.2d 513. Since the action is for *giving* a bribe, section 653f is not applicable. Officers Stanton and Jewell were not assisting appellant in originating or in executing his crime. Therefore, their testimony did not require corroboration. People v. Kennedy, supra; People v. Frazer, 80 Cal.App. 464, 468, 252 P. 633.

[10] It is contended that at the time of giving the bribe to the chief there was no act, decision, opinion or other proceeding pending before him. That could not be true according to appellant's concession that he paid the $3000. The offer of payment for the privilege of operating his unlawful enterprises without interference brought at once to the chief's mind the matter of deciding on the proposal. That the payment of money to an officer to allow the briber to operate gambling houses and red-light brothels is bribery is the law of this state. People v. Megladdery, 40 Cal.App.2d 748, 782, 106 P.2d 84; People v. Glass, 158 Cal. 650, 677, 112 P. 281; People v. McGee, 107 Cal.App. 56, 58, 290 P. 61.

[11] When the indictment was returned, it accused appellant of giving a "bribe of Three Thousand Dollars * * * to William P. Clark who was then and there a ministerial officer of the City of Oxnard, to wit: the Chief of Police of the City." On motion the prosecution was allowed to amend the pleading by substituting the word "executive" for the word "ministerial." Because the latter word is used in section 67½ whereas the word executive is used in section 67 of the Penal Code, appellant contends that a different crime is charged from that found by the grand jury and that the court is thereby deprived of jurisdiction. It was to dispose of such inconsequential arguments that the lawmakers reformed the law so as to allow the district attorney to amend an indictment or information. Penal Code, sec. 1008; People v. Suter, 43 Cal.App.2d 444, 462, 111 P.2d 23; 14 Cal.Jur., Indictment and Information, pp. 91-93. No possible prejudice could have been suffered by a change in the description of the bribee. The accused was not surprised and he made no claim of prejudice in the trial court. If the amendment had been an unexpected occurrence it was incumbent upon him then and there to complain to the court which could have granted a continuance or have repaired any detriment suffered.

[12] Because Ordinance 296 of the City of Oxnard establishes the city manager as the chief executive and administrative officer, appellant contends that the chief of police is a ministerial officer. His conclusion does not follow. The ordinance does not declare that there shall be but one executive officer. It has been held that a deputy sheriff, People v. Lips, 59 Cal.App. 381, 385, 211 P. 22, a constable, Manss v. Superior Court, 25 Cal.App. 533, 535, 144

the defendant, then the defendant is not criminally liable for the acts so committed.

Instruction No. 854

It is important in considering the defense of entrapment to ascertain whether the acts charged as constituting the offense were the result of the intent of some other person to place the accused in a position where he might be charged with the offense, in which event the defendant may not be convicted or whether the defendant, acting in pursuance of his own intent, committed the acts, such other person merely affording him the opportunity of doing so, in which latter event the defense of entrapment would not relieve the defendant from responsibility.

P. 298, a junior epidemiologist-bacteriologist of the department of public health, People v. Kerns, 9 Cal.App.2d 72, 48 P.2d 750, a city marshal, People v. Anderson, 75 Cal.App. 365, 372, 242 P. 906, are executive officers. Even though the cited decisions were prior to the amendment of section 68[3] of the Penal Code they are persuasive if not decisive of the nature of work performed by a chief of police. Appellant contends that a chief of police in a city of the sixth class is a ministerial officer by reason of the fact that the city manager is in charge of the police and gives orders to the chief. In this he omits from consideration that there is always some authority superior to the chief of police. Because in many cities he is appointed by the mayor or by the police commission he is not on that account made a ministerial officer. The general law as well as local ordinances place upon him the responsibility of enforcing the law and of assigning his subordinates to their several tasks. Such labors make of him an executive, whereas if he did only such as might be prescribed by a superior, he would be a ministerial officer.

No Errors in Rulings on the Admissibility of Evidence

[13] It is contended that the exclusion of evidence "regarding the gambling activities of officer Stanton" was error; that appellant's theory was that Stanton had lost heavily in gambling and was urging the opening of the town in order to recoup his losses. Whether Stanton lost his money on a green table or lost the city's money in his quest of violators of gaming laws is immaterial. His personal behavior in indulging in social vices was in no respect material to the proof of whether appellant gave the chief $3000 for the purpose of influencing him to open the town.

[14, 15] In the course of appellant's testimony, his counsel offered to prove that appellant approached one Gottlieb, operator of a burlesque show, and told him that the police would let him open his show if he paid a thousand dollars and that Gottlieb replied, "I won't give them ten cents." Appellant contends that the exclusion of such testimony was error; that it was a part of the *res gestae*. The conversation was hearsay and irrelevant. It was not spoken at the time of the payment of the bribe or at the time of any conversation between appellant and the chief. Only those declarations which form part of the transaction in dispute are *res gestae*. They must be incidental to and explanatory of the main fact and so closely connected with it as to constitute a part of it and without which the main fact might not be properly understood. (Code Civ.Proc., sec. 1850; 8 Cal. Jur. pp. 190, 191.) Appellant says it was not offered to prove that the police would let Gottlieb open his show if he paid them $2,000, "but merely to show that such a conversation took place." It could not have been offered for any purpose other than to influence the jury to believe that appellant was led to slaughter by officers who lured him into captivity.

No Prejudice Resulted From Instructions Given or Refused.

[16] There was no error in the instruction that "the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason." This is taken from the Code of Civil Procedure, section 1844. It has not been amended since its adoption in 1872. Section 653f, Penal Code, is not pertinent. It relates to a prosecution of a person for soliciting another to offer or accept a bribe and is not referable to section 67.

[17] Appellant assigns the following instruction as prejudicial error.

"One who, under the direction of an officer of the law or of any other person, or upon his own initiative, and without criminal intent, feigns complicity in the commission of a crime merely for the purpose of detecting the perpetrator thereof, with a view to prosecution for the offense, is not an accomplice in law, and his testimony need not be corroborated. To support a conviction, however, such testimony and all other evidence tending to prove guilt must carry the convincing force required by law."

---

[3] Section 68, amended in 1933 makes it a felony for an executive or a ministerial officer to receive a bribe on agreement that his action will be influenced thereby.

This instruction is taken from Caljic No. 825. It states the law as settled by the appellate courts. People v. Kennedy, 66 Cal. App.2d 522, 523, 152 P.2d 513; People v. Hicks, 62 Cal.App.2d 859, 145 P.2d 689; People v. Bolanger, 71 Cal. 17, 19, 11 P. 799.

[18] Complaint is made that the court did not define accomplices. Such definition was not pertinent. The theory of the defense was entrapment. The testimony of appellant and his cross-examination of the State's witnesses were both outlined to establish such defense. No accomplice was named either as accessory before or after the fact, only feigned accomplices as to whom appropriate instructions were read covering the law of entrapment.

[19, 20] The court gave an instruction to the effect that in considering the following definitions you should remember that in every public offense "there must exist a union, or joint operation of act and intent or criminal negligence. *The intent is manifested by the circumstances connected with the offense,* and the sound mind and discretion of the accused; but all persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity." Appellant contends that this instruction was prejudicial because it allows the jury to find criminal intent from the circumstances of the offense and cites People v. Snyder, 15 Cal.2d 706, 709, 104 P.2d 639, 640, in support of such contention. The argument is erroneous and the authority does not apply. The instruction there deemed to be vicious said that "the specific intent essential to the commission of a crime less than homicide may be presumed from the doing of the unlawful act." The criticized instruction effectually directed the jury *to find the intent as manifested by the circumstances.* It must be read in connection with all the other instructions which the jury are presumed to have understood and obeyed. They were told the significance of the word bribe (Caljic, 772) and that it is given "with a corrupt intent to influence unlawfully the person to whom it is given." This language in effect directs the jury to ascertain whether the bribe was given with a corrupt intent. Moreover, at appellant's request the jury were instructed that in every public offense "there must exist a union of joint operation of act and intent, or criminal negligence."

[21] The contention that the court refused to give instructions 26 and 33 which treat of reasonable doubt that might be created by defendant's testimony and to apply the same rules as are applied in considering the testimony of other witnesses is unfounded. Approved instructions were given with reference to weighing the testimony of witnesses, reasonable doubt, the insufficiency of a preponderance of proof, finding true the testimony of a lesser number as against a greater number of witnesses, determining their credibility, and that the jury are exclusive judges of the effect and value of evidence.

[22, 23] There was no error in instructing that the testimony of a police officer is to be judged by the standards applied to all other witnesses. In this case they were not accomplices, and because of that fact it was not error to instruct that "an essential element of the crime of bribery is that the subject matter upon which the bribe is to operate actually exists and has been or can be brought before the officer in question in his official capacity." That instruction is Caljic's 776 and has been approved. Whether a chief of police will enforce the law against social vices is always before him.

[24] Defendant's proposed instructions 55, 56 and 57 were effectually included in the instructions given. They deal with the law of entrapment; ensnaring the accused; giving of a present to a public official after he has acted on a matter. Jurors are presumed to have understood the instructions and repetition is not to be encouraged. People v. Fitzpatrick, 78 Cal. App. 37, 44, 247 P. 601.

[25] Defendant's proposed instruction 7 would have directed that the law knows no creed or nationality and that "every defendant whatever his race, color or condition * * * stands equal before the law and should be tried with perfect impartiality." There was no occasion to say more on the duty of the jurors to guard cautiously the rights of the accused than is contained in the court's charge. Nothing in the evidence indicated any prejudice against the race, color or creed of appellant.

[26, 27] There was no coercion of the jury. At 10:25 p. m. the court had them returned into court and asked how they stood numerically. The foreman answered "11 to 1." "The Court: Do you think there is a chance to agree? Foreman: I believe so. The Court: There ought to be at 11 to 1. All right, retire with the bailiff." Nothing was said that in the slightest degree could be reasonably construed as indicating which side the court favored. It was not only proper but it was the court's duty to recommend that the jury arrive at a verdict. People v. Selby, 198 Cal. 426, 439, 245 P. 426; People v. Miles, 143 Cal. 636, 637, 77 P. 666; People v. Walker, 93 Cal.App.2d 818, 209 P.2d 834 is not apropos. There the court had learned that the jury stood 10 to 2 for conviction. When they were directed to retire for further deliberation, the court saying that where they stand ten to two they ought to reach an agreement, it was an indication that the judge could see no reason why the two could not give up the struggle. Similar behavior was the ground for reversal in the several cases cited by the court in support of its reversal of the Walker judgment. In the action at bar no intimation had been given as to which way the majority had voted before the judge ordered the retirement of the jury at 10:25 p. m. with the consent of both counsel. When they returned at 11 o'clock to hear the judge say that he had made arrangements at a hotel, speaking through their foreman, the jury indicated their preference "rather to settle it tonight than to break up the session." They had been directed to adhere to their decisions until convinced they were wrong and not to change merely to reach a verdict. Nothing was said by the judge that can be reasonably interpreted as his favoring a verdict of conviction.

The judgment and the order denying the motion for a new trial are affirmed.

McCOMB and WILSON, JJ., concur.

---

98 Cal.App.2d 770

McKAY et al. v. SUPERIOR COURT IN AND FOR SHASTA COUNTY.

Civ. 7927.

District Court of Appeal, Third District, California.

Aug. 3, 1950.

Proceeding by James McKay and another against the Superior Court in and for the County of Shasta, to obtain a peremptory writ of prohibition to restrain Honorable Albert F. Ross, Judge of the Superior Court for Shasta County, from proceeding further in an action pending in that court. The District Court of Appeal, Third District, Per Curiam, held that judge, who was personally acquainted with murder victims, was disqualified from presiding at murder trial.

Writ of prohibition issued.

1. Criminal law 🔑304(17)

Judicial notice may be taken of period during which judge has been in office.

2. Judges 🔑51(4)

When sufficient facts appear from affidavit of bias the challenged judge is precluded from passing upon question of his alleged bias or prejudice. Code Civ.Proc. § 170.5.

3. Judges 🔑51(4)

In determining whether judge is disqualified because of bias or prejudice, consideration should be given not to what he may have thought or what his state of mind may have been at time he made challenged statements, but rather to what he said or did. Code Civ.Proc. § 170.5.

4. Judges ⚿51(4)

Where statements made by judge indicating bias or prejudice were undisputed, judge's denial of bias or prejudice did not create a conflict in the evidence, and question of actual existence of bias or prejudice was a question of law properly determinable by the court. Code Civ.Proc. § 170.5.

5. Judges ⚿56

Bias or prejudice, if sufficient to disqualify a judge to conduct a trial when sitting without a jury, will also disqualify him to conduct a jury trial. Code Civ. Proc. § 170.5.

6. Judges ⚿49(1)

Judge who was personally acquainted with murder victims, who were under sheriff and deputy sheriff of county, was disqualified to preside at murder trial.

◆

Clarence H. Pease and William H. Lally, Sacramento, Kennedy Jackson, Jr., and Rupert Crittenden, Oakland, for petitioners.

Frank W. Shuman, Dist. Atty., Redding, Fred N. Howser, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., and C. J. Scott, Asst. Atty. Gen., for respondent.

PER CURIAM.

This is a proceeding to obtain a peremptory writ of prohibition addressed to the Honorable Albert F. Ross, as Judge of the Superior Court for Shasta County, restraining him from proceeding further in an action pending in that court.

It appears from the petition that on June 1, 1950, an indictment was found and filed in the Superior Court in Shasta County in Action No. 16879 therein, whereby the grand jury of that county accused petitioners James McKay and Robert Sturm of the crime of murder; further that said McKay and Sturm, through their counsel, and on July 18, 1950, presented to the said Superior Court and filed with the clerk thereof, written statements objecting to the hearing or trial of any issues of fact or law in said action before Judge Ross, pursuant to the provisions of Section 170 of the Code of Civil Procedure of this State, and of subdivision 5 thereof, basing their said objections upon the ground that it appeared probable that by reason of bias and prejudice on the part of Judge Ross a fair and impartial trial in said action could not be had before him; said statement having been filed, Judge Ross declined to consent that the action be tried before another Judge and filed with the clerk his answer to the allegations contained in the statement, whereupon the Judicial Council assigned the Honorable Warren Steel, Judge of the Superior Court in Yuba County, to hear and determine the question of the disqualification of Judge Ross; on July 19th Judge Steel heard the matter upon the affidavits filed in support of the statement of disqualification, the answer thereto of Judge Ross and a transcript of the proceedings before Judge Ross on the filing of the statement, all of which was stipulated into evidence; the matter being submitted to Judge Steel for his determination, he decided that Judge Ross was not disqualified to proceed with the action.

Thereupon McKay and Sturm petitioned this Court for a writ of prohibition, and upon the filing of said petition we directed the issuance of the alternative writ and the matter has been heard and submitted for decision.

In brief, the statements of objection on the part of McKay and Sturm allege the following: That for many years Earl Sholes and Dan Heryford, persons alleged in the indictment to have been murdered, resided in the County of Shasta and in the City of Redding, during all of which time Judge Ross was likewise a resident of the same community; that the persons alleged to have been murdered were respectively under sheriff and deputy sheriff of said County and for a long time Judge Ross and the said persons had conducted daily official business together; that the Judge had for more than fifteen years been intimately acquainted with Sholes and engaged with him in social and athletic events and in matters of official business on countless occasions; that Earl Sholes had at one time been acting chief of police of the City of Redding, and that the Judge and Sholes were mutual close friends at the time of the alleged murder of Sholes; that Judge Ross was unavoidably acquainted with the facts involved in the action; that in 1918 the Judge's father, who was then sheriff of Shasta County, had been killed while acting in the scope of his duty by a prisoner then in his custody, under circumstances somewhat akin to the circumstances which the prosecution contended surrounded the demise of said decedents; that there had been unusual and extensive prejudicial publicity against McKay and Sturm, causing a state of feeling, sentiment, bias and prejudice in the County which made it appear probable that a fair and impartial trial could not be had before any Judge living therein; that these matters of bias, prejudice, sentiment and feeling were known to Judge Ross and that this situation made it improbable that he could sit as a trial Judge without being affected thereby to such an extent that he could not give the defendants a fair and an impartial trial.

When the statements were filed in open court Judge Ross commented thereon in the following manner: He said that he did not feel that he had any disqualification actually; that the mere fact he knew the decedents would not disqualify him to proceed; that the fact his father, while sheriff of the County, had been killed would not disqualify him because his father had been killed by an insane man who didn't know what he was doing and that there were as to that no bad feelings on his part. He then said: "However, it is understood, or is it understood that if I am disqualified you will still proceed before a jury? Of course disqualification is disqualification of a judge whether it is a judge or a jury trial, however it might make a difference. I might admit a possible disqualification to pass on questions of fact and not feel a bit disqualified in matters of law, and that quite often happens. In civil cases who [you] have a trial by jury I can sit here and preside and rule on the evidence and let the jury decide whether the plaintiff or the defendant is entitled to a verdict while if I had to do it myself my possible acquaintance with one of the parties would make no [me] hesitate to say that I could be entirely fair in deciding a question of fact and what witness should be believed and so forth. That would not be up to the judge in the case of a jury trial. However I admit in an abstract matter of law the judge is either disqualified or he is not and you have a right to request a ruling on it. Would that point make any difference?"

Counsel for McKay and Sturm replied in substance that they thought it would be better for the Judge to consent to disqualification, to which counsel representing the People objected. After some further discussion, Judge Ross commented as follows:

"I don't want to evade my duty. I am here and paid to preside in these cases and I don't feel that I am personally disqualified in this case. * * *

"In spite of what I said before and due to the district attorney's objection I am not at this time going to consent, blanket consent, to my disqualifications or admit my disqualification. I will say this—I don't know what the district attorney will think about this but I will say it—that if a jury trial is to be waived and the case tried before a court without a jury I will consent to my disqualification right now. If a jury trial is waived so that the case is tried before a judge without a jury I will consent to my disqualification because I do feel if I would have to take the functions of the jury and determine guilt and degree and penalty and so forth, then perhaps the things stated by the defense would constitute a disqualification. I doubt that they actually constitute disqualification to try the case with the jury because all the judges does is rule on the evidence and the jury has to decide all questions of fact. It wouldn't make any difference whether the judge believes a witness or doesn't believe him; the jury has the say. So I don't believe as a practical matter that I am disqualified to preside at a jury trial. I realize that that may be a matter of practicality and not of legality when a judge either is disqualified or isn't but I do feel qualified to preside over a jury trial. I might be disqualified if I had to determine the fact of murder and the degree and penalties because as stated I was a very good friend of both Mr. Sholes and

Mr. Heryford but I don't think that would disqualify me from doing my duty, however.

"The fact that my father was sheriff and was killed would not disqualify me. As I stated, the fact that my brother-in-law was warden of Folsom Prison and was killed in a break there should if anything influence me more than my father's case although it would not influence me. * * *

"So at this time I will file a brief written denial of disqualification saying that I am not disqualified to try the case before a jury unless you stipulate that the jury will be waived and I take it that is out of the question at this present time."

Thereupon Judge Ross announced that he would ask that another Judge be sent in to hear the matter of his alleged disqualification and that in the meantime he would file an answer saying: "I will file it within the next half hour, it will be brief but to the extent that I said, that I don't consider myself disqualified to try the case with a jury, or words to that effect."

[1] He further averred in substance that he had known Earl Sholes and Dan Heryford since about 1915; that they were about the same age as he was and that all three had lived in Redding or in Shasta County all of their lives; that his relations with the decedents was a friendly relationship with both in public matters and in connection with official duties, but that he had not visited at the home of either nor engaged in social matters with them, except that they had been members of one or two fraternal organizations to which he belonged, but that he could not remember having been present with either of them at any activities of such organizations; that he had engaged in basketball team play with Earl Sholes while both were members of the American Legion back in 1922, and other than that he had not engaged in athletic activities with them; that his associations with the decedents had been in connection with official matters while Sholes was chief of police and while both were in the sheriff's office; that he had been district attorney of Shasta County from 1927 to 1933—and in this connection, of course judicial notice may be taken of the fact that he had been continuously the Judge of the Superior Court in Shasta County since 1933. He further averred:

"Affiant does not believe there is any wide-spread prejudice against defendants herein in Shasta County; there was considerable shock at the time of the alleged murder and there is a feeling among the friends of deceased that the killers should be adequately punished but there is a disposition that the punishment should be duly left to a court acting on legal evidence before it, and affiant feels that a fair and impartial jury can be obtained to try this action and no public feeling whatever has influenced affiant as a judge in this action whatever.

"Affiant therefore alleges that he is not disqualified as a judge for this action. However, if there should be a waiver of a a jury trial or a plea of guilty which would necessitate a hearing before the judge as to degree of crime and penalty, affiant would and hereby offers to consent that said matters be tried before another judge, but if the trial is to proceed before a jury, such consent is not given. This may be considered as a consent in writing of affiant to have the action tried before another judge in case of waiver of jury or change of plea to Guilty, but not as an admission of disqualification."

The portions of section 170 of the Code of Civil Procedure pertaining to this proceeding provide:

"No justice, judge or justice of the peace shall sit or act as such in any action or proceeding: * * *

"5. [Bias or prejudice.] When it is made to appear probable that, by reason of bias or prejudice of such justice, judge, or justice of the peace a fair and impartial trial can not be had before him. * * *"

Additionally, section 170.5 of the same code sets forth in detail the manner in which a peremptory challenge of a judge may be filed and the manner in which the hearing thereof shall proceed before another judge who must be assigned for the purpose either by the presiding judge of the county or if there is no presiding judge then by the Chairman of the Judicial Council.

[2] From a reading of the two sections above cited it is readily apparent that the legislature has determined that when it appears *probable* from a proper challenge that by reason of bias or prejudice of a judge, before whom the matter is pending, a fair and impartial trial cannot be had, without further proof or act another judge shall be assigned to hear the challenge. Stated otherwise, when sufficient facts appear from the affidavit of bias the challenged judge is precluded from passing upon the question of his alleged bias or prejudice. That this is a proper interpretation of the statutes in question is self-evident, since if this were not true and the judge so challenged were allowed to conclusively determine his own state of mind the efficacy of the section (170.5) as written would be defeated. Briggs v. Superior Court, 215 Cal. 336, 10 P.2d 1003; Kreling v. Superior Court, 63 Cal.App.2d 353, 146 P.2d 935.

[3] Although we are impressed as are counsel by the evident sincerity of Judge Ross in his endeavor to appraise his situation as posed by the allegations of the defendants, nevertheless we must follow the well established rule and look—not to what he may have thought or what his state of mind may have been at the time he made the challenged statements, but rather we must look to what he said or did. Briggs v. Superior Court, supra; Kreling v. Superior Court, supra.

[4] Turning to the record we find no conflict between the allegations of defendants as to what Judge Ross said and his affidavit in opposition thereto. Admittedly he made the statements as disclosed by the transcript, and although he denied bias or prejudice in so stating such denial did not create a conflict in the evidence. Briggs v. Superior Court, supra; Kreling v. Superior Court, supra. Thus the question for decision is whether or not the determination of Judge Steel that Judge Ross was not disqualified is a question of fact supported by the evidence and hence binding upon this court, Briggs v. Superior Court, supra, or purely a question of law properly determinable by this court.

While we have no more desire than did the Supreme or District Court in the cases cited above to be understood as holding that the affidavit of a challenged judge may not under any circumstance be considered by the judge assigned to pass upon the issue of bias or prejudice, however, here, as in those cases, by reason of the undisputed remarks of the challenged judge we must conclude as did the reviewing courts therein, that as a matter of law Judge Ross is disqualified. Here, Judge Ross, after discussing his views as to court and jury trials generally, clearly stated that if he were conducting a trial without a jury "then perhaps the things stated by the defense would constitute a disqualification." Necessarily, therefore, where, as here, the facts alleged in support of the challenge are not denied but only the bias or prejudice alleged the question presented is solely one of law and properly determinable by this court in this proceeding. Briggs v. Superior Court, supra, 215 Cal. at page 342, 10 P.2d 1003; Kreling v. Superior Court, supra, 63 Cal.App.2d at page 362, 146 P.2d 935.

[5] We cannot agree with the argument of respondent that while such statements might disqualify a judge to conduct a trial when sitting without a jury, the same statements would not disqualify him to conduct a jury trial. Section 170 of the Code of Civil Procedure makes no such distinction and we can conceive of none. If there can be no such distinction it necessarily follows that the fundamental right of every litigant to a fair and impartial trial applies with equal solemnity to a court trial as to a trial before a jury.

[6] The disqualification of a judge should not be taken lightly nor should it be the result of frivolous allegations or conclusions. But certainly no less serious is the crime for which the defendants are charged and for which they may pay the supreme penalty. Because of these very evident factors we are persuaded that it would neither be fair to the defendants

nor to Judge Ross for him to preside at their trial.

By reason of the conclusions we have reached herein it becomes unnecessary to consider the petitioners' remaining contentions.

Let the writ issue.

98 Cal.App.2d 562

In re ARBUCKLE'S ESTATE.

STAINBACK et al. v. WEST.

Civ. 17313.

District Court of Appeal, Second District, Division 3, California.

July 24, 1950.

Rehearing Denied Aug. 17, 1950.

Hearing Denied Sept. 21, 1950.

Proceeding in the matter of the estate of Pearl P. Arbuckle, deceased, wherein Stuart N. West brought a proceeding against Katherine Elizabeth Stainback and Virginia Stainback to revoke probate of will. The Superior Court of Los Angeles County, Charles E. Haas, J., entered judgment dismissing proceeding on ground that West was not an interested person entitled to contest will after probate and contestant appealed. The District Court of Appeal, Vallee, J., held that an opening statement showing that testator's trusted agent accepted custody of a prior will and codicil of testator, and that agent destroyed will without knowledge or consent of testator, was a sufficient showing that contestant, who was beneficiary under prior will, was able to establish at least a prima facie case that he was an interested party entitled to contest subsequent will of testator.

Judgment reversed.

1. Wills 🔑290

Where it is shown that a will cannot be found after death of testator, and when last seen or known to exist it was in testator's possession, two inferences arise, that will was destroyed by testator and that act of destruction was done with purpose of revoking will.

2. Wills 🔑290

Where it appeared that testatrix did not, after execution of will or codicil, have either in her possession or have access to either documents, when will could not be found after death of testatrix no inference arose that will was destroyed by testatrix with intention of revoking it.

3. Wills 🔑229

Only an interested person may contest a will either before or after probate, and an "interested person" is one who has such an interest as may be impaired or defeated by probate of will or benefited by setting it aside. Probate Code, §§ 370, 380.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Interested Person".

4. Wills 🔑229

A beneficiary under an earlier will, which would be entitled to probate if contested will is declared invalid, is an "interested party" and may contest later will without first obtaining probate of earlier one. Probate Code, §§ 370, 380.

5. Wills 🔑229

The term "interested person" within statutory definition of those who may contest a will either before or after probate, includes one interested under a prior will which has been fraudulently destroyed. Probate Code, §§ 370, 380.

6. Wills 🔑309

In a contest of a will after probate, main issue to be adjudicated is validity of will admitted to probate, not absolute validity of an earlier will under which contestant claims, and a prima facie showing of contestant's interest is sufficient.

7. Wills 🔑290

While probate of an earlier will, under which a contestant claims, is not necessary before he may maintain a contest, he has, nevertheless, burden of proof on trial of contest and must if allegations of petition concerning earlier will are denied, make out at least a prima facie case as to existence, terms and validity of earlier will and his interest thereunder.

8. Wills 🔑302(8)

In case of an alleged destroyed will, a prima facie showing must be made that will can be established as destroyed will under Probate Code. Probate Code, § 350.

9. Wills 🔑232

The section of Probate Code providing for proving of a destroyed will is remedial in its nature and is to be liberally construed in furtherance of justice and for prevention of fraud. Probate Code, § 350.

10. Wills 🔑234

A will duly executed may continue to exist although paper on which it is written has been destroyed, unless revoked by testator in one of ways provided by statute. Probate Code, § 74.

11. Wills 🔑171, 176

Destruction of a will without intention to revoke is not a prescribed method of revocation, and neither is destruction by someone else other than testator, not done in his presence, and done without his direction and without his knowledge or consent. Probate Code, § 74.

12. Wills 🔑171

The destruction of a will during lifetime of testator should not preclude probate of will, if act of destruction was not accomplished under such conditions as to revoke it and proof meets requirements of statutes. Probate Code, § 350.

13. Fraud 🔑1

Fraud is either actual or constructive.

14. Fraud 🔑6

Constructive fraud comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence, and resulting in damage to another. Civ.Code, § 1573.

15. Fraud 🔑6

Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated, because it has all actual consequences and legal effects of actual fraud. Civ.Code, § 1573.

16. Fraud 🔑7

Constructive fraud usually arises from a breach of duty where a relation of trust and confidence exists.

17. Fraud 🔑7

A confidential relation may be said to exist whenever trust and confidence is reposed by one person in integrity and fidelity of another.

18. Fraud 🔑7

Where evidence showed that a particular party was testator's trusted agent and business manager, such relationship was a confidential one and fiduciary in character.

19. Principal and agent 🔑48

Acts of an agent are judged with almost same strictness as those of a trustee.

20. Trusts 🔑231(1)

A trustee is not permitted to use or deal with trust property for his own profit, or for any other purpose unconnected with trust, in any manner. Civ.Code, § 2229.

21. Wills 🔑127

Where testator's trusted agent accepted custody of testator's will and codicil, agent accepted responsibilities that went with custodianship, namely, to safely preserve will and codicil for decedent until her death, and upon her death to deliver them to clerk of court having jurisdiction of estate for probate. Probate Code, § 320.

22. Wills 🔑176

Where testator's trusted agent accepted custody of testator's will and codicil, agent's action in destroying will without knowledge or consent of testator amounted to actual fraud and a "fraudulent destruction" of will within meaning of Probate Code. Probate Code, § 350.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Fraudulent Destruction".

23. Wills 🔑323

In will contest, an opening statement alleging that testator's trusted agent accepted custody of a prior will and codicil, and that agent destroyed will without knowledge or consent of testator was a sufficient showing that contestant, who was beneficiary under prior will, was able to establish at least a prima facie case that he was an "interested person" entitled to contest subsequent will of testator, and therefore motion to dismiss proceedings should have been denied. Probate Code, § 350.

* * *

Margolis & McTernan, John W. Porter, Los Angeles, for appellant.

Knight, Gitelson & Ashton, Alfred Gitelson and Robert R. Ashton, all of Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by Stuart N. West from a judgment dismissing a proceeding instituted by him to revoke the probate of a will. The contest was dismissed on the ground that West was not an interested person entitled to contest the will under Probate Code section 380.

West, not an heir at law of decedent, bases his right to contest the will on the ground he is the principal beneficiary under a prior will and codicil, executed by Pearl P. Arbuckle, decedent, which will, together with the codicil, was destroyed in 1943 or 1944, during decedent's lifetime, without her knowledge or consent.

Mrs. Arbuckle died testate February 26, 1947, in Los Angeles. On April 17, 1947, her purported last will and testament, dated November 19, 1939, was admitted to probate. By this will all of decedent's property was bequeathed to her niece Katherine Elizabeth Stainback, who was also named executrix. On August 5, 1947, West filed a petition seeking revocation of the probate of the 1939 will on the grounds of want of testamentary capacity and undue influence. Respondents filed a general denial and as a special defense alleged that West was not an "interested person" entitled to contest the will.

By stipulation of counsel the latter issue was presented to the court for determination on the opening statement of plaintiff's attorney prior to trial of the issues of fact relating to the validity of the asserted will. Cf. In re Estate of Plaut, 27 Cal.2d 424, 426, 164 P.2d 765, 162 A.L.R. 837; In re Estate of Land, 166 Cal. 538, 540, 137 P. 246; In re Estate of Wickersham, 153 Cal. 603, 612, 96 P. 311. Contestant's attorney made an opening statement in which he outlined the facts he expected to prove. Respondents then moved to dismiss the proceeding on the ground it affirmatively appeared contestant was not an interested person under Probate Code section 380. No evidence was received. The motion was granted. West appeals from the judgment which followed.

The opening statement revealed that appellant was prepared to prove the following facts:

Appellant and decedent's daughter Edith were married in 1916. Edith died in 1917. Decedent met a Mr. Bell in 1920 or 1921 in connection with a real estate transaction. Thereafter a relationship of great confidence developed between them which continued for almost 20 years. Bell supervised and managed decedent's real estate interests, and in the latter part of 1934 was given a general power of attorney by decedent to handle her business affairs and property. In 1933 decedent decided to make a will and went to Bell for assistance. She explained the terms of the proposed will to him and he drafted it for her. Decedent approved it and executed it in his office in the presence of two witnesses who signed it in her presence. Bell was named as executor of the will. It provided that after paying the debts of the estate he was to liquidate the real estate interests and divide the proceeds four-fifths to appellant and one-fifth to decedent's half-sister Virginia Stainback. Only an original of the will was made which decedent at the time of execution handed to Bell for safekeeping. About a year later decedent made an holographic codicil which modified the 1933 will only by naming two beneficiaries as legatees of $500 each. On its execution decedent delivered the codicil to Bell for safekeeping. Bell placed the will and the codicil in his safe deposit box.

Beginning in 1934 decedent gradually deteriorated mentally. In 1938 Bell arranged for a companion nurse for her. In May of that year the companion nurse sent for Katherine Stainback, urging her to come to California to look after decedent. Katherine came to California and later was joined by her mother and father. On November 19, 1939, decedent executed the will in contest. At that time she was between

73 and 83 years of age. Soon after the execution of this will the Stainbacks notified Bell his services as decedent's manager were no longer required. In November, 1942, decedent was placed in a private mental sanitarium by the Stainbacks, where she remained until her death.

The 1933 will and the codicil thereto remained in Bell's safe deposit box until about 1940, when he transferred them to a file in his office. In 1943 or 1944, and after decedent had been placed in the mental sanitarium and at a time when she was of unsound mind, Bell, in accordance with his practice of periodically cleaning out his business files and assuming that his relationship with decedent had been finally terminated, took all the papers in the Arbuckle file and desroyed them by burning, including the 1933 will and the codicil thereto. He destroyed the 1933 will and the codicil thereto in the absence of decedent, without her direction and without her knowledge or consent. Facts giving color to appellant's claim on decedent's bounty and showing that in naming West as the principal beneficiary in the 1933 will decedent was discharging an obligation to him for which she had received consideration, were also stated.

We, of course, assume the facts stated in the opening statement to be true for the purpose of this decision.

[1, 2] Where it is shown that a will cannot be found after the death of the testator and when last seen or known to exist it was in his possession, two inferences arise: 1) that the will was destroyed by the testator, and 2) that the act of destruction was done *animo revocandi.* In re Estate of Johnston, 188 Cal. 336, 339, 340, 206 P. 628; In re Estate of Moramarco, 86 Cal. App.2d 326, 334, 194 P.2d 740; 26 Cal.Jur. 807, sec. 141. These inferences do not arise in the present case. According to the opening statement, upon the execution of the will it was deposited with Bell as custodian and remained in his possession until its destruction. The same was done with the codicil. It affirmatively appears that the testatrix did not, after the execution of the will or codicil, have either in her possession or have access to either of them. In re Estate of Thompson, 44 Cal. App.2d 774, 777, 112 P.2d 937.

[3-5] Only an interested person may contest a will either before or after probate. (Prob.Code, secs. 370, 380.) An interested person is one who has "such an interest as may be impaired or defeated by the probate of the will, or benefited by setting it aside." In re Estate of Plaut, 27 Cal.2d 424, 425, 426, 164 P.2d 765, 766, 162 A.L.R. 837; In re Estate of Land, 166 Cal. 538, 543-544, 137 P. 246; In re Estate of Bily, 96 Cal.App.2d 333, 215 P.2d 78. A beneficiary under an earlier will which would be entitled to probate if the contested will is declared invalid is an interested party and may contest the later will without first obtaining probate of the earlier one. In re Estate of Plaut, 27 Cal. 2d 424, 428-429, 164 P.2d 765, 162 A.L.R. 837. The term "interested person" includes one interested under a prior will which has been fraudulently destroyed. McDonald v. McDonald, 142 Ind. 55, 41 N.E. 336, 339, 340; Re Will Chittenden, 1 Tuck, N.Y., 135; 68 C.J. 928, sec. 671; cf. In re Estate of Phillips, 202 Cal. 490, 498, 261 P. 709.

[6-8] In a contest of a will after probate the main issue to be adjudicated is the validity of the will admitted to probate, not the absolute validity of an earlier will under which the contestant claims; and a prima facie showing of the contestant's interest is sufficient. In re Estate of Langley, 140 Cal. 126, 130, 73 P. 824; In re Estate of Plaut, 27 Cal.2d 424, 428, 164 P. 2d 765, 162 A.L.R. 837. While probate of an earlier will, under which a contestant claims, is not necessary before he may maintain a contest, he has, nevertheless, the burden of proof on the trial of the contest and must, if the allegations of the petition concerning the earlier will are denied, make out at least a prima facie case as to the existence, terms and validity of the earlier will and his interest thereunder, In re Estate of Munfrey, 61 Cal.App.2d 565, 568, 143 P.2d 414, 144 P.2d 370; Kennedy v. Walcutt, 118 Ohio St. 442, 161 N.E. 336, 337-338; Anno; L.R.A.1918A, 471, for if the will under which he claims is not a

valid, unrevoked will, it is immaterial to him whether any other will is admitted to probate. In the case of an alleged destroyed will, a prima facie showing must be made that the will can be established as a destroyed will under Probate Code section 350.

[9] Section 350 provides that no will can be proven as a destroyed will "unless * * * shown to have been destroyed fraudulently * * * in the lifetime of the testator, without his knowledge * * *." Section 350 is remedial in its nature and is to be liberally construed in furtherance of justice and for the prevention of fraud. In re Estate of Camp, 134 Cal. 233, 235, 66 P. 227; In re Estate of Patterson, 155 Cal. 626, 638, 102 P. 941, 26 L.R.A.,N.S., 654, 132 Am.St.Rep. 116, 18 Ann.Cas. 625; see also In re Frandsen's Will, 50 Utah 156, 167 P. 362, 364; Hall v. Gilbert, 31 Wis. 691, 694; In re Dorrity's Will, 118 Misc. 725, 194 N.Y.S. 573, 576; Hook v. Pratt, 8 Hun., N.Y., 102, 109; Thornton on Lost Wills, p. 46, sec. 23.

[10-12] It is undeniable, upon the facts stated to the court, that the testatrix did not destroy the will of 1933 or the codicil thereto, nor was either of them destroyed in her presence, or by her direction, or with her consent or knowledge. It follows that neither the 1933 will nor the codicil thereto has been legally revoked. Nowhere does the Probate Code declare that the destruction of a will by someone other than the testator, without his knowledge or consent, destroys the status of the will as an executed instrument. A will duly executed may continue to exist although the paper on which it is written has been destroyed. Unless revoked by the testator in one of the ways provided by the statute, it continues to exist as a will. It is expressly declared that a revocation can be made only in the manner and by the means prescribed by the Probate Code. (Prob.Code, sec. 74.) Destruction without intention to revoke is not a prescribed method of revocation; neither is destruction by someone other than the testator, not done in his presence, and done without his direction and without his knowledge or consent, a prescribed method of revocation. Under the statutes such destruction does not operate to revoke a will. The duly executed will has a potential existence, subject to defeat only by revocation or by reason of impossibility of proof under the law. The destruction of a will during the lifetime of the testator should not preclude the probate of the will if the act of destruction was not accomplished under such conditions as to revoke it and if the proof meets the requirements of section 350. Section 350 relates wholly to the proof that must be furnished and the facts which must be established in order that a destroyed will may be admitted to probate. In re Estate of Patterson, 155 Cal. 626, 637, 638, 102 P. 941, 26 L.R.A., N.S., 654, 132 Am.St.Rep. 116, 18 Ann. Cas. 625.

Respondents contend that the allegedly destroyed will may not be proven because it was not "destroyed fraudulently." Appellant, on the other hand, contends that the destruction by the custodian of the will during the lifetime of the testatrix, without her knowledge or consent, amounts to a constructive fraud and thus a fraudulent destruction within the meaning of Probate Code section 350.

[13-15] Fraud is either actual or constructive. It is conceded that actual fraud is not present here. Civil Code section 1573 defines constructive fraud as consisting: "* * * 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." Fraud assumes so many shapes that courts and authors have ever been cautious in attempting to define it. Each case must be considered on its own facts. 12 Cal.Jur. 705, sec. 2. In its generic sense, constructive fraud comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence, and resulting in damage to another. In re Hearn's Will, 158 Misc. 370, 285 N.Y.S. 935, 941; In re Dorrity's Will, 118 Misc. 725, 728, 194 N.Y.S. 573, 575; 37 C.J.S., Fraud, §§ 1, 2 and 3 pages 204, 211, 213. Constructive fraud exists in cases in which conduct, although not actually fraudulent,

ought to be so treated,—that is, in which such conduct is a constructive or quasi fraud, having all the actual consequences and all the legal effects of actual fraud. Herd v. Tuohy, 133 Cal. 55, 62, 65 P. 139; Higgins v. California Petroleum etc. Co., 147 Cal. 363, 368, 81 P. 1070; Higgins v. California Petroleum etc. Co., 122 Cal. 373, 376, 55 P. 155; Younglove v. Hacker, 15 Cal.App.2d 211, 217, 59 P.2d 451; 12 Cal. Jur. 710, sec. 5; cf. In re Dorrity's Will, 118 Misc. 725, 194 N.Y.S. 573; Schultz v. Schultz, 35 N.Y. 653, 91 Am.Dec. 88; Rose v. Hunnicutt, 166 Ark. 134, 265 S.W. 651.

[16, 17] Constructive fraud usually arises from a breach of duty where a relation of trust and confidence exists. Darrow v. Robert A. Klein & Co., Inc., 111 Cal.App. 310, 315, 316, 295 P. 566. A confidential relation may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. In re Estate of Cover, 188 Cal. 133, 143, 204 P. 583; Hemenway v. Abbott, 8 Cal.App. 450, 463, 97 P. 190; 37 C.J.S., Fraud, § 2, c, (2), page 214.

[18-21] The opening statement asserted facts showing that Bell was decedent's trusted agent and business manager. Such a relationship is a confidential one, fiduciary in character. Darrow v. Robert A. Klein & Co., Inc., 111 Cal.App. 310, 316, 295 P. 566; Rest., Agency, sec. 13, and California cases cited thereunder. The acts of an agent are judged with almost the same strictness as those of a trustee. Williams v. Lockwood, 175 Cal. 598, 601, 166 P. 587. A trustee is not permitted to use or deal with trust property for his own profit, *or for any other purpose unconnected with the trust, in any manner.* (Civ. Code, sec. 2229.) "A violation of duty on the part of a trustee is treated as a fraud upon the beneficiary (Civ.Code, § 2234), and a violation of duty on the part of an agent should be treated in the same manner. Civ.Code, § 2322; Sterling v. Smith, 97 Cal. 343, 32 P. 320. Under said section 2322, an agent may not do any act which a trustee is forbidden to do." Darrow v. Robert A. Klein & Co., Inc., 111 Cal.App. 310, 316, 295 P. 566, 568; Elam v. Arzaga, 122 Cal.App. 742, 746, 10 P.2d 805. In addition to his other duties as decedent's trusted agent, Bell accepted custody of the 1933 will and codicil. In so doing, he accepted the responsibilities that went with that custodianship, to wit, to safely preserve the will and codicil for decedent until her death or until called for by her, and upon her death to deliver them (since he was named as executor in the will) to the clerk of the court having jurisdiction of the estate for probate. (Prob. Code, sec. 320.) Bell was, therefore, charged "with the execution of this trust." Mastick v. Superior Court, 94 Cal. 347, 350, 29 P. 869, 870; Vigne v. Superior Court, 37 Cal.App.2d 346, 99 P.2d 589; Snyder v. Security First Nat. Bank, 31 Cal. App.2d 660, 665, 88 P.2d 760; cf. Pond v. Faust, 90 Wash. 117, 155 P. 776, 778, Ann. Cas.1918A, 736; Caulk v. Burt, 112 Miss. 660, 73 So. 618, 619.

[22] Bell's action in destroying, without the knowledge or consent of the decedent, the very thing that had been entrusted to his care for safekeeping, had all the actual consequences and all the legal effects as though it had been destroyed under circumstances amounting to actual fraud. He not only violated the confidence and trust which decedent had reposed in him and failed in the duties which he had assumed by his acceptance of the will (see Civ.Code, secs. 2229, 2234, 2322), but his act served to defeat the wishes and intent of the decedent with regard to her will. Such violation, although done in good faith, is, in the eyes of the law, a constructive fraud upon the decedent and the beneficiaries named in the 1933 will and the codicil thereto. It was a fraudulent destruction of the will and codicil within the meaning of Probate Code section 350.

Our conclusion is in line with the decisions in other jurisdictions having statutes similar to Probate Code section 350. Among other cases are the following: Schultz v. Schultz, 35 N.Y. 653, 91 Am. Dec. 88; In re Dorrity's Will, 118 Misc. 725, 194 N.Y.S. 573; In re Estate of Breckwoldt, 170 Misc. 883, 11 N.Y.S.2d 486, 488; In re Cosgrove's Will, 31 Misc.

422, 65 N.Y.S. 570; In re Gethins' Will, 97 Misc. 561, 163 N.Y.S. 398; St. John v. Putnam, 128 Misc. 714, 717, 220 N.Y.S. 141, 145; Rose v. Hunnicutt, 166 Ark. 134, 265 S.W. 651; cf. In re Bians' Estate, 162 Md. 208, 159 A. 596; Brookie v. Portwood, 84 Ky. 259, 1 S.W. 637; Succession of O'Brien, 168 La. 303, 121 So. 874, 875; In re Frandsen's Will, 50 Utah, 156, 167 P. 362; In re Miller's Will, 49 Or. 452, 90 P. 1002, 124 Am.St.Rep. 1051, 14 Ann.Cas. 277.

The statute on which section 350 is based was originally adopted in 1850. (Stats. 1850, chap. 129, sec. 38, p. 379.) As enacted, it was identical with the then New York statute.[1] The New York statute was enacted in 1827. (1 R.L. 364, Title I, Art. Third, sec. 89. See New York Rev.Stats. 1846, Vol. 2, p. 133.) Prior to 1850 the courts of that state had said that the fraudulent destruction of a will did not amount to a revocation in law, and that if its contents could be satisfactorily shown it would be admitted to probate. Idley v. Bowen, 1833, 11 Wend., N.Y., 227, 236.

In Schultz v. Schultz, supra, 35 N.Y. 653, 91 Am.Dec. 88, the testator executed his will on October 23, 1863. He left it for safekeeping with one of the beneficiaries, who placed it in his trunk. The testator died about two years later. When the testator died the custodian supposed the will was in the trunk where he had placed it, but it was not there, and could not be found. The testator did not have the will in his possession after he gave it to the custodian. The court held, 91 Am.Dec. 90: "The fraud mentioned and referred to in this connection is a fraud upon the testator by the destruction of his will so that he should die intestate, when he intended and meant to have disposed of his estate by will, and never evinced any change of that intent. It is undeniable from the facts in the record that either this will was in existence at the time of the death of the testator, or that it had been destroyed in his lifetime without his knowledge, consent, or procurement, or accidentally lost. If so destroyed, it was done fraudulently as to him, and in judgment of law the legal results are the same precisely as if it had continued in existence up to the time of his death."

In the Dorrity case, 118 Misc. 725, 194 N.Y.S. 573, the testatrix executed a will on February 21, 1921. In October, 1921, she took it to an attorney and asked him to add a provision to it. The attorney directed his stenographer to add the provision. The stenographer recopied the last three sheets of the executed paper writing with an added clause therein as desired by the testatrix. Before the work was done, the testatrix told the attorney she would go out and do some shopping and return. The stenographer took the executed will apart, removed the last three pages, and in their place substituted the three new typewritten sheets. The three sheets of the executed document contained the signature of the testatrix, the attestation clause, and the signatures of the witnesses. The stenographer mislaid, lost, or destroyed the sheets of the executed will, unknown to the decedent. They were never found. The testatrix never returned to the attorney's office. She died shortly thereafter. In holding that the will was fraudulently destroyed, the court said, 194 N.Y.S. 575: "The equitable doctrine of fraud deals with those manifold varieties of fraud where relief is required for the purpose of substantial justice. It includes all acts, or admissions, which involve a breach of a duty, or trust or confidence reposed, and are injurious to another. Bouvier's Dict. [Rawle's Third Rev.] 1306; 1 Story, Eq.Juris. (14th Ed.) 256; People v. Kelly, 35 Barb., N.Y., 444, 457; Mills v. Smith, 65 Hun. 619, 19 N.Y.S. 854–857. The fraud mentioned in section 143 of the Surrogate's Court Act[2] is a fraud upon the testatrix and the persons who would take under the will, by her dying intestate when she meant to die testate. The will was destroyed fraudulently as to her and those who take under the will. There was no actual fraud, nor an intention to profit by the destruction of the will. The destruction of the will, without the knowledge or consent of the testatrix, in disregard of her intention and to the injury of the objects of her bounty, constitutes constructive fraud, and becomes a fraudulent destruction, within the meaning of section 143 of the Surrogate's Court Act. [Citations.] The statute should have a liberal construction. Hook v. Pratt, 8 Hun., N.Y., 102. No positive dishonesty of purpose is required to show constructive fraud."

---

[1] The original California statute and the New York Statute read: "No will * * shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator; or be shown to have been fraudulently destroyed, in the lifetime of the testator; nor unless its provisions shall be clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being deemed equivalent to one witness."

The same principle was followed in Rose v. Hunnicutt, 166 Ark. 134, 265 S.W. 651, page 652, where the will was lost or destroyed by the custodian, and the court held: "If lost or destroyed in the lifetime of the testatrix, without her consent or knowledge, it amounted to a fraudulent destruction of the will as to her", citing Schultz v. Schultz, supra, 35 N.Y. 653, 91 Am.Dec. 88.

Estate of Kidder, 66 Cal. 487, 6 P. 326, 327, and In re Estate of Johnson, 134 Cal. 662, 66 P. 847, cited by respondents, are distinguishable on their facts from the present case. In neither case was the will destroyed out of the presence of the testator and without his knowledge or consent by a custodian with whom it had been deposited for safekeeping. In the Johnson case the will was destroyed by a friend in the presence of the testator who made no effort to prevent its destruction. Since the testator was present at the time and aware of its destruction, it was done with his consent and impliedly by his direction. In Estate of Kidder, one of the findings was that "when said will was brought to her (the testatrix) she partially withdrew it from the envelope, and then returned it there, and then *allowed it to fall from her hand into the fire,* when it was wholly consumed." (Italics added.) The only witness present when this occurred, and upon whose negligence it was alleged the will was fraudulently destroyed, testified as follows concerning the destruction of the will: "I handed the will to her; she lay it in her hands like that (showing) and kind of sank, and I just walked around the other side of her, and saw it was in the fire. While I was walking, it was in the fire. * * * She made a motion of her hand down on one side, like she was half asleep, and the paper went into the fire, and was consumed there." This evidence was held insufficient to show a fraudulent destruction of the will. Since the testatrix herself "allowed it to fall from her hand into the fire," it could reasonably be inferred that the testatrix destroyed the will "with the intent and for the purpose of revoking the same." (Prob.Code, sec. 74.)

[23] We conclude appellant made a sufficient showing in his opening statement that he is able to establish at least a prima facie case that he is an interested person entitled to contest the will of November 19, 1939, and that the motion to dismiss the proceeding should have been denied.

Judgment reversed. Respondents to bear appellant's costs on appeal.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

---

[2] Under section 143 of the Surrogate's Court Act, a lost or destroyed will may be admitted to probate in the Surrogate's Court if "the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime, and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness."

98 Cal.App.2d 493

GARNER et al. v. BOARD OF PUBLIC WORKS OF CITY OF LOS ANGELES et al.

Civ. 17411.

District Court of Appeal, Second District, Division 1, California.

July 19, 1950.

Rehearing Denied Aug. 8, 1950.

Hearing Denied Sept. 13, 1950.

Petitions by Ray H. Garner and others against the Board of Public Works of the City of Los Angeles and others, for a writ directing reinstatement of the plaintiffs as employees and payment of salaries from date of their discharge. The Superior Court of Los Angeles County denied an alternative writ of mandate, Clarence M. Hanson, J., and the petitioners appealed. The District Court of Appeal, Drapeau, J., held that an ordinance requiring a loyalty oath was constitutional.

Order affirmed.

Constitutional law ⚷90, 91, 274
Municipal corporations ⚷217(3)

Ordinance of the City of Los Angeles requiring loyalty oaths of its employees and providing that one must aver whether or not he is or ever was a member of the Communist Party, that he has not within 5 years advocated the overthrow of the government by force, etc., is constitutional and does not violate due process of law, nor infringe upon freedoms of speech, press or assembly.

◆

Charles J. Katz, Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., George William Adams, A. L. Lawson, and Alan G. Campbell, Dep. City Attys., all of Los Angeles, for respondents.

DRAPEAU, Justice.

The City of Los Angeles adopted an ordinance, in part as follows:

"An Ordinance to effectuate the provisions of Charter Section 432 and otherwise to insure the loyalty of the officers and employees of this City.

"The People of the City of Los Angeles Do Ordain as Follows:

"Section 1. Every person who is hereafter elected or appointed to an office or position in the service of the City of Los Angeles must, before entering upon the duties of his office or position, take and subscribe to the following oath:

"I, ..., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America and the State of California, and will support and defend the Constitution and laws of the United States of America and of the State of California and the laws of the City of Los Angeles against all enemies, foreign and domestic. I further swear (or affirm) that I do not advise, advocate or teach, and have not within the period beginning five (5) years prior to the effective date of the ordinance requiring the making of this oath or affirmation, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California and that I am not now and have not, within said period, been or become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California. I further swear (or affirm) that I will not, while I am in the service of the City of Los Angeles, advise, advocate or teach, or be or become a member of or affiliated with any group, association, society, organization or party which advises, advocates or teaches, or has within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California, that I will well and faithfully discharge the duties of my office or employment in the service of the City of Los Angeles and that I take this whole obligation freely without any mental reservation or purpose of evasion, So Help Me God.

"Sec. 2. Every person who now holds or occupies an office or position in the service of the City of Los Angeles must, within thirty (30) days after the effective date of this ordinance, or if he be on leave or under suspension for cause from the service of the city at such effective date, within thirty (30) days after his return to such service, take and subscribe to the oath set forth in Section 1 hereof.

"Sec. 3. Every person who is hereafter elected or appointed to an office or position in the service of the City of Los Angeles must, before entering upon the duties of his office or position, execute an affidavit stating whether or not he is or ever was a member of the Communist Party of the United States of America or of the Communist Political Association, and if he is or was such a member, stating the dates when he became, and the periods during which he was, such a member; provided, however, that no additional affidavit shall be required on account of the transfer, demotion or promotion of any person who has once executed an affidavit under this section or under Section 4 hereof.

"Sec. 4. Every person who now holds or occupies an office or position in the service of the City of Los Angeles must, within thirty (30) days after the effective date of this ordinance, or if he be on leave or under suspension for cause from the service of the city at such effective date, within thirty (30) days after his return to such service, execute an affidavit stating the facts required to be stated in the affidavit required by Section 3 of this ordinance."

Seventeen employees of the city refused to comply with the ordinance, and were discharged. They filed in the Superior Court their consolidated petitions for writ of mandate directing reinstatement and payment of salaries from the date of their discharge. The court denied the petition, and petitioners appeal to this Court.

The issues involved in this case have been set forth and disposed of in Steiner v. Darby, 1948, 88 Cal.App.2d 481, 199 P.2d 429. Hearing denied by the Supreme Court, Jan. 10, 1949.

No good purpose would be served in repeating the reasoning so clearly and logically stated by Mr. Justice McComb in the Steiner case. In that case the law as developed to its date of decision is stated and applied.

Since then, so far as brought to our attention, the principles here involved have been before the courts in the following cases:

Lawson v. United States, D.C.Cir., 176 F.2d 49.

In that case the United States Court of Appeals for the District of Columbia Circuit held that questions by a Congressional Committee to script writers for motion pictures whether they were or were not communists were pertinent and proper; therefore contumacious witnesses were not protected by the Bill of Rights from answering.

L'Hommedieu et al. v. Board of Regents of the University of the State of New York, 276 App.Div. 494, 95 N.Y.S.2d 443.

In that case the Supreme Court, Appellate Division, Third Department, of the State of New York held that a statute which provides for dismissal from the public school system of members of subversive organizations does not violate due process of law, nor does it infringe upon the freedoms of speech, press, or assembly.

In that case it is said:

"There is no constitutional right to be a teacher any more than there is to be a public official or a member of any of the professions. No one has a constitutional right to advocate the overthrow of the government by force and violence. The courts have held time and time again that the freedoms quaranteed by the Constitution are not absolute but must yield to the public welfare. [95 N.Y.S.2d at page 451.]

* * * * * *

"The most important qualification of a teacher is loyalty to our government. It necessarily follows that disqualification is advocacy of the overthrow of that government. The statute under review is a law dealing with public employment of teachers in our public schools. To avail oneself of the privilege of teaching certain qualifications must be possessed, certain rights renounced. This is not an unconstitutional classification. (Citing cases.)

"When it comes to loyalty to our government, the affirmation of loyalty, the denial of disloyalty, renunciation of membership in organizations advocating overthrow of our government or subscribing to subversive tenets, all have been upeld as qualifications of public employment or of holding office in organizations availing themselves of statutory privileges. (Citing cases.) [95 N.Y.S.2d at pages 452–453.]

* * * * * *

"'The Constitution,' said the United States Supreme Court in U. S. ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 414, 41 S.Ct. 352, 355, 65 L.Ed. 704, 'was adopted to preserve our government, not to serve as a protecting screen for those who, while claiming its privileges, seek to destroy it.' A contemporary statement of the same principle is found in Barsky v. United States, 83 U.S.App.D.C. 127, 167 F.2d 241, certiorari denied 334 U.S. 843, 68 S.Ct. 1511, 92 L.Ed. 1767."

American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674.

In that case, decided May 8, 1950, the United States Supreme Court upheld the constitutionality of subsection 9(h) of the Labor Management Relations Act of June 23, 1947, 29 U.S.C.A. § 159(h). This section denies labor unions the right to present cases to the National Labor Relations Board unless there is on file with the Board "* * * an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

The following comments by the Court are applicable to the case at bar:

"* * * If accidents of birth and ancestry under some circumstances justify an inference concerning future conduct, it can hardly be doubted that voluntary affiliations and beliefs justify a similar inference when drawn by the legislature on the basis of its investigations. [339 U.S. at page 390, 70 S.Ct. 680].

* * * * * *

"The exercise of particular First Amendment rights may fly in the face of the public interest in * * * Government's obligation to provide an efficient public service * * *. [339 U.S. at page 398, 70 S.Ct. 684]

* * * * * *

"We have previously had occasion to consider other statutes and regulations in which the interests involved were, in large measure, like those now being considered. In United Public Workers v. Mitchell [330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754], supra, we upheld a statute which provided that employees of the Federal Government could not participate in partisan political activities, concededly a First Amendment right, if they would retain their positions. The decision was not put upon the ground that government employment is a privilege to be conferred or withheld at will. For it was recognized that Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' 330 U.S. at page 100, 67 S.Ct. at page 569, 91 L.Ed. 754. But the rational connection between the prohibitions of the statute and its objects, the limited scope of the abridgment of First Amendment rights, and the large public interest in the efficiency of government service, which Congress had found necessitated the statute, led us to the conclusion that the statute may stand consistently with the First Amendment." [339 U.S. at page 404, 70 S.Ct. 687]

In the present case petitioners fail to understand that loyalty is indispensably necessary in the employer-employee relationship between the state and its servants. It is treasonable to advocate the destruction by force of the government for which one works. It is an ever-present threat to government itself to have treasonable persons charged with the conduct of public affairs. Having such people on the payroll results in impairment of governmental service. In times of national stress it would seriously affect the functioning of government. It is, therefore, the duty of those charged with the management of the business of government to ascertain, require, and insure unconditional, unswerving loyalty of every servant of the people, high or low.

One of the foundation stones of private business is that the employee must be loyal to his employer. Loyalty is implicit in the contract of hiring. No private business can long succeed without the conscientious, undivided support of its employees. The man or woman who denies allegiance to his employment is, and should be, soon separated from it. Nemesis with a club waits for him around the corner. And, so long as the employment continues, every employer has the right at any time to ask his employee to declare his loyalty.

"But," say some of the petitioners, "we're loyal. We will take the oath to defend and support the Constitution of the United States and of the State of California. What we object to is that we are required, under oath, to express our beliefs; it inquires into our thinking today, our thinking tomorrow."

A paragraph from a letter of one of the petitioners reads as follows:

"It violates the right of every individual to free political association, singling out the Communist Party and saying, in effect, that no city worker has a right to belong to it. Not that it says so specifically. But every worker who signs the oath and affidavit knows by the mere juxte position (sic) of the three questions, *Loyalty, Force-and-violence, Communist Party,* that membership in the latter is considered evidence of disloyalty and shows the desire to overthrow the government by force and violence 'or other unlawful means.' Actually, according to Supreme Court decision, the Communist Party is a legally constituted party entitled to all the electoral privileges accorded any other legal party. My employer, the City of Los Angeles, has no right to ask me whether or not I belong to the Communist, the Republican, the Democratic, or the Prohibition Party. My party affiliations, according to the Constitution of the United States, are strictly my own affair."

It is an interesting question whether the legislative power may require disclosure or disavowal of mere beliefs or opinions, without overt acts. The argument may be followed extensively in the dissenting and concurring opinion of Mr. Justice Jackson in American Communications Ass'n v. Douds, supra.

That question is not present in this case. The ordinance under consideration does not call for beliefs. It provides that one must aver whether or not he is or ever was a member of the Communist party or the Communist Political Association; that he has not within five years advocated the overthrow of the government by force, violence, or unlawful means; that he is not and has not been a member of any group, society, association, organization, or party which advises or teaches overthrow of the government by such means; and that while he is in the service of the City he will not belong to or become a member of any such group, or advocate or teach such subversive doctrines.

The right of the people of the State of California to have their employees declare their allegiance to the state, that they are not its enemies, and do not advocate or believe in destroying the state by force, violence, or unlawful means, is not trammeled, infringed, or denied by any constitutional provisions, by natural justice, or by common sense. The ordinance before this Court, adopted by a subdivision of state government, is well within the legislative power, and a timely and proper exercise thereof.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

98 Cal.App.2d 586

NATIONAL AUTOMOBILE & CASUALTY INS. CO. v. DOWNEY.

Civ. 16760.

District Court of Appeal, Second District, Division 3, California.

July 25, 1950.

The National Automobile & Casualty Insurance Company, a corporation, brought mandamus proceedings against Wallace K. Downey, as Insurance Commissioner of the State of California, to secure an order to compel the Commissioner to vacate order suspending the petitioner's certificate of authority in proceedings before administrative agency. The Superior Court of Los Angeles County, W. Turney Fox, J., rendered a judgment for the petitioner, and the defendant appealed. The District Court of Appeal, Wood, J., held that statutory amendments relating to a hearing officer were applicable to proceedings before administrative agency, though they did not become effective until after the proceedings had been begun, that deputy insurance commissioner who was not qualified as a hearing officer under the amended statutes was not authorized to preside at the hearings, and that administrative agency was therefore without jurisdiction, and that Superior Court properly refused to determine the issues involved in the proceedings before the administrative agency.

Judgment modified and, as modified, affirmed.

1. Statutes 🔑267(2)

Statutes affecting only matters of procedure are applicable to actions which are pending when the statutes become effective.

2. Constitutional law 🔑106, 169

The legislature may change rules of procedure, or remedies, and such changes may be made applicable to pending actions, provided that under the guise of a mere change of procedure or substitution of remedies, vested rights are not destroyed or the obligation of contracts impaired.

3. Administrative law and procedure 🔑17
Insurance 🔑4

Amendment of the Government Code to provide for a hearing officer, and amendment of Insurance Code to provide that proceedings relating to suspension of a certificate of authority of an insurer shall be conducted in accordance with the Government Code, related only to procedure, and therefore they were applicable to proceedings by insurance commissioner to suspend certificate of authority of insurer, though proceedings were pending on effective date of the amendments. Government Code, §§ 11500–11528, 11502; Insurance Code, § 704.

4. Administrative law and procedure 🔑443
Insurance 🔑5

Deputy insurance commissioner who was not qualified as a hearing officer within meaning of the Government Code and within meaning of section of the Insurance Code providing that proceedings relating to suspension of a certificate of authority of an insurer shall be conducted in accordance with the Government Code, was not authorized to preside at hearing of proceedings to suspend certificate of authority, on ground that the hearing before the deputy insurance commissioner was in fact before the agency though the deputy insurance commissioner presided. Government Code, §§ 11500–11528, 11502; Insurance Code, § 704.

5. Administrative law and procedure 🔑443
Insurance 🔑5

Proceeding for suspension of certificate of authority of insurer was invalid where deputy insurance commissioner who presided at the hearing was not qualified as a hearing officer as required by the Government Code and the Insurance Code, though deputy, who acted as legal advisor during the hearing, was qualified as a hearing officer, where deputy, who acted as legal advisor, was absent because of illness about nine days during progress of the proceedings. Government Code, §§ 11500–11528, 11502; Insurance Code, § 704.

6. Administrative law and procedure 🔑443
Insurance 🔑5

Insurer against which proceedings were instituted for suspension of certificate of authority, was not required to make a request for the appointment of a hearing officer required by amendments of the Government Code and the Insurance Code which became effective during the proceedings. Government Code, §§ 11500–11528, 11502; Insurance Code, § 704.

7. Administrative law and procedure 🔑234
Mandamus 🔑172

Where superior court in mandamus proceeding against insurance commissioner properly determined that administrative agency had no jurisdiction of proceedings to suspend insurer's certificate of authority, superior court properly refused to determine the issues involved in proceedings before the administrative agency, since determination of issues should first be made by administrative agency, and administrative agency, not having had jurisdiction, determined no issues.

8. Administrative law and procedure 🔑817

Where an administrative agency has not conducted a hearing properly, or has committed error of law, or if evidence is insufficient to support the findings, and it is still possible under the circumstances for the agency to exercise its discretion, court should remand matter to agency for further consideration.

◆

Fred N. Howser, Atty. Gen., T. A. Westphal, Jr., and Harold B. Haas, Dep. Attys. Gen., for appellant.

Wright, Wright, Green & Wright, formerly Wright & Millikan and Neil Cunningham, San Francisco, for respondent.

WOOD, Justice.

On March 21, 1945, the insurance commissioner issued an order directing the National Automobile and Casualty Insurance Company to appear and to show cause why its certificate of authority to transact insurance in the State of California should not be suspended for a period not to exceed one year. It was stated in part therein that said order was based on reports made to the commissioner that: said insurance company had as a matter of ordinary practice settled claims arising under workmen's compensation policies through the medium of a compromise and release form which form bore the heading, "Before the Industrial Accident Commission of the State of California"; said form contained recitals that the facts set forth therein were for the purpose of obtaining "the approval of the Industrial Accident Commission thereto," and that said facts were to be submitted "to the said Commission"; said insurance company had knowingly and wilfully failed to submit said form to the Industrial Accident Commission for its approval; said insurance company had used said form to settle claims for amounts less than the amounts due, and had compelled claimants to accept less than the amounts due or to resort to litigation. Partial lists of transactions showing such alleged "activities" were attached to and made a part of said order.

The hearing on said order to show cause was commenced on June 11, 1945, and proceeded, with the exception of periods of recess, until November 8, 1945. A deputy insurance commissioner, who was not an attorney, and who had no civil service classification, was designated by the commissioner to preside at the hearing. Another deputy insurance commissioner, who was an attorney with civil service classification, was designated to act as legal adviser to the deputy who presided. On May 15, 1946, the presiding deputy filed his "Proposed Decision" which included his findings of fact. The legal adviser concurred in the proposed decision and that decision was adopted by the insurance commissioner as his decision. It was found in effect that the insurance company had engaged in the practices referred to in the order to show cause; and it was ordered that the certificate of authority of said insurance company, in so far as it authorized said company to solicit or execute new contracts of insurance, be thereby suspended for a period of 90 days; that its certificate of authority be restored at the end of a period of 30 days if the insurance company, as evidence of its good faith, did certain acts which included discontinuing the practices set forth in the findings of the presiding deputy, and the filing with the Industrial Accident Commission, for its approval or disapproval, every compromise and release agreement entered into after June 30, 1941, on the form thereinbefore referred to.

In an amended petition for a writ of mandate the insurance company, hereinafter referred to as petitioner, sought to have the superior court order the insurance commissioner to vacate the order of suspension and to set aside and annul the findings and decision adopted by the commissioner in said order of suspension. It was alleged in said petition, among other things, that by the Statutes of 1945, Chapter 867, Section 1, the provisions of the Government Code were amended by adding to and including therein sections 11500 to 11528, inclusive; that said sections became effective on September 15, 1945, while the hearing on the order to show cause was in progress; that no "Hearing Officer" was designated to act in the proceeding pursuant to section 11502 of the Government Code; and that the hearing deputy (who presided at the hearing) and the insurance commissioner were without jurisdiction to hear or conduct the proceeding on the order to show cause on or after September 15, 1945, without the assignment of a "Hearing Officer" as provided for in said section 11502.

A hearing was had in the superior court on said petition, and evidence both oral and documentary was received. The court found, among other things, that: sections 11500 to 11528, inclusive, of the Government Code became effective on September 15, 1945, at which time the hearing on the order to show cause was in progress; at no time on or after September 15, 1945, was a hearing officer appointed to act in said proceeding pursuant to the provisions of section 11502 of the Government Code; and the deputy who presided at the hearing and the commissioner were without jurisdiction to hear or conduct the proceedings on the order to show cause on or after September 15, 1945, without the assignment of a hearing officer. Also in the findings the court stated that said amendments to the Government Code made it mandatory that a hearing officer be designated to preside at the hearing on said order to show cause on and after September 15, 1945, as provided by sections 11500 to 11528, inclusive, of the Government Code and by an amendment to section 704 of the Insurance Code which likewise became effective on September 15, 1945; the failure to have a hearing officer appointed "went to the jurisdiction" of the proceeding on the order to show cause and rendered null and void the findings of fact of the deputy who presided at the hearing; and the commissioner was without jurisdiction to make his order of suspension, and the deputy who presided at the hearing was without jurisdiction to make the proposed decision and order. The judgment commanded the commissioner to set aside the order of suspension and the decision, and directed that a peremptory writ of mandate issue commanding the commissioner to set aside said order and decision. The commissioner appeals from said judgment.

Appellant contends that the commissioner did not lose jurisdiction to proceed with the hearing on September 15, 1945, when the new sections 11500 to 11528 of the Government Code and the amendment to section 704 of the Insurance Code became effective. One of the arguments of appellant is that the hearing was in progress at the time said sections and amendment became effective; that "over 3,000 pages of testimony had been taken and thousands of pages of exhibits introduced" with which a "Hearing Officer" would not have been familiar.

Sections 11500 to and including section 11528 of the Government Code comprise Chapter 5, Part 1, Division 3, Title 2, of said code, and said chapter is entitled "Administrative Procedure." The amendment to section 704 of the Insurance Code, above referred to, provides that proceedings relating to suspension of a certificate of authority of an insurer shall be conducted in accordance with said Chapter 5 of the Government Code, and that the "commissioner shall have all the powers granted therein."

Section 11502 of the Government Code pertains to the qualifications of "Hearing Officers" and provides in part as follows: "(a) * * * Any agency [including the insurance commissioner] requiring full-time hearing officers for the purposes of this act has power to appoint them for the particular agency. Each hearing officer shall have been admitted to practice law in this State for at least five years immediately preceding his appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved. (b) All persons now employed * * * who, pursuant to and in accordance with the terms and provisions of their civil service classifications and prior to the effective date of this act, shall have performed functions similar to those of a hearing officer in an agency may act as hearing officers in the same agency and shall not be subject to the qualifications provisions of subdivision (a)."

[1-3] As above shown, the deputy insurance commissioner who presided at the hearing on the order to show cause was not an attorney (as required by subdivision (a) of section 11502), and he had not, pursuant to a civil service classification, performed functions similar to those of a hearing officer (as required by subdivision (b) of said section). Consequently said deputy was not qualified to act as a hearing officer within the meaning of section 11502 of the Government Code. The hearing had been in progress about three months prior to the effective date of the sections, and the hearing proceeded about two months after said effective date; and the presiding deputy filed his proposed decision eight months after said date. A principal question herein is whether the provisions of said new sections of the Government Code became applicable to the proceedings on the order to show cause. Sections 11500 to and including section 11528 of said code are procedural statutory provisions. See Bartosh v. Board of Osteopathic Examiners, 82 Cal.App.2d 486, 495–496, 186 P.2d 984. Statutes affecting only matters of procedure are applicable to actions which are pending when the statute becomes effective. California Emp., etc., Comm. v. Smileage Co., 68 Cal.App.2d 249, 252, 156 P.2d 454; Sour v. Superior Court, 1 Cal.2d 542, 545, 36 P.2d 373; Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 122, 47 P.2d 716; Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal.2d 228, 233, 174 P.2d 441. It was stated in the case of Arques v. National Superior Co., 67 Cal.App.2d 763, at page 778, 155 P.2d 643, at page 651: "'It is a well-settled rule of law that the Legislature may change rules of procedure, or remedies, and that such changes may be made applicable to pending actions, provided, of course, that under the guise of a mere change of procedure or substitution of remedies vested rights are not destroyed or the obligation of contracts impaired.'" The statutes here involved relate to procedure. As stated in Re Estate of Giordano, 85 Cal.App.2d 588, 592, 193 P.2d 771, 774, "no litigant has any vested right in any matter of procedure." In the present case sections 11500 to and including 11528 of the Government Code became applicable to the proceedings on the order to show cause.

[4] Appellant asserts further that the deputy insurance commissioner who presided at the hearing on the order to show cause had the power, as such deputy, to act as the "agency itself" at said hearing; that when a "case is heard by the 'agency itself' the 'hearing officer' has nothing to do with making any findings of fact and decision, being limited to advising the agency"; and that the new sections of the Government Code do not "provide as to how a deputy, sitting for the 'agency itself' shall handle the matter." It seems that the appellant argues, in effect, that the hearing was before the agency itself since a deputy commissioner presided at the hearing, and that the new sections of the Government Code do not require the appointment of a hearing officer when a case is heard by the agency itself. Section 11512 of the Government Code provides in part as follows: "(a) Every hearing in a contested case shall be presided over by a hearing officer. The agency itself shall determine whether the hearing officer is to hear the case alone or whether the agency itself is to hear the case with the hearing officer. (b) When the agency itself hears the case the hearing officer shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law; the agency itself shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the hearing officer. When the hearing offi-

cer alone hears a case he shall exercise all powers relating to the conduct of the hearing." In the case of Bartosh v. Board of Osteopathic Examiners, supra, 82 Cal.App. 2d 486, 186 P.2d 984, it was held that the Board of Osteopathic Examiners must comply with the provisions of sections 11500–11528 of the Government Code in so far as they relate to the appointment of a hearing officer to preside over a hearing regarding charges of unprofessional conduct on the part of a physician. It was stated therein, 82 Cal.App.2d at page 492, 186 P.2d at page 987: "The hearing officer is needful for the purpose of conducting all hearings after such fashion as will safeguard the legal rights of those concerned." See also Hohreiter v. Garrison, 81 Cal.App.2d 384, page 393 et seq., 184 P.2d 323, wherein there is a discussion of the history and purposes of sections 11500–11528 of the Government Code. A hearing officer, with the qualifications required by said new sections of the Government Code, should have been appointed in the present case. The commissioner acted in excess of his jurisdiction.

[5] Appellant contends further that the formal appointment of a hearing officer "would have been superfluous." He asserts that the deputy, who acted as legal adviser to the presiding deputy during the hearing, was qualified to perform the duties of a hearing officer, and that he did in fact perform such duties by ruling directly on the matters and by making "substantially *every* ruling on evidence or law." He argues in effect that this was a sufficient compliance with the statutes. The court found, and there was evidence to support such finding, that the legal adviser "absented himself from the hearing room at various times" during the course of the hearing "when oral evidence was being heard and received and did not hear all of the evidence." In answer to a question asked by the court, the legal adviser testified that he became ill while the hearing on the order to show cause was in progress and he was absent about 9 days. During such absence testimony was received. It therefore appears that, irrespective of any question of qualification or right of said legal adviser to act as a hearing officer, the legal adviser did not hear all the testimony or the proceedings, and by reason of such absence was not qualified to rule upon the evidence thereafter offered or to determine the issues on the order to show cause.

[6] Appellant also argues that the petitioner did not request the appointment of a hearing officer and states that the point was first raised by petitioner in an "argument brief" filed with the presiding deputy on February 20, 1946, after the close of the hearing (which was before the proposed decision was filed on May 15, 1946). The court found that on September 17, 1945, and repeatedly thereafter for approximately two weeks, petitioner requested the hearing deputy to make a ruling as to whether sections 11500 to 11528 of the Government Code were applicable to the proceedings on the order to show cause; that "at no time during the course of the hearing did petitioner make a formal request or demand that a Hearing Officer be appointed." It appears that on September 19, 1945 (4 days after sections 11500 to 11528 of the Government Code became effective) the petitioner asked the deputy, who was presiding at the hearing on the order to show cause, to obtain an opinion from the Attorney General as to whether the new sections of the Government Code were applicable to the proceedings on said order, and that on September 20, 1945, the presiding deputy stated that he would follow the new sections in so far as they affected the respondent (petitioner herein). The new administrative procedure statutes had been passed by the Legislature prior to the commencement of the hearing (but had not become effective). Although no formal request was made that a hearing officer be appointed, the question as to whether the provisions of the new sections were applicable was raised by petitioner. The provisions of said sections require, as above shown, that a hearing officer shall have certain qualifications, and that every hearing in a contested case "shall be presided over by a hearing officer." It was not necessary to make a request for the appointment of a hearing officer.

[7, 8] Appellant contends that the superior court should have referred the proceeding back to the commissioner for further hearing, or should have received evidence and made findings as to the issues. The court stated in finding No. V: "The court expressly refrains from making any finding as to whether or not the aforesaid Order and the Proposed Decision adopted therein are not supported by the findings or the findings are not supported by the evidence for the reasons stated in finding No. XIII hereinafter set forth." Finding No. XIII was to the effect that the agency did not have jurisdiction to make the order under review for the reason that the person who heard the case was not a hearing officer or a person qualified under the said new sections of the Government Code. Since the court decided that the administrative agency did not have jurisdiction, no useful purpose would have been served in reviewing the evidence presented at the hearing on the order to show cause. The determination of the issues should first be made by the administrative agency. Steen v. City of Los Angeles, 31 Cal.2d 542, 546, 190 P.2d 937. Since the agency did not have jurisdiction, in that the proceeding under review had not been heard by a properly qualified person, the result is that the issues had not been determined first or at all by the administrative agency. Therefore, the court properly refrained from determining the sufficiency of the evidence. It is clear that the court did not decide the merits of the case. As above stated, the judgment of the court commanded the commissioner to set aside the order of suspension and the decision, and directed that a peremptory writ of mandate issue commanding the commissioner to set aside said order and decision. As above stated, the findings of the court show that the judgment was based upon the fact that the agency had acted without or in excess of jurisdiction. It appears that the judgment did not terminate the order to show cause. The status of the matter of the order to show cause, however, would have appeared more clearly if the court had remanded the matter to the commissioner for his consideration as to further proceedings, if any, in the light of the findings and judgment of the court. Where an administrative agency has not conducted a hearing properly, or has committed error of law, or if the evidence is insufficient to support the findings, and it is still possible under the circumstances for the agency to exercise its discretion, the court should remand the matter to the agency for further consideration. See La Prade v. Department of Water & Power, 27 Cal.2d 47, 53, 162 P.2d 13; Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545.

In view of the above conclusions, it is not necessary to discuss the other contentions of appellant.

The judgment is modified by adding thereto at the end of paragraph 2 the following: "The matter of the order to show cause is remanded to the commissioner for his consideration as to further proceedings, if any, in the light of the findings and judgment of the court." As so modified the judgment is affirmed. Each party to pay his own costs on appeal.

SHINN, P. J., and VALLÉE, J., concur.

98 Cal.App.2d 455

PEOPLE v. RAFFINGTON.

Cr. 4441.

District Court of Appeal, Second District, Division 2, California.
July 14, 1950.

Hearing Denied Aug. 10, 1950.

Donald Raffington was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., of abortion and attempted abortion and he appealed. The District Court of Appeal, Wilson, J., held that defendant was not denied due process because he was charged by an information and not by an indictment and that the evidence sustained conviction.

Judgments affirmed.

1. Criminal law ⚿1130(3)

Defendant's brief did not conform with the rule where the statement of facts consisting of 108 pages contained no reference to any part of the transcript supporting any alleged statement of fact or quotations of the evidence. Rules on Appeal, rule 15.

2. Constitutional law ⚿12

Neither the Fifth nor Sixth Amendment nor any other provision of the bill of rights places restrictions upon the states in the prosecution of criminal cases. U.S.C.A. Const. Amends. 5, 6.

3. Constitutional law ⚿265

Words "due process of law" in the Fourteenth Amendment do not require an indictment by a grand jury in a prosecution by a state for a felony and a conviction upon an information filed by the district attorney does not deprive the defendant of due process. U.S.C.A. Const. Amend. 14.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Due Process of Law".

4. Constitutional law ⚿206(1)

The privileges and immunities of a citizen are not abridged by a state law providing for prosecution under an information instead of by indictment by a grand jury. U.S.C.A. Const. Amend. 14.

5. Constitutional law ⚿266

"Due process of law" is not denied by the introduction of the deposition of a witness taken upon preliminary examination before a committing magistrate in presence of defendant where he cross-examines or has the opportunity of cross-examining the witness when such witness is absent from the state or prosecutor has been unable to procure his attendance. U.S.C.A. Const. Amend. 14.

6. Criminal law ⚿543(1)

Testimony of witnesses given at preliminary examination of defendant who were not available at the time of trial was properly read to the jury over the objection of defendant where the witnesses had departed from the state and the prosecution was unable to compel them to return and defendant did not refute evidence of the prosecution concerning the absence of the witnesses. Pen. Code, § 686, subd. 3.

7. Criminal law ⚿1153(6)

Whether it is satisfactorily shown that a witness cannot with due diligence be found within the state so as to permit the reading of his testimony given at preliminary examination is a question of fact for the trial court to determine from the evidence introduced and an appellate court will not interfere unless there has been an abuse of discretion in holding that due diligence has been used. Pen. Code, § 686, subd 3.

8. Abortion ⚿11

Evidence sustained convictions for attempted abortion and abortion. Pen. Code, § 274.

9. Abortion ⚿1

Since the 1935 amendment to the abortion statute, it is no longer necessary to prove the pregnancy of the woman upon whom the operation was performed and evidence of the intent of accused to procure a miscarriage when not necessary to preserve the woman's life, satisfies the statute. Pen. Code, § 274.

10. Criminal law ⚿37

"Entrapment" is available as a defense when criminal design originates with the officer who, by persuasion or deceit, entices a law-abiding citizen to commit a crime which he would not have committed in the absence of such inducement.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Entrapment".

11. Criminal law ⚿569

In prosecution for abortion, evidence did not sustain claim of defendant of entrapment where there was no evidence that defendant was lured into the attempt to commit the abortion by persuasion or inducement of officers.

12. Criminal law ⚿44

Whenever design of a person to commit a crime is clearly shown, slight acts done in furtherance thereof constitute an "attempt."

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Attempt".

13. Criminal law ⚿511(1)

In abortion prosecution where the victim and man responsible for her condition discussed cost of the operation with defendant and the fee of defendant was paid by the man and defendant performed the operation resulting in a miscarriage, evidence of the victim and the man was sufficiently corroborated to sustain conviction. Pen. Code, §§ 274, 275, 1108, 1111.

14. Criminal law ⚿511(7)

In prosecution for abortion, corroboration of testimony of the victim and man responsible for her condition may be had in the statements and admissions of defendant himself. Pen. Code, §§ 1108, 1111.

15. Criminal law ⚿511(4)

In abortion prosecution, evidence of possession by defendant of instruments and medical substances customarily used for purpose of producing a miscarriage was substantial corroboration of the statements of the victim and the man responsible for her condition. Pen. Code, §§ 1108, 1111.

16. Criminal law ⚿511(4)

In abortion prosecution, statements of defendant which he knew to be false respecting the cause of the critical condition of his victim furnished corroboration of testimony given by the victim and the man responsible for her condition. Pen. Code, §§ 1108, 1111.

17. Criminal law ⚿1137(3)

Instruction given which was one of those requested by a defendant could not be complained of by him on appeal.

18. Abortion ⚿13

In abortion prosecution instruction on intent was a correct statement of the law and was properly given under the evidence.

◆

Gladys Towles Root, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

WILSON, Justice.

[1] Defendant was accused by an information in one count of attempted abortion and in a second count of abortion. Another information was filed charging him with an additional crime of abortion. The cases were consolidated for trial and a jury found him guilty on all three counts. He was sentenced to the state prison on each count and has appealed from the judgments.[1]

Defendant contends that his constitutional rights have been infringed, asserting he was denied due process of law and his privileges and immunities were abridged in that: (1) he was charged by an information filed by the district attorney and not by indictment of the grand jury, and (2) that as to count 2 the testimony of witnesses given at his preliminary examination who were not available at the time of trial was read to the jury over his objection. In connection with the latter ground defendant contends that part of subdivision 3 of section 686 of the Penal Code permitting the reading of such testimony is unconstitutional.

[2-4] These questions have long since been determined adversely to defendant's contention. Neither the Fifth Amendment, Adamson v. California, 332 U.S. 46, 49, 67 S.Ct. 1672, 1674, ff., 91 L.Ed. 1903, 1907, 171 A.L.R. 1223, nor the Sixth Amendment, West v. Louisiana, 194 U.S. 258, 262, 24 S.Ct. 650, 48 L.Ed. 965, 969, nor any other provision of the Bill of Rights, Wolf v. Colorado, 338 U.S. 25, 26, 69 S.Ct. 1359, 93 L.Ed. 1782, 1784, places restrictions upon the states in the prosecution of criminal cases. The words "due process of law" in the Fourteenth Amendment do not require an indictment by a grand jury in a prosecution by a state for a felony and a conviction upon an information filed by the district attorney does not deprive a defendant of life, liberty or property without due process of law, Hurtado v. California, 110 U.S. 516, 538, 4 S.Ct. 111, 292, 28 L.Ed. 232, 239, nor are the privileges and im-

---

[1] Defendant's brief does not conform with Rule 15 of the Rules on Appeal, 22 Cal. 2d 12, in that in the statement of facts, consisting of 108 pages, there is no reference whatsoever to any part of the transcript supporting any alleged statement of fact or quotation of the evidence.

munities of a citizen abridged by a state law providing for prosecution under an information instead of by indictment by a grand jury. Maxwell v. Dow, 176 U.S. 581, 587, 20 S.Ct. 448, 44 L.Ed. 597, 599.

[5] Due process of law is not denied by the introduction of the deposition of a witness taken upon the preliminary examination before a committing magistrate in the presence of the defendant where he cross-examined or had the opportunity of cross-examining the witness when such witness is absent from the state or the prosecutor has been unable to procure his attendance. West v. Louisiana, supra; People v. Schwarz, 78 Cal.App. 561, 579, 248 P. 990; People v. Wilson, 26 Cal.App. 336, 338, 146 P. 1048; People v. Hermes, 73 Cal.App.2d 947, 955, 168 P.2d 44; People v. Valdez, 82 Cal.App.2d 744, 749, 187 P.2d 74.

Defendant does not claim he did not cross-examine or at least have the opportunity of cross-examining the witnesses at the preliminary examination. The foundation for the reading of the evidence was sufficiently laid. A witness testified that she was in Minnesota three weeks prior to the trial where she talked to one of the absent witnesses on the telephone and personally saw the other. One of them said she might return to California after the following Christmas but did not know whether she would or not. The other witness did not state when he expected to return, if at all.

[6] The witnesses had appeared when the case was first set for trial and had been instructed to return on the day to which it was continued. In violation of this instruction they departed and remained absent from the state. The prosecution was unable to compel them to return and could not be charged with lack of diligence in procuring their attendance at the trial. Defendant did not offer any evidence to refute that which was offered by the prosecution concerning the absence of the witnesses. In these circumstances the court did not abuse its discretion in permitting the reading of the evidence given at the preliminary examination by the absent witnesses.

[7] Whether it is satisfactorily shown that a witness cannot with due diligence be found within the state is a question of fact to be determined by the trial court from the evidence introduced and an appellate court will not interfere unless there has been an abuse of discretion in holding that due diligence had been used. People v. Stewart, 91 Cal.App.2d 675, 676, 205 P.2d 412; People v. Bernstein, 70 Cal.App.2d 462, 468, 161 P.2d 381; People v. Wohnon, 61 Cal.App.2d 782, 786, 144 P.2d 100; People v. Centers, 56 Cal.App.2d 631, 633-634, 133 P.2d 29; People v. Cavazos, 25 Cal.2d 198, 201, 153 P.2d 177; People v. Hermes, supra.

[8] Contrary to defendant's contention, the evidence is sufficient to sustain the verdict and judgment upon all three counts. As to count one, attempted abortion, a man and woman, operatives of the State Medical Board, visited defendant at his office, told him they were husband and wife and that the woman was pregnant. They discussed the cost of the operation and the manner in which defendant would perform it, whether by a jelly injection or "D and C." Upon their objection to the price of $150 named by defendant, he stated he had performed an operation on another woman on the same morning for which he had been paid $600, and showed them cards bearing the names of other girls whom he had aborted. The parties returned on a later date when they handed defendant three $50 bills. He placed the woman on the table, sterilized his instruments and prepared materials for use, which he said would produce an abortion within 24 hours. He manipulated the woman's abdomen, whereupon, by prearranged signal, other officers entered the room. Defendant stated, "You haven't anything on me, I haven't done a pelvic." On demand he removed the three $50 bills from his pocket and handed them to one of the officers. The serial numbers of the bills corresponded with those on the money handed to defendant before he began his preparations. One of the officers called defendant's attention to jars of materials and instruments and asked defendant if he was preparing to use

them on the woman and he answered in the affirmative.

[9] Section 274 of the Penal Code as originally enacted in 1872 and in effect until 1935 read: "Every person who provides, supplies, or administers to any [pregnant] woman, or procures any [such] woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years." The words "pregnant" and "such" enclosed in brackets in the above-quoted section were deleted by the amendment enacted in 1935. Stats. 1935, ch. 528, p. 1605. Prior to that year proof of pregnancy of the woman operated upon was necessary. People v. DeVaughan, 105 Cal. App. 516, 518, 288 P. 113. It is no longer necessary since the 1935 amendment to prove the pregnancy of the woman upon whom the operation was performed. People v. Ramsey, 83 Cal.App.2d 707, 717, 189 P.2d 802. Evidence of the *intent* of the accused to procure a miscarriage when not necessary to preserve the woman's life satisfies the requirement of the statute. Defendant's criminal intent is amply established by the foregoing evidence of his acts and admissions.

[10, 11] Defendant's contention that he was entrapped is not sustained by the evidence. Entrapment is available as a defense when the criminal design originates with the officer who, by persuasion or deceit, entices a law-abiding citizen to commit a crime which he would not have committed in the absence of such inducement. People v. Makovsky, 3 Cal.2d 366, 369, 44 P.2d 536. There is no evidence that defendant was lured into the attempt to commit a criminal offense by persuasion or inducement. The conversation was between persons who professed to desire the abortion to be performed and defendant, willing to perform upon the payment of his requested fee. In such case enticement or entrapment is not available as a defense. People v. Cherry, 39 Cal.App.2d 149, 153, 102 P.2d 546; People v. Kennedy, 66 Cal.App.2d 522, 523, 152 P.2d 513. In the instant case defendant had in his office all the instrumentalities with which abortions are produced. He described another abortion he had performed on the same day and stated the amount paid to him for the operation. He placed the woman operative on the table, palpated her abdomen, sterilized his instruments, and prepared to apply aborticides to her. By his own statements he was habitually engaged in the unlawful enterprise. In his own mind he was ready and willing to commit the crime and only awaited the opportunity and payment of his fee to make use of the appliances which he possessed, ready for use whenever called upon.

[12] The overt acts of defendant above described are sufficient to sustain the verdict of guilty of the charge of attempted abortion. Whenever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of the design will constitute an attempt. People v. Lanzit, 70 Cal.App. 498, 505, 233 P. 816; People v. Fiegelman, 33 Cal.App.2d 100, 105, 91 P.2d 156. "A specific intent and ineffectual overt act directed at its consummation" are the two elements essential to an attempted crime, People v. Gibson, 94 Cal.App.2d 468, 470, 210 P.2d 747, 748, and both elements are shown by the record to have been present in the instant case.

[13, 14] Defendant's contention that the evidence is insufficient to sustain his conviction upon the charge stated in count 2, in that the evidence of accomplices were not corroborated, is untenable. The prosecutrix and the man who was responsible for her condition went to defendant's office where they discussed the cost of the operation and other details; defendant's fee was paid by the man; defendant performed the operation which resulted in a miscarriage. The evidence of the woman involved in such a case requires corroboration, Penal Code, sec. 1108, and that of the man requires corroboration if he is an accomplice of defendant, sec. 1111. It is established that the evidence of one is sufficient to corroborate the other since they could not be prosecuted for the same offense, the woman being subject to prosecution under section 275 of the Penal Code and the man under section 274. People v. Wilson, 25 Cal.2d 341, 346, 153 P.2d 720; People v. Clapp, 24 Cal.2d 835, 838, 151 P.2d 237; People v. Alvarez, 73 Cal.App.2d 528, 531, 166 P.2d 896. It is also established that corroboration may be had in the statements and admissions of the defendant himself. People v. Wilson, supra, 25 Cal.2d at page 347, 153 P.2d 720; People v. Tallent, 89 Cal.App.2d 158, 161, 200 P.2d 214; People v. Tibbitts, 35 Cal. App.2d 669, 672, 96 P.2d 812. In the instant case defendant admitted that the prosecutrix and her male friend visited his office, that he diagnosed her condition as pregnancy, that he treated her vaginal tract and injected a drug for the purpose of having her expel whatever there was in her uterus. He also admitted having received money from the man and of having administered a second treatment to the girl in his office. His contention that he was treating her for an abnormal condition designated as a hydatiform mole was a question for the jury to decide and it rejected his contention.

[15] Evidence of defendant's possession of instruments and medical substances customarily used for the purpose of producing a miscarriage is substantial corroboration of the statements of the witnesses above named. People v. Lee, 81 Cal.App. 49, 54, 252 P. 763.

[16] Contrary to defendant's contention the evidence amply sustains the verdict and judgment as to the offense charged in the second information, which counsel have referred to as count 3. The complaining witness and another woman visited defendant's office, told him the prosecutrix was pregnant and did not want to have a child; he placed the girl on a table, inserted a speculum in her vaginal tract and worked over her for 45 minutes or longer using instruments and packing her with cotton. He also inserted into her vaginal tract an amber colored substance. He told her that if she passed anything she should bring it back to him the next morning. The same treatment was repeated on four different occasions at defendant's office. As the treatments progressed the girl became too ill to go to his office and he appeared at the home where she was staying and repeated the operation. He had received the sum of $250 from the woman upon their first call at his office. He returned this sum upon his visit to the home where the girl was staying. He then told the mother of the girl that the latter was very ill and he thought she had a ruptured appendix, and made other statements which he knew to be false. Such statements furnished corroboration of the testimony given by the other witnesses. People v. Ramsey, 83 Cal.App. 2d 707, 717, 189 P.2d 802.

Defendant assigns as error the giving of the following instruction: "An essential element of each crime of which the defendant is accused in the Information is intent, the law requiring that to constitute such a crime there must exist a union or joint operation of criminal conduct and criminal intent. However this does not mean that one must intend all the consequences of his conduct or that he must know that such conduct is unlawful to be guilty of a public offense such as any of those charged against the defendant in this case. The intent to do the forbidden thing constitutes the criminal intent. The law requires that to be guilty of crime, one must intend the conduct that fits the description of the crime and must engage in that conduct knowingly and wilfully."

[17] (1) The instruction is one of those requested by defendant himself, designated by number from "Caljic"[2] and he therefore cannot complain of the court's having given it as requested. People v. Rubio, 75 Cal. App.2d 697, 710, 171 P.2d 737; People v. Weston, 169 Cal. 393, 398, 146 P. 871.

(2) The instruction is not comparable to those which have been declared to be erroneous in the cases cited by defendant wherein the court instructed that from the mere doing of an unlawful act the defendant was presumed to have intended all the natural and probable consequences of his act,

---

[2] California Jury Instructions, Criminal, West Publishing Co., 1946.

unless there is evidence on his part to controvert the presumption.

[18] (3) It is a correct statement of the law as applied to the evidence in this case, which we have hereinbefore declared to be sufficient to show a specific intent on the part of the defendant to produce a miscarriage in each of the instances covered by the informations.

Judgments affirmed.

MOORE, P. J., and McCOMB, J., concur.

98 Cal.App.2d 667

MYERS et al. v. RICHFIELD OIL CORPORATION.

Civ. 17764.

District Court of Appeal, Second District, Division 2, California.

July 28, 1950.

Rehearing Denied Aug. 16, 1950.

Hearing Denied Sept. 21, 1950.

C. P. Myers and Jack F. Frazier brought proceedings against the Richfield Oil Corporation, a corporation, to compel the company to arbitrate a grievance under articles of agreement between defendant and union. The Superior Court of Los Angeles County, Clarence M. Hanson, J., rendered an order and judgment denying the petition, and C. P. Myers and Jack F. Frazier appealed. The District Court of Appeals, Wilson, J., held that grievance was subject to arbitration under articles of agreement.

Order and judgment reversed with directions.

1. Master and servant 🔑3(2)

Where union and the employer on November 9 entered into a strike settlement agreement providing that if any employee should have a grievance arising from his assignment to employment, he should file grievance within ten days after signing of new articles of agreement, and that case should be completed within forty days, and on November 11 they executed articles of agreement having an arbitration clause, and a member of union whose job had been filled during strike was offered a new job on November 12 in a new district but he declined, and on January 10 he was again offered a job which he accepted and he went back to work on February 10 when he was classified as a new employee without seniority, grievance did not arise until February 10 which was after expiration of forty-day period during which grievance could be processed under strike settlement agreement, and therefore he was entitled to arbitration under new articles of agreement. Code Civ. Proc. § 1282.

2. Contracts 🔑284(1)

The utmost effect will be given to arbitration agreements.

3. Contracts 🔑284(1)
Master and servant 🔑3(2)

The policy of law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing and therefore every reasonable intendment will be indulged to give effect to such proceedings, especially in cases of collective bargaining agreements.

◆

Wirin, Rissman & Okrand, Los Angeles, for appellants.

William H. Powell, Los Angeles, for respondent.

WILSON, Justice.

Appeal from order and judgment denying petition under section 1282[1] of the Code of Civil Procedure for an order directing arbitration.

---

[1] Section 1282 reads as follows: "A party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing providing for arbitration may petition any superior court of the county or city and county where either party resides, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of the hearing of such application shall be served personally upon the party in default.

The facts, about which there is no dispute, are as follows:

Jack F. Frazier, hereinafter called appellant, began to work for respondent in November, 1945. In September, 1948, the Oil Workers International Union, C.I.O., of which appellant is a member, called a strike against respondent and in response to the union's call appellant went on strike. Prior to the termination of the strike respondent filled the position previously held by appellant. On November 9, 1948, the union and respondent entered into a strike settlement agreement and on November 11, 1948, they executed "Articles of Agreement." On November 12, 1948, appellant was offered a new job in another district, which he declined in writing. On January 10, 1949, he was again offered a job which he accepted. When he went back to work on February 10, 1949, he was classified as a new employee with seniority dating from that date.

Appellant's classification as a new employee and the loss of seniority resulting therefrom is the basis of his grievance and the refusal of respondent to arbitrate either the grievance or the question whether or not the grievance is subject to the arbitration clause of the agreement of November 11, 1948, is the basis of the instant action.

Appellant contends that the grievance comes within the provisions of Article XXII of the Articles of Agreement; that an agreement to arbitrate having been shown and respondent's refusal to arbitrate being clear, an order directing arbitration should have been made.

Respondent admits the execution of the Articles of Agreement and its refusal to arbitrate. It also admits the sole question for determination by the court is whether a contract is in existence under which arbitration may be ordered. It contends, however, that appellant's grievance does not come within the provisions of the Articles of Agreement of November 11, 1948, but is governed by the strike settlement agreement of November 9, 1948, which contains the rules and procedure for the return of the strikers to work; that appellant was not an employee when his grievance arose.

So much of paragraph 12 of the strike settlement agreement, containing the provisions with respect to the return of employees to work, as is pertinent to the issues herein reads as follows: "(b) The Employer will schedule the assignment of employees who return to work and who are reinstated, in accordance with an orderly plan to be worked out by the Employer to meet work schedules. If any employee has a grievance arising from his assignment, he shall file such grievance arising from his assignment with Local Management within ten (10) days after the signing of the new Articles of Agreement. Such grievance shall not be processed through the grievance procedure provided for in the new Articles of Agreement, but shall be referred to and heard by the same committee provided for in (a) above. Such committee will conduct a hearing on such grievance, and a representative of the Union may be present at

The court shall hear the parties, and upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the agreement or the default be in issue an order shall be made directing a summary trial thereof. Where such an issue is raised, the party alleged to be in default, may, on or before the return day of the notice of application, demand a jury trial of such issue, and if such demand be made, said court shall make an order referring the issue or issues to a jury called and impaneled in the manner provided for the trial of actions at law. If no jury trial be demanded said court shall hear and determine such issue. If the finding be that no agreement in writing providing for arbitration was made, or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the finding be that a written provision for arbitration was made and there is a default in proceeding thereunder, an order shall be made summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

such hearing and assist the employee in the presentation of his grievance. All such cases shall be completed and disposed of within forty (40) days from the date of the signing of the new Articles of Agreement. After the expiration of such period of forty (40) days, the provisions of the new Articles of Agreement in reference to seniority will be given full force and effect, except that no grievance disposed of during such forty (40) day period shall be revived or be used as the basis for a new grievance or shall be made the basis of any claim or right by an employee affected by such grievance under the new Articles of Agreement or any provision thereof; provided, however, that nothing herein shall be construed to constitute or operate as a waiver of any right any employee may have under the Labor-Management Relations Act, 1947 [29 U.S.C.A. § 141 et seq.]."

[1] Contrary to respondent's contention, appellant's grievance did not arise until February 10, 1949, when he went back to work and was classified as a new employee and thereby lost his seniority. It therefore arose after the expiration of the 40-day period during which his grievance could be processed under section 12 (b) of the strike settlement agreement.

Section 1450 of the New York Civil Practice Act is substantially the same as section 1282 of our Code of Civil Procedure. The courts of that state have repeatedly held that on motions to stay or to compel arbitration the only issues which may be raised are whether an agreement to arbitrate was made and whether one of the parties has refused arbitration; that every other issue, whether legal or factual, must be left exclusively for determination by the arbitrators. Lipman v. Haeuser Shellac Co., 289 N.Y. 76, 43 N.E.2d 817, 819, 142 A.L.R. 1088; Building Service Emp. Intern. Union v. Westchester Country Club, —— Misc. ——, 94 N.Y.S.2d 642, 643; Application of Swift & Co., Sup., 76 N.Y.S. 2d 881, 883; Mencher v. B. & S. Abeles & Kahn, 274 App.Div. 585, 84 N.Y.S.2d 718, 723.

In the Lipman case, supra, the contract contained a clause that "Any and all controversies in connection with, and/or arising out of, this contract shall be exclusively settled by arbitration * * *." [289 N.Y. 76, 43 N.E.2d 818, 142 A.L.R. 1088.] The court stated that while it had no power to grant a motion to compel arbitration unless the subject matter is comprised within the agreement to arbitrate, the agreement must be considered in the light of the broad language used in the arbitration statute which seems to imply that all the acts of the parties subsequent to the making of the contract which raise issues of fact or law lie exclusively within the jurisdiction of the arbitrators; that the language of the agreement to arbitrate must be sufficiently broad to permit of the application of the general principle that all issues subsequent to the making of the contract are for the arbitrators and not for the court. The court held that the language used in the arbitration clause was sufficiently broad to express the intention of the parties to include within the exclusive jurisdiction of the arbitrators as a general rule all acts of the parties giving rise to issues in relation to the contract except the making thereof.

In Hudson Wholesale Grocery Co. v. Allied Trades Council, 3 N.J.Super. 327, 65 A.2d 557, the court stated that the language of the New Jersey statute, R.S. 2:40–12, N.J.S.A., was identical with that of New York and approved the holding of the court in the Lipman case.

The Articles of Agreement in the instant case provide, in section XXII thereof, for the arbitration of "any grievance or dispute arising out of the application of any of the terms of this Agreement." Article VI of the agreement contains the provisions relative to seniority. Appellant maintains that when he went back to work on February 10, 1949, he was in the status of a "laid-off" employee and should not have lost any of his seniority rights or been classified as a new employee. Respondent's contentions are: that it had a legal right to fill appellant's position by a permanent replacement; after the position was filled by a permanent replacement during the strike appellant was no longer an employee; appellant's status as an employee was properly terminated by his refusal to accept the employment offered him; appellant's grievance was reviewable only under the strike settlement agreement; even if appellant's grievance is arbitrable under the Articles of Agreement, he failed to take the first step required by the procedure set forth in section XXII; when he filed his grievance with the National Labor Relations Board ~~he~~ initiated a proceeding wholly inconsistent with a right to arbitration.

[2, 3] It has long been the policy in California to recognize and give the utmost effect to arbitration agreements. As stated in Utah Construction Co. v. Western Pacific Ry. Co., 174 Cal. 156, 159, 162 P. 631, 632: "The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing. * * * Therefore every reasonable intendment will be indulged to give effect to such proceedings." This policy is especially applicable to collective bargaining agreements since arbitration under such agreements has been a potent factor in establishing and maintaining peaceful relations between labor and industry. Levy v. Superior Court, 15 Cal.2d 692, 704, 104 P.2d 770, 129 A.L.R. 956.

Section 1282 of the Code of Civil Procedure provides that the court "upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." There is no dispute as to the making of the agreement or the refusal to arbitrate. The language of the arbitration clause is sufficiently broad to include all the issues raised by the contentions of the parties. Whether (1) appellant's status as an employee was properly terminated; (2) he lost his seniority and his status as an employee upon his refusal to accept the first position offered to him; (3) his only recourse was under section 12(b) of the strike settlement agreement; (4) he failed to properly pursue the remedy afforded him under section XXII of the Articles of Agreement; (5) the proceedings before the National Labor Relations Board constituted a waiver of any rights appellant might have and other issues raised by respondent are matters for the arbitrators to decide.

Order and judgment reversed with directions to enter an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

MOORE, P. J., and McCOMB, J., concur.

---

98 Cal.App.2d 687

PEOPLE v. KIRK.

Cr. 4428.

District Court of Appeal, Second District,
Division 3, California.
July 29, 1950.

Eric H. Kirk was convicted of abortion, and he moved to set aside a plea of guilty and the judgment entered thereon. The Superior Court, Los Angeles County, Charles W. Fricke, J., made an order denying the motion, and the defendant appealed. The District Court of Appeal, Shinn, P. J., held that the evidence did not support the claim that the defendant's change of plea was brought about because of duress.

Order affirmed.

1. Criminal law 🔑997

Motion to set aside plea of guilty and judgment entered thereon on theory defendant had not had a fair trial was in nature of application for writ of error coram nobis.

2. Criminal law 🔑997

On application for writ of error coram nobis, defendant must establish by preponderance of substantial and credible evidence that error of which he complains was such that he was deprived of legal rights by extrinsic causes amounting to deprivation of trial on the merits.

3. Criminal law 🔑1023(12)

Order denying writ of error coram nobis is appealable as an order made after judgment.

4. Criminal law 🔑553

In criminal prosecution, trial judge need not accept as true the sworn testimony of a witness even in absence of evidence contradicting it, and rule applies to an affidavit.

5. Criminal law 🔑997

On motion to set aside plea of guilty and judgment entered thereon on ground defendant did not have a fair trial, court was not required to grant relief because affidavits in support were uncontradicted.

6. Criminal law 🔑997

Where court set aside its denial of motion to set aside plea of guilty and judgment on ground original trial was unfair, and both sides offered testimony and additional affidavits in support of their respective positions, defendant could not complain that court set aside denial of, motion so that motion might be given a full hearing on the merits.

7. Judges 🔑51(3)

Where defendant failed to present and file written statement setting forth facts constituting ground for disqualification of judge as required by statute, judge was not required to disqualify himself or to allow question of his alleged disqualification to be passed upon by some other judge agreed upon by the parties. Code Civ.Proc. § 170, subd. 5.

8. Criminal law 🔑997

Writ of error coram nobis cannot be issued to vacate judgment of conviction entered on plea of guilty on sole ground of alleged misrepresentation or bad advice of counsel.

9. Criminal law 🔑1158(1)

On appeal from denial of writ of error coram nobis, appellate court will not substitute itself for trier of fact and will not weigh evidence.

10. Criminal law 🔑997

In proceeding to set aside plea of guilty and judgment entered thereon on ground defendant did not have a fair trial, evidence did not support claim that there were corroborating acts or statements by state officer to prove representations allegedly made by defendant's attorney upon which defendant relied in making plea.

11. Criminal law 🔑1158(1)

Resolution of conflicting evidence in form of affidavits or otherwise is for trier of fact, and his determination will not be disturbed on appeal when there is substantial evidence in support thereof.

12. Criminal law 🔑997

In proceeding to set aside plea of guilty and judgment entered thereon on ground defendant did not have a fair trial, evidence did not support claim that change of plea from not guilty to guilty was brought about because of duress on part of defendant's attorney.

13. Criminal law 🔑997

In proceeding to set aside plea of guilty and judgment entered thereon on ground defendant did not have a fair trial, evidence did not support claim that court and district attorney agreed to permit alleged bribery charge to be brought into case if defendant did not plead guilty.

◆

Sam Houston Allen, Los Angeles, for appellant.

Fred W. Howser, Attorney General, Donald D. Stoker, Deputy Attorney General, for respondent.

SHINN, Presiding Justice.

Defendant, Eric H. Kirk, appeals from an order denying his motion to set aside the plea of guilty made by him in the above entitled cause and the judgment made and entered pursuant thereto.

On October 21, 1948, defendant was charged by an indictment returned by the Grand Jury of Los Angeles County with five counts of abortion. Defendant at the outset pleaded not guilty to all Counts but his plea was changed to that of guilty as to

Count III on the second day of trial. On May 5, 1949, defendant was sentenced to a term of imprisonment in San Quentin and Counts I, II, IV and V were dismissed. On August 22, 1949, defendant, through his present attorney, San Houston Allen, served and filed his motion for an order to set aside the plea and judgment and sentence imposed thereon. The motion was supported by affidavits of defendant, his wife, and his attorney, Mr. Allen. The motion was based in brief on the theory that defendant had not had a fair trial in that he had been induced to plead guilty because of representations made to him by his *then* attorney, Buron Fitts, that the Court, Judge Fricke, had agreed to grant him "straight probation" if he would change his plea from that of not guilty, and that if he did not change his plea he would be accused of having attempted to bribe certain police officers.

Defendant's motion came on for hearing before Judge Fricke on September 19, 1949, at which time the affidavits in support thereof were uncontradicted. In the course of the hearing the motion was denied by the Court on the grounds that the affidavits were wholly insufficient, that he did not believe the affidavits, that they were inherently improbable, absolutely ridiculous and "so terrifically apart from the actual facts as they are known to me and as they are known to Mr. Fitts * * * that he never would have made that kind of statement." Before the hearing was concluded, on motion of the People, and over the objection of defendant, the ruling on defendant's motion was set aside to allow both parties to introduce testimony and further affidavits. At this time defendant's attorney requested orally that the Court disqualify himself on the ground of bias and prejudice, but the Court refused to do so. At the conclusion of the hearing the Court again denied defendant's motion on the ground there was no evidence to corroborate his statements; that the facts were not as he had set them forth, and that defendant had not brought himself within the rule of People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657. The trial judge further found that there was no evidence tending in the slightest degree to indicate that he had had anything whatsoever to do with the change of plea by defendant.

On this appeal, defendant maintains: (1) That the motion and affidavits were sufficient, as a matter of law, to require the court to grant the motion. He contends that the court was bound by the uncontroverted averments contained in the affidavits; (2) that the trial court was disqualified because of bias and prejudice against him and that the proceeding subsequent to the first denial of defendant's motion constituted only a "semblance of a 'hearing' because the Court had previously found appellant's motion insufficient in point of law and the affidavits in support thereof untrue" ; (3) that defendant's contention that he was intimidated by the threats of Police Officers Stoker and Davis and the fear of prosecution for attempted bribery was established by both affidavits and oral testimony, and that this evidence was neither contradicted nor impeached, but was corroborated, in part, by the evidence adduced by the People.

Defendant, in his affidavit, makes the following statements: That he was indicted and found guilty of the crime of abortion; that he had entered a plea of not guilty to the indictment and each of the five counts thereof; that he was arrested on or about the 24th of September, 1948, and that on the day of his arrest he was released on bail. Several days thereafter, according to defendant, Audre Davis and Charles Stoker, (officers of the Los Angeles Police Department) called upon him and told him that if he would pay them the sum of $2500 in cash no proceedings would be taken against him in connection with his previous arrest. At this time Stoker is alleged to have informed defendant that unless he did pay that sum they (Stoker and Davis) would "see that you spend 20 years in prison," and placed defendant under arrest and held him in his office for approximately three hours. During this time Stoker called a certain police officer on the telephone, told the officer that he had acted too hastily, and asked if the sum of $2500 would "quash the charges then pending against defendant." After this conversation Stoker informed defendant in the presence of his wife, and Officer Davis, that "it was all arranged for the charges to be dismissed if the defendant would pay the sum of $2500." After this, defendant was released from the custody of the two officers and told that he had better get the money by the first of the next week or they would put together a case that would keep him in jail for 20 years. Defendant alleges that he received several calls from Audre Davis inquiring as to whether he had been able to obtain the funds. Defendant averred that he had "wire recordings" to substantiate this conversation. (No such recordings were ever produced.)

Defendant states that he retained an attorney, Buron H. Fitts, to represent him in the trial and arranged to pay him the sum of $2,000 for his services; and that he at all times informed Mr. Fitts that he was not guilty of the charges against him. Defendant's affidavit contains statements to the effect that his attorney, Buron Fitts, made certain representations to him concerning the advisability of withdrawing his plea of not guilty and entering a plea of guilty to one of the charges against him. Mr. Fitts is alleged to have told defendant that he, Fitts, was well acquainted with certain judges, and with Judge Fricke in particular. That he, Fitts, had been in the District Attorney's office with Judge Fricke; that while he was Lieutenant Governor he had been largely responsible for Judge Fricke's appointment to the bench; that he had talked with Judge Fricke and the District Attorney prosecuting the case and that it had been agreed between them that if defendant would plead guilty to one count the others would be dismissed, and he would be given straight probation. Fitts is also alleged to have told defendant that the court had given permission to the District Attorney to bring the bribery charges into the case if defendant did not change his plea.

Defendant stated that at the time the jury was impaneled, and in the presence of the prospective jurors, the attorney for his codefendant Tully, informed the court that his client desired to withdraw his plea of not guilty and enter a plea of guilty and that, at that time, defendant said, in substance, to Fitts: "Surely you are not going to stand for this jury to be picked from this venire who heard my codefendant offer to plead guilty, are you" and that Fitts answered that he knew what he was doing and if defendant would take his advice he would get him straight probation.

Marion Kirk, wife of defendant, filed an affidavit in which she stated that she had heard the conversation between her husband and the two police officers, and the conversation between her husband and Mr. Fitts as related in his affidavit. She corroborated her husband's statements that Fitts had said he had an agreement with the court whereby defendant was to be given straight probation.

Fitts, in his affidavit, denied, generally, all the material charges made by the defendant, and alleged that defendant changed his plea because of the overwhelming and damaging testimony of the witnesses who testified against him. He deposed, however, that an agreement had been reached between the District Attorney, Judge Fricke and himself that a plea of guilty to only one count would be accepted and that he so informed defendant.

Defendant maintains that the statements made in his affidavit are corroborated by the following circumstances: That his case had been transferred to the court of Judge Fricke; that the court permitted the jury to be selected from the venire which had heard his codefendant plead guilty; by the presence in court of officers Stoker and Davis; by the conversations in the Judge's Chambers at the time and under the circumstances set forth; by the District Attorney indicating, after the conversation in chambers, that he would accept a plea of guilty to one count only by Tully which he had previously refused to do; by the fact that the District Attorney insisted that defendant plead guilty before he would take the plea of Tully. Because of the foregoing circumstances, defendant believed that the trial judge "had promised and agreed to grant * * * (him) * * * probation and that if the defendant did not enter a plea of guilty he would be prosecuted upon the additional charge of bribery," and that as a result of such hope and intimidation his free will had been overreached and he had been deprived of his right to defend on the merits.

[1-3] Defendant's motion to set aside the plea of guilty and the judgment entered pursuant thereto is in the nature of an application for a writ of error *coram nobis.* People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657; People v. Odlum, 91 Cal.App.2d 761, 205 P.2d 1106. Under the well established rules governing the issuance of such writ it is incumbent upon the defendant to establish by a preponderance of substantial and credible evidence that the error of which he complains was such that he was deprived of legal rights by extrinsic causes amounting to a deprivation of a trial on the merits. People v. Lewis, 64 Cal.App.2d 564, 565, 149 P.2d 27; People v. Schwartz, 201 Cal. 309, 257 P. 71; People v. Deutsch, 16 Cal.App.2d 121, 60 P.2d 155. And the order denying the relief sought is appealable as an order made after judgment. People v. Martinez, 88 Cal.App.2d 767, 199 P.2d 375.

[4-6] Defendant's first contention on this appeal is that the trial court was required, as a matter of law, to grant the first motion for relief because the affidavits in support thereof were uncontradicted. This contention cannot be sustained. A trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence contradicting it, and this rule applies to an affidavit. Further, the trial court as trier of the fact, is the judge of the credibility of the witness whether he testify in person or by affidavit. Lohman v. Lohman, 29 Cal.2d 144, 173 P.2d 657; Berg v. Journeymen's Plumbers & Gas Fitters Union, 5 Cal.App.2d 582, 42 P.2d 1091. The first denial of defendant's motion was set aside because the Court had inadvertently overlooked the fact that the motion itself stated that the affidavits of defendant and his wife would be supported by oral testimony. After this denial had been vacated, both sides offered testimony and additional affidavits in support of their respective positions. Defendant is in no position to complain that the court set aside the denial so that the motion might be given a full hearing on the merits.

[7] Section 170 of the Code of Civil Procedure provides that "No justice, judge or justice of the peace shall sit or act as such in any action or preceeding: * * * 5. When it is made to appear probable that, by reason of bias or prejudice of such justice, judge, or justice of the peace a fair and impartial trial can not be had before him." The section also provides that a verified written statement may be presented to the court and filed with the Clerk setting forth the facts constituting the ground of the alleged disqualification of such judge. This statement must be presented at the earliest practicable opportunity after discovery of the facts constituting the disqualification. In the instant action defendant did not present and file such a written statement—his objection to the qualification of the court was made orally at the hearing. Inasmuch as defendant failed to follow the procedure provided for in the section, Code Civ.Proc., sec. 170(5), Judge Fricke was not legally required to disqualify himself or allow the question of his alleged disqualification to be passed upon by some other judge agreed on by the parties. Code Civ.Proc., sec. 170(5).

[8-10] It is our opinion that defendant has failed to bring himself within the rule laid down in People v. Gilbert, cited supra. A writ of error *coram nobis* will not issue to vacate a judgment of conviction entered on a plea of guilty on the sole ground of alleged misrepresentation or bad advice of counsel. "Mere advice and persuasion or the expression of matters of opinion by his own attorney will not suffice to vitiate the plea. Neither will unwarranted or even wilfully false statements of factual matters by his attorney suffice. The private attorney is selected by the party and is his agent. But if the representation of the private attorney presents a purported commitment by a responsible state officer which if actually made would vitiate the plea and if the acts or statements of such state officer, although innocently done or

made, apparently corroborate the representation, are in good faith and without negligence relied upon by the defendant, and in truth operate to prevent the exercise of his free will and judgment, then the state in its solicitude for fairness will not accept the benefit of a plea so given." People v. Gilbert, 25 Cal.2d 422, 443, 154 P.2d 657, 668. It is unnecessary to discuss the circumstances of the actions of the judge and the district attorney upon which defendant relies for apparent corroboration of the alleged representations of his attorney. The record shows that every statement made by defendant with reference to the events leading up to his change of plea was flatly contradicted by counter affidavit and testimony at the hearing. This court is not in a position to substitute itself for the trier of the fact and is without power to weigh the evidence, and we are unable to say, as a matter of law, that defendant has established that there were acts or statements of such state officer which "although innocently done or made, apparently corroborate the representation[s]" allegedly made by defendant's attorney, Mr. Fitts. See People v. Gilbert, supra, 25 Cal.2d at page 443, 154 P.2d at page 657.

[11-13] Defendant's third contention that his change of plea was brought about through intimidation and fear that he would be prosecuted on a bribery charge brought about through the alleged attempted extortion on the part of Officers Davis and Stoker is equally without merit. Defendant failed to introduce in evidence the wire recordings of the alleged conversation in support of the allegations contained in his affidavit; neither of the two officers was called as a witness; and there is nothing in the record to substantiate his statement that evidence adduced by the People corroborated his allegations in this respect. It appears to us that the matter of the alleged intimidation on the part of Mr. Fitts (supposedly stemming from the Davis-Stoker conversation) falls within the well established rule that the resolution of conflicting evidence in the form of affidavits or otherwise is for the trier of the fact and that his determination will not be disturbed on appeal when there is substantial evidence in support thereof. People v. Odlum, supra. We cannot say that the evidence established, as a matter of law, that defendant's change of plea was brought about because of duress on the part of his attorney, Buron Fitts. People v. Corsalini, 46 Cal.App.2d 704, 707, 116 P.2d 784; People v. Deutsch, 16 Cal.App.2d 121, 60 P.2d 155. We find no support in the record for the statement made by defendant that the court and district attorney had agreed to permit the bribery charge to be brought into the case if defendant did not plead guilty.

The order appealed from must be affirmed and it is so ordered.

WOOD and VALLÉE, JJ., concur.

98 Cal.App.2d 709

PEOPLE v. DE WITT.

Cr. 4438.

District Court of Appeal, Second District,
Division 1, California.
July 31, 1950.

Carol De Witt was convicted in the Superior Court of Ventura County, Charles F. Blackstock, J., of attempted robbery and of assault with a deadly weapon, and from the judgment of conviction and from order denying motion for new trial, the defendant appealed. The District Court of Appeal, White, P. J., held that testimony of prosecuting witness was sufficient to identify defendant as the prosecuting witness' assailant, that Superior Court did not abuse its discretion in admitting photographs of the scene of the crimes, and that failure to give instructions provided for in statute with reference to expert testimony, was error, but was not reversible error.

Judgment and order affirmed.

1. Criminal law ⇨741(2), 742(1)

In a criminal case, it is a jury's function to pass on the strength or weakness of identification and uncertainties, if any, of witnesses in giving their testimony.

2. Criminal law 🔑566

In a criminal case, it is not necessary that any witness called to identify defendant should have seen his face.

3. Criminal law 🔑739(2)

In prosecution for attempted robbery and for assault with a deadly weapon, jury was not required to believe alibi defense of defendant nor to give credence to assumption based thereon, that someone stole defendant's automobile, abandoned it at scene of crime, later retrieved it and returned it to the point from which it was taken.

4. Criminal law 🔑566
Robbery 🔑24(3)

In prosecution for attempted robbery and for assault with a deadly weapon, testimony of prosecuting witness was sufficient to identify defendant as prosecuting witness' assailant.

5. Criminal law 🔑388

Admissibility of evidence given in the nature of an experiment lies within sound discretion of trial court in criminal prosecution, so long as substantially the same conditions obtain in the experiment as existed in the original act, and there is no abuse of discretion where it reasonably appears that evidence tends to aid rather than to confuse the jury.

6. Criminal law 🔑438

In prosecution for attempted robbery and for assault with a deadly weapon, court did not abuse its discretion in admitting photographs of scene of crime for purpose of establishing that prosecuting witness could have identified defendant, where conditions were substantially the same at time when photographs were taken as when crime was committed.

7. Criminal law 🔑785(1), 1186(4)

Where prosecution introduced expert testimony of forensic chemist and of a ballistics expert, but prosecuting witness positively identified defendant as his assailant, failure of trial court to give instruction provided for in statute with reference to expert testimony, was error, but was not reversible error. Pen.Code, § 1127b; Const. art. 6, § 4½.

William P. Butcher, Santa Barbara, for appellant.

Fred N. Howser, Attorney General, Donald D. Stoker, Deputy Attorney General, for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Ventura County, defendant Carol DeWitt and John Lucius Gifford were jointly charged in Count I with the crime of attempted robbery of Ernest Westley Garrison, and in Count II with the offense of assault with a deadly weapon upon the said Garrison.

Following the entry of not guilty pleas by both defendants the cause proceeded to trial before a jury resulting in verdicts finding defendant DeWitt guilty as charged in both counts of the information, and the defendant Gifford not guilty as to both counts.

Following denial of defendant DeWitt's motion for a new trial and the pronouncement of judgment he prosecutes this appeal from the judgment of conviction and from the order denying his motion for a new trial.

Epitomizing the evidence which gave rise to this prosecution, the record reflects that on August 10, 1949, the aforesaid Mr. Garrison was operating a service station on the corner of Main Street and Katherine Drive in the city of Ventura. At 7:20 o'clock on the evening of that day Mr. Garrison, who was alone in the station, waited upon a customer in a tan Chevrolet sedan automobile, which vehicle was identified as belonging to defendant DeWitt. Mr. Garrison could not identify the people in the tan Chevrolet automobile because he was very busy and in a hurry to go home. Thereafter, another car drove into the station, the driver checked the tires and water and drove away. Thereupon, Mr. Garrison immediately went inside, put away his lube guns, Coca-Cola machine, and other equipment. He took that day's receipts from the money till, put it into his money bag, turned the lights off on the outside of the station, and walked out of the front door, locking it. He walked around the corner of the service station and started to enter his truck. He had his right hand on the handle of the door of the truck, his left hand on the window frame, and was about to open the truck door when a man later identified at the trial by Mr. Garrison as defendant DeWitt, gave the former a command, "Just a minute there, Buddy". Until then Mr. Garrison did not know that anyone was in the area. He turned to his right and first observed a tall, rather, slender man standing at the back end of the truck near the rear fender. Mr. Garrison could not positively identify defendant Gifford as that man, although he stated that the size and build of the man corresponded to the size and build of the defendant Gifford. Next to the large window of the station and a short distance away from him, Mr. Garrison saw a man, later identified by him as defendant DeWitt, and who had a "six-shooter" pointed at Garrison's stomach about three inches therefrom. The man with the gun was described as blond, heavy set, "chunky", and was about 180 or 190 pounds in weight. His facial features were "full, chunky, heavy built". He was "soft-spoken" and "wasn't excited." As Mr. Garrison turned around this man said, "Buddy, this is a stick-up." Mr. Garrison "looked him right in the eye for a little while" and not being "quite sure" that it was a "stick-up" said, "What did you say?" to which the man replied, "Bud, this is a stick-up." Mr. Garrison reached out, grabbed the gun with both hands and turned the weapon away from him, at the same time attempting to take possession of the weapon. His assailant beat him on the hands in an effort to make him let go but Mr. Garrison continued to hold on and "wouldn't turn loose of the gun and he (the assailant) fired once, then maybe I would say maybe twice, or two reports, it seemed like." According to the witness Garrison, he may have closed his eyes or looked away while "I was battered over the hands." The attacker then hit Mr. Garrison on the top of the head and knocked him on the ground. Thereupon the two intruders fled. Mr. Garrison then ran to the home of Mr. Vander Haar who lives across the street, shouting, screaming, and making considerable noise. As he ran through the street, Mr. Garrison could see his assailants running up Katherine Drive. He attempted to procure aid to pursue the men but was unsuccessful. About ten or fifteen minutes thereafter Mr. Garrison was taken to the county hospital where his injured hand and body were treated. A wristwatch on his left hand had been smashed "very flat".

At the time of the alleged offenses, neon lights on a clock on the corner of the driveway were burning, as were two street lights, one in the alley at the back of the service station lot and another at the intersection of Katherine Drive and Main Street, approximately 90 to 100 feet from the service station. The light at the back of the lot was some 95 to 100 feet from the intersection up Katherine Drive. The lights inside the station were off but the sun had set only fifteen or twenty minutes and it was not "completely dark".

The clock lights consisted of two light tubes following the circular perimeter of the clock, a green one on the outside which was a solid circle of light, and a red one on the inside, which apparently seemed from certain angles to be a solid circle of light but which was actually half painted with black. The lights on the clock, according to Mr. Garrison, served to "help show the items up inside of my station and see if somebody is in there at night."

Shortly after 7:35 on the evening in question, a witness, John Earl Taft, saw a man yelling and hollering for help at the intersection of Katherine Drive and Lexington Street and he also observed that two men were running on Katherine Drive toward Poli Street. He described one as rather short and chunky, of heavy build, and the other as about a head taller than his companion, and weighing about 180 pounds. The former wore khaki clothing and the latter wore a silver-white hat.

At about 7:30 o'clock on the night in question, Patricia Smith, 11 years old, who lived at 49 North Katherine Drive, saw a tan car drive up and park. It parked on the west side of North Katherine Drive between Main Street and the alley which was parallel to Main Street, running between the latter street and Lexington Street. The two men got out and one started toward the back of the service station, the other toward the lavatory. One of these men was taller than the other. A few minutes later she heard something "like a baby crying" she went to the door and observed Mr. Garrison running across the street to Mr. Vander Haar's house.

At the time Miss Smith heard Mr. Garrison scream she looked at her watch and it was 7:40 p. m. Her father went out of the house, returning after the ambulance had taken Mr. Garrison. A minute or two thereafter, Miss Smith told her father what she had seen. He then went out of the house, took a description of the car and the license number. This vehicle was later identified as belonging to defendant DeWitt. After taking the license number Mr. Smith gave it to a police officer and upon returning to his home found the automobile gone.

On August 11, shortly after 6 o'clock in the morning, police officers saw defendants DeWitt and Gifford enter the Cottage Cafe. Defendant DeWitt opened the screen door first, put his hand on the doorknob, started to open the door, observed the officers who were sitting inside the cafe. He thereupon hesitated, and defendant Gifford who was behind him, "bumped into him". While the two men were sitting in the cafe under the observation of the officers they appeared to be "nervous, ill at ease". They were arrested shortly thereafter.

On September 17, 1949, a witness testified he saw a revolver in a load of dirt which had been hauled from the parking lot behind the junior college, which is situated about a quarter of a mile from Mr. Garrison's service station, to the property of the witness on Ramona Street. The weapon had one empty shell and five loaded shells in it when found.

The bullet discharged from the gun in the struggle at the service station was picked up by an officer from under the back seat of the Garrison truck. It was examined by a ballistics expert, who testified at the trial that it was his opinion that the bullet passed through the barrel of the foregoing gun.

As a witness in his own behalf, defendant DeWitt testified that he was not at the scene of the crimes at the time of their commission. He testified that he had come to Ventura about four days prior to August 10 in an effort to obtain a job. That on the day in question he and his codefendant went to a beach at Oxnard, near Ventura, about noon and started back to the latter city at about 5:30 p. m., stopping enroute to buy some food and to fill the gas tank of the automobile "clear to the top". That they returned to their hotel where they remained some thirty minutes and then visited friends who lived in a nearby auto court. They returned again to the hotel at about 7:20 p. m. and parked DeWitt's automobile on the hotel parking lot, leaving the key in the switch. That when appellant left his automobile on the night in question the door was closed but when he returned the next morning it was open about an inch. He testified that he remained in his hotel room until about 8 o'clock when he went to a moving picture show. That defendant Gifford left the room at about 7:20 p. m. That on the night in question he had ninety-one cents and the room rent was not paid, but that his codefendant was paying for the hotel accommodations.

The codefendant Gifford, according to his testimony, came into the hotel at about 8:20 or 8:30 p. m. and shortly thereafter he visited other people in the hotel, remaining in their room for an hour and a half to two hours. In this testimony defendant Gifford was corroborated, but defendant DeWitt was unable to name a single person he had seen between 7:20 and 11 o'clock on the night in question.

As grounds for reversal, appellant first challenges the sufficiency of the testimony of the victim Garrison identifying him as the assailant. In that regard it is urged that the victim was afforded only a few seconds during the struggle with his attacker within which to identify the latter. That the victim was frightened, that he was unable to identify the codefendant Gifford, and that the light at and about the spot where the encounter occurred was insufficient to permit identification of a person within so short a space of time.

[1, 2] It is the function of the jury to pass upon the strength or weakness of the identification and the uncertainties if any, of the witnesses in giving their testimony. It is not necessary that any witness called to identify the accused should have seen his face. In State v. Mason, 152 Minn. 306, 189 N.W. 452, 453, the court said: "Identification may be sufficient though the person making it cannot remember the face. Identification based upon other peculiarities may be reasonably sure." In the case just cited the Minnesota Supreme Court held that identification may be sufficient though the witnesses say that they could not identify the accused from his face, the crime having been committed in the dark, but that they could identify him from his size, his general appearance, his talk and his walk. In Bowlin v. Commonwealth, 195 Ky. 600, 242 S.W. 604, the identification held to be sufficient was made from a recognition of the defendant's voice.

In the case now before us the complaining witness was able to identify appellant by his build, "he was heavy-set, chunky", by his complexion "blond", by his facial features, "his face was very full, chunky, heavy-built * * *". The witness described the appellant's manner of speech as "very soft-spoken".

Furthermore, and notwithstanding the above, the complaining witness in the case at bar made a positive identification of appellant when at the trial he testified as follows:

"Q. By Mr. Deem (Deputy District Attorney): Mr. Garrison, did you ever see after that night the man who was holding the gun? A. Yes.

"Q. When did you next see him? A. At 9:00, 9:30 the next morning down at the police station.

"Q. At the Ventura City Police Station? A. The City Police Station in Ventura, yes, sir.

"Q. Are you sure it was the same man? A. Very sure.

"Q. Is that man in Court today? A. Yes.

"Q. Can you point him out to the Court and jury? A. He is the light-headed fellow over here with the red colored shirt on.

"Mr. Deem: Let the record show that he has pointed to the Defendant DeWitt."

[3] In addition to the testimony of the victim of the robbery and assault there was circumstantial evidence pointing toward the guilt of appellant. His car was identified by witnesses at the scene of the crimes, and one witness saw two men get out of the vehicle just prior to the commission of the offenses. The jury was not required to believe appellant's alibi defense nor to give credence to the assumption based thereon, that someone stole the appellant's automobile, abandoned it at the scene of the crime, later retrieved it and returned it to the point from which it was taken.

[4] With reference to the foregoing, as well as appellant's contentions that the victim was unable to identify the former's codefendant, and that the lighting at the scene was insufficient to enable the complaining witness to identify appellant, they are fully answered by what this court said in the case of People v. Hightower, 40 Cal.App.2d 102, 106, 104 P.2d 378, 381, as follows:

"While the claimed inconsistencies in the testimony of the foregoing witnesses, such as the positions they were in at the time when they claimed ability to see and identify appellant, as well as other claimed weaknesses in their testimony, undoubtedly afforded grounds for a forceful argument to the jury, nevertheless they cannot avail appellant as grounds for a reversal, because the evidence identifying a defendant as the perpetrator of the crime charged need not be positive and uncontradicted. As stated in People v. Farrington, 213 Cal. 459, 2 P.2d 814, 815: 'The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. It has approved the finding of the jury, and on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction.' Undoubtedly because reviewing judges are obviously in no position to determine the credit which should be accorded to witnesses or to weigh their testimony, our Constitution provides that appellate courts are without authority to review evidence except where, on its face, it may justly be held to be insufficient to support the ultimate issue involved, in which latter case of course it is not a review of a question of fact, but purely one of law. The jury being the exclusive judges of the credibility of witnesses, Code Civ.Proc., sec. 1847, and of the effect and value of evidence addressed to them, except as modified by section 2061 of the Code of Civil Procedure they were in this case justified, if they conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject any testimony or circumstances which might have been contradictory to or inconsistent with testimony identifying appellant as hereinbefore narrated. We perceive nothing in the testimony identifying appellant that would warrant us in saying that such testimony is not true or is improbable upon its face."

Appellant next complains that the court was guilty of prejudicial error in admitting into evidence pictures taken for experimental purposes and the testimony with respect thereto.

In this regard the record reflects that between 7:30 and 7:45 p. m. on the night of September 27, 1949, pictures were taken to indicate to the jury what could be seen at the locus of the crimes at that time of night. A camera was located near the left door of the truck on the side of the same next to the station, and the truck was placed at approximately the same position at which the complaining witness stood when he was approached by his assailant, at eye level. Mr. Garrison directed the placing of the camera himself. He posed for the pictures in the same place he testified appellant had stood on the night of the offenses, forty-two inches from the place in which the victim had stood on the night of the crimes. A photographer then took four pictures at time exposures of from 15 to 90 seconds.

[5] The rule is well established in this state that the admissibility of evidence given in the nature of an experiment lies within the sound discretion of the trial court so long as substantially the same conditions obtain in the experiment as existed in the original act. And there is no abuse of discretion where it reasonably appears that the evidence tends to aid rather than to confuse the jury. People v. Dyer, 11 Cal. 2d 317, 321, 79 P.2d 1071; People v. Glab, 15 Cal.App.2d 120, 123, 59 P.2d 195; People v. Crawford, 41 Cal.App.2d 198, 206, 106 P.2d 219; People v. Woon Tuck Wo, 120 Cal. 294, 296, 297, 52 P. 833.

In the case at bar the pictures complained of by appellant were taken under substantially the same conditions as those prevailing at the time the offenses were charged to have been committed. They were taken at the same time—between 7:30 and 7:45 p. m., only the neon lights on the clock and the two nearby street lights were on—as was the case at the time of the alleged offenses. The camera and its subject were placed to correspond to the positions of the complaining witness and appellant on the night of the crimes. The atmospheric conditions with respect to fog were the same; there was none on either night. One of the pictures was taken at a time exposure at least approximating the time within which the complaining witness was engaged in defending himself against his assailant, 15 seconds.

[6] Manifestly, the principal conditions were the same, and the jury could weigh and make allowances for any differences contended for by appellant. The court did not err in admitting this testimony.

[7] Finally, appellant asserts prejudicial error because of the failure of the court to give the instruction provided for

in section 1127b of the Penal Code with reference to expert testimony. This charge of prejudicial error is predicated upon the claim that the testimony of the expert, "was largely circumstantial", and "was uncertain and not conclusive."

The prosecution resorted to the testimony of a forensic chemist and ballistics expert to establish the fact that the gun found in a load of dirt about a quarter of a mile from the scene of the crimes was the one used by the perpetrator thereof. After amply qualifying as a forensic chemist and ballistics expert, the witness Leland V. Jones testified that it was his opinion that the bullet found under the rear seat of the victim's truck and introduced into evidence had passed through the barrel of the foregoing revolver. He gave as reasons for his opinion (1) the fact that the test bullet and the bullet found at the scene of the crimes were of the same weight, and (2) the photograph introduced into evidence, showing the similarity of striations (markings made by the gun barrel in firing) between the two bullets.

Appellant's contention that the evidence in the case, taken in its entirety, was "largely circumstantial" is without merit. The victim of the attempted robbery and assault positively identified appellant as his assailant and we find nothing "uncertain" and "not conclusive" in the testimony of the expert witness.

That it was the duty of the court to give an instruction in accordance with the provisions of section 1127b of the Penal Code admits of no argument, and that is so regardless of whether the accused requested such an instruction. The statute in question makes it the imperative duty of the court to give such instruction irrespective of the action of the accused in relation thereto. We entertain no doubt that it was error to fail to give the statutory instruction as to expert witnesses. The court, however, did give an instruction as to the jurors being the sole and exclusive judges of the effect and value of evidence and the credibility of witnesses.

After examining the entire cause, including the evidence, we can not see how a different verdict could have been rendered if the omitted instruction had been given. While the cited code section provides that the instruction should be given where applicable, section 4½ of Article VI of our State Constitution is equally mandatory in its nature, and deprives us of the power to set aside a judgment unless we shall be of the opinion that the error complained of has resulted in a miscarriage of justice. In the case now engaging our attention we cannot perceive wherein the court's omission to give the required statutory instruction resulted in any miscarriage of justice. Therefore, we are without authorization to order a reversal of the judgment. People v. Williamson, 134 Cal.App. 775, 780, 781, 782, 26 P.2d 681; People v. Brac, 73 Cal. App.2d 629, 639, 640, 167 P.2d 535, and cases therein cited; People v. Moore, 70 Cal.App.2d 158, 165, 160 P.2d 857.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are and each is affirmed.

DORAN and DRAPEAU, JJ., concur.

NATIONAL UNIVERSITY LIBRARY
3 1786 10047 6990

NATIONAL UNIVERSITY LIBRARY SAN DIEGO

NON CIRCULATING

NATIONAL UNIVERSITY